City University of New York (CUNY)
CUNY Academic Works

Dissertations, Theses, and Capstone Projects
CUNY Graduate Center

9-2017

# Trump's "America First" Trade Policy and the Politics of U.S. International Investment Agreements

Jesse Liss
*The Graduate Center, City University of New York*

How does access to this work benefit you? Let us know!

More information about this work at: https://academicworks.cuny.edu/gc_etds/2343
Discover additional works at: https://academicworks.cuny.edu

This work is made publicly available by the City University of New York (CUNY).
Contact: AcademicWorks@cuny.edu

# TRUMP’S “AMERICA FIRST” TRADE POLICY AND THE POLITICS OF U.S. INTERNATIONAL INVESTMENT AGREEMENTS

By

JESSE LISS

A dissertation submitted to the Graduate Faculty in Sociology in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

2017

© 2017

JESSE LISS

All Rights Reserved

Trump's "America First" Trade Policy and the Politics of U.S. International Investment Agreements

By

Jesse Liss

This manuscript has been read and accepted for the Graduate Faculty in sociology in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

| ___________________ | ________________________________ |
|---|---|
| Date | Paul Attewell<br>Chair of Examining Committee |

| ___________________ | ________________________________ |
|---|---|
| Date | Philip Kasinitz<br>Executive Officer |

Supervisory Committee:

Stephanie Luce

Ming Xia

Nadia Doytch

THE CITY UNIVERSITY OF NEW YORK

ABSTRACT

Trump's "America First" Trade Policy and the Politics of U.S. International Investment Agreements

By

Jesse Liss

Advisor: Dr. Paul Attewell

Previous sociological studies on U.S. trade policy institutions concluded that "free trade" political actors had durable power to determine U.S. trade policy. This conclusion was proven wrong when the Trump administration promised "a new direction" and to implement an "America First" trade policy. My dissertation serves to explain the U.S.' political transition away from "free trade" and towards "nationalist" trade policy. I do this by examining the politics of U.S. international investment agreements, which are central to U.S. trade policy. As case studies, I use the investment agreements from the North American Free Trade Agreement (NAFTA) and the Trans-Pacific Partnership (TPP), which are the first and most recent U.S. free trade agreements with developing countries, although the U.S. is no longer a member of the TPP. I use a qualitative method called "process tracing" to document their negotiations, in which competing actors became either policy-makers or policy-takers. I show how and why "free trade" political actors successfully negotiated and implemented the NAFTA, and how and why "free traders" unsuccessfully implemented the TPP in the U.S. I conclude that U.S. trade and investment

agreements had polarizing effects in the U.S., which empowered “nationalists” and social movements to force major revisions to U.S. trade policy.

## Acknowledgments

I would like to express my gratitude to my dissertation committee, Dr. Paul Attewell, Dr. Stephanie Luce, Dr. Ming Xia, and Dr. Nadia Doytch. All of you had tremendous patience, empathy, and support for me while my project took many twists and turns. Your expertise and diverse viewpoints are what guided me through the research and analyses. Your revisions and commentary pushed me to complete this manuscript. I need to underscore my appreciation for my dissertation committee's patience with me throughout this process, particular my chair, Dr. Paul Attewell, I would have been lost without your guidance.

Table of Contents

I. The Politics of U.S. International Investment Agreements…1

II. Historical Origins of U.S. International Investment Agreements…23

III. Negotiations of the NAFTA Investment Agreements…62

IV. U.S. Impacts of the NAFTA Investment Agreements…106

V. Negotiations of the TPP Investment Agreements…154

VI. The Direction of U.S. International Investment Agreements…235

VII. Trump's "America First" Trade Policy and Polanyi's "Double Movement"…265

VIII. Appendices…280

IX. Annexes…289

X. References…316

List of Tables

1. Core provisions of the U.S. Model Bilateral Investment Treaty (BIT)…48
2. Differences between international trade agreements…53
3. Synthesis of U.S. objectives in the NAFTA…72
4. Core Provisions of the NAFTA Financial Services Chapter…83
5. The NAFTA opening rounds (June to September, 1991)…83
6. From fact-finding to drafting (October 1991 to January 1992)…88
7. "The Dallas Jamboree" and aftermath (February to April 1992)…93
8. Reaching an agreement (May to August 1992)…96
9. Synthesis of U.S. Objectives in the TPP…168
10. TPP 2010 negotiations formally begin while Congress attempts to pressure the USTR…175
11. TPP 2011 negotiations, USTR officially supports key business proposals…185
12. TPP 2012 negotiations, membership expands while investment chapter leaked…192
13. TPP 2013 negotiations, USTR applies pressure to conclude negotiations…201
14. TPP 2014 negotiations, the Obama administration prepares for TPA…209
15. TPP 2015 negotiations, Obama administration secures TPA and TPP concluded…215
16. Mexico, gross contingent liabilities (as percentage of total banking capital)…283
17. NAFTA Chapter 11 Cases up to January 1, 2015…284
18. NAFTA Chapter 11 Claims and Awards by Provision and Country up to January 1, 2015…284
19. NAFTA Chapter 11 Cases Filed by Investors by Nationality…285
20. Types of Regulation Challenged under NAFTA Chapter 11 up to January 1, 2015…285

List of Figures

1) Polanyi's "Double Movement" as Ideal Types of U.S. Trade Policy Positions…16

2) U.S. FDI Stocks in Mexico by Sector…121

3) North America vs. East Asia, Shares of Total World Merchandise Exports…123

4) Total U.S. Manufacturing Employment by Sector…138

5) Feedbacks Between Regulatory and Income Effects of U.S. International Investment Agreements…146

6) Two Policy Positions in U.S. International Investment Law…152 & 276

7) Mexican Housing and Consumption Loans as Share of Total Loans…282

8) Banks' Net Non-Interest Income Share of Total Income…282

9) Organizational inputs into USTR's objectives during NAFTA negotiations…291

10) No correlation between U.S. trade deficit and official unemployment rate (from Hufbauer et. al. 2014)…298

11) U.S. labor force participation rate vs. trade balance…302

12) Organizational inputs into USTR's objectives during TPP negotiations…303

Chapter One

1. Introduction

2. A sociological perspective

3. Research questions

4. The politics of U.S. international investment agreements

5. Karl Polanyi's "double movement" and U.S. trade policy actors

6. Data and method

7. Outline of manuscript

## I. Introduction

In a 2011 Senate Hearing just before the U.S. hosted the annual heads of state meeting of the Asia Pacific Economic Cooperation, ranking Senators and business leaders commiserated over declining U.S. market shares in the Asia-Pacific due to the lack of free trade agreements (FTAs) with the region in relation to U.S. competitors. Official Peter Scher represented the United States Trade Representative (USTR), the government agency that coordinates trade policy. Scher responded that domestic political conflicts constrained the USTR's ability to make trade deals. Scher was opining the fact that the Trans-Pacific Partnership (TPP), a FTA the USTR was negotiating with countries in the Asia-Pacific, was so unpopular in Congress that the Obama administration lacked Congressional mandate to negotiate the TPP, which was the first time in over thirty years that a Presidential administration negotiated a FTA without Congress' authority. Scher revealed that domestic politics are "very relevant" to the USTR and the business

community, who are highly cognizant about popular concerns that "globalization [helps] some, but not the masses" (cited in Senate 2011).

Five years later, reality television star Donald Trump won the 2016 Presidential election by promising to empower the white working class in swing states. Trump's trade promises became a symbol for his nationalism. At Trump's 2016 campaign rally in Ohio, while wearing a red hat with his campaign slogan "Make America Great Again," he declared, "The Trans-Pacific Partnership is another disaster done and pushed by special interests who want to rape our country, just a continuing rape of our country. That's what it is, too. It's a harsh word: It's a rape of our country." Trump's "nationalist" trade promises were a stark contrast to the "free trade" policy norms in Washington.

Since at least 1986, when the U.S. began to negotiate the establishment of the World Trade Organization (WTO), U.S. trade policy reflected "free trade" doctrine. "Free trade" policies refer to a set of institutions and legal norms that seek to establish a market-based governance of the global economy. Since the WTO came into force in 1995 and up until the Trump administration took office in 2016, "free trade" political actors had the institutional power to determine U.S. trade policy (Chorev 2007; Dreiling & Darves 2016). During this time, competing political actors, including "nationalists" and social movements, were marginalized from U.S. trade institutions and they had only trivial victories over the "free traders." In that context, "free trade" proponents championed the TTP as the largest comprehensive FTA in history. However, in 2017, President Trump withdrew the U.S. from the deal. He promised to implement an "America First" trade policy, guided by "nationalism" first and "free trade" second. If the "free traders" had such strong institutional control over U.S. trade policy, how did they lose the TPP? Why did the "nationalists" gain the political power to write U.S. trade policy?

## II.A. A sociological perspective

Studies on economic globalization are done by economists or political scientists and sociologists, and each have different methodologies and make distinct contributions to the field. Broadly, economists offer "structuralist" approaches, in which economic globalization is determined by technological change and market conditions. Political scientists and sociologists prefer "institutionalist" approaches, which focus on the political actors and institutions that condition processes of economic globalization.

"Structuralist" approaches to economic globalization are done by trade economists who measure and model international trade and finance. However, the legal content of trade policy, trade agreements, and trade institutions relate to issues of governance of the global economy, and governance is not just about economics but also politics. Economic and "structuralist" research lacks political analysis of the role of trade policy and trade institutions in international governance. For this reason, economists tend to conflate "nationalist" trade orientations and social movements with trade "protectionism," which is an irrational departure from the universal benefits of "free trade." According to the Trump administration, "nationalist" trade policy is actually about prioritizing national sovereignty over multilateral trade institutions, which is not a traditional topic in economics (USTR 2017: 1-3). As President Trump's appointee for USTR, Robert Lighthizer, explained to Congress, "The definition of protectionism is shifting." Conversely, social movements that seek to alter globalization argue that trade policy should be revised to prioritize workers, consumers, and the environment over corporate profits. Since "structuralist" research does not focused on the politics of the governance of trade, "structuralist"

research on trade policy must be complemented by “institutionalist” analyses of trade institutions.

Political scientists and sociologists provide “institutionalist” approaches to economic globalization, which investigate the actors and institutions that shape globalization, its scope, and its pace. My study is an “institutionalist” analysis of the shift from past U.S. “free trade” policies to Trump’s “America First” trade policy. Contrary to “structuralist” assumptions that Trump’s “nationalism” is trade protectionism, I argue that people who voted for Trump based on his campaign promises on trade policy had rational concerns about trade. Actors and institutions from across the political spectrum argued that past “free trade” policies had prioritized the interests of multinational corporations (MNCs) over national interests. In the 2016 Presidential elections, Trump harnessed these sentiments for his political advantage. Therefore, an “institutionalist” analysis is necessary to understand the political transition from a “free trade” to a “nationalist” trade policy, and its consequences.

II.B. Existing “institutionalist” approaches to U.S. trade Policy

In *The Making of NAFTA: How the Deal Was Done* (2000), political scientists Maxwell Cameron and Brian Tomlin detailed the NAFTA negotiations to explain the outcome of the final agreement. Cameron and Tomlin provided not only a historical account of the negotiations, but they reflected on negotiating strategies and processes, and the role of institutions in shaping bargaining outcomes. They conclude that negotiations were shaped by power asymmetries between the three countries, the structure of domestic political institutions, and differences in the non-agreement alternatives. Similarly, in *Interpreting NAFTA: The Science and Art of Political Analysis* (1998), political scientist Frederick Mayer presented a U.S.-centric analysis of the

NAFTA negotiations and ratification. Mayer's focus was the politics of support and opposition for the NAFTA and he offered a political analysis of the relative success and failure of negotiating strategies in particular contexts.

Both analyses offer insights into the NAFTA negotiating dynamics that produced wins and losses for different actors. However, neither account explains the origins and motivations the legal content of the NAFTA and the original authors of those policies. In broad terms, this gap in the literature was filled by sociologist Nitsan Chorev in her book *Remaking U.S. Trade Policy: From Protectionism to Globalization* (2007). Chorev focused on the domestic institutional arrangements that affected the U.S.' scope and pace of integration with the global economy, which is particularly relevant because the U.S. has been a global trade policymaker. She argued that trade protectionists controlled U.S. trade policy for a century and a half, so throughout the twentieth century "free traders" had to overcome formidable political resistance from protectionists. She demonstrated that, "…the more consequential political struggles focused not on substantive policies but rather on ['free traders'] changing the institutional arrangements in place, that is, the rules and procedures that govern how future policies would be formulated and implemented" (2007: 7). In so doing, the "free traders" successfully installed institutional arrangements that contained the political influence of "protectionists," thereby providing "free traders" with the structural political power to implement trade policy. In political economist Jane Kelsey's book, *Serving Whose Interests?: The Political Economy of Trade in Services Agreements* (2008), she documented that in order for U.S. MNCs to intellectually justify their trade policy proposals in key areas, they had to change the public and pedagogical discourse on trade.

Building on Chorev and Kelsey's findings, in the book *Agents of Neoliberal Globalization: Corporate Networks, State Structures, and Trade Policy* (2016), sociologists Michael C. Dreiling and Derek Darves theoretically and empirically demonstrate the regulatory capture of U.S. trade policy by U.S. MNCs. They focused on the institutional alliances between MNCs and national and international trade agencies, which enabled MNCs to shape international markets using trade policy. In parallel, political scientists Leo Panitch and Sam Gindin combined a "structuralist" and "institutionalist" perspective in their book, *The Making of Global Capitalism: The Political Economy of American Empire* (2012). They argued that the post-war internationalization of U.S. MNCs meant that they became increasingly dependent upon cross-border inputs and outputs. Gindin and Panitch argue, "This increased pressures on states to support the 'constitutionalization' of free trade and capital movements through both bilateral and multilateral agreements that effectively protected the assets and profits of MNCs around the world" (2012: 10). Since MNCs are the main importer and exporter of capital, U.S. MNCs became the "key vehicle" for the diffusion of U.S. policy abroad as well as a key source of domestic economic growth. Therefore, MNCs had the structural power to justify their dominant role in U.S. trade policymaking.

## III. Research Questions

The purpose of past investigations into the NAFTA negotiations were to not only to provide historical documentation of the negotiations, but to explain the outcomes in terms of power relations (Mayer 1998; Cameron & Tomlin 2000). However, these studies exclusively focused on the negotiations and not the legal content of the agreements. In my study, I identify the origins of the legal content of the NAFTA and TPP investment agreements, and then I detail

their negotiations. My focuses are the political actors in the negotiations and their interactions with trade institutions and political processes. I have two main research questions, how and why did "free trade" actors defeat "nationalists" and social movements in negotiating and implementing the NAFTA? And, how and why did "nationalists" and social movements defeat "free trade" actors in implementing the TPP in the U.S.?

## IV. The Politics of U.S. International Investment Agreements

There is no consensus among social scientists about the political logic that motivates U.S. trade policy. There are two competing characterizations of U.S. trade policy, the first is the theory of comparative advantage, and the second theory purports that U.S. trade policy is a political project to consolidate class power, called "neoliberalism." However, both of these social science theories are focused on the U.S.' "free trade" initiatives. Neither of the two theories explain the Trump administration's "nationalist" revisions to U.S. trade policy. In this section, I outline both existing theories. Then I rely on Karl Polanyi's "double movement" theory to reconcile the two theories with the Trump administration's "America First" trade policy. Using Polanyi's "double movement" theory, I construct three ideal types of U.S. trade policy orientations - "free trade," "socialist," and "nationalist." Throughout my project I will use these ideal types of trade policy positions to analyze the political motivations of trade policy actors in the NAFTA and TPP negotiations.

### IV.A. "U.S. FTAs as comparative advantage"

The WTO claims the theory of comparative advantage as "the single most powerful insight into economics" (WTO 2016). Former USTR Carla Hills, who negotiated the WTO, asserted, "[comparative advantage] has successfully guided our bipartisan trade policy for more than six decades" (2008). Comparative advantage is credited to the early political economist David Ricardo in his forceful argument against British agricultural protectionism in the early 1800s (Ricardo 1821). Ricardo aimed to prove that free trade was beneficial for all trading partners. He reasoned that comparative costs determine the gains from trade. When nations trade the goods that they produce most efficiently then they produce greater world output, even when one nation has an absolute advantage in producing all tradeable goods. The market ensures that exports exchange for an equivalent amount of imports, balancing trade. Contemporary trade theories combine the theory of comparative advantage with economies of scale to model patterns of trade and investment (Krugman 1979; Baumol & Gomory 2001).

Economists argue that FTAs function to remove barriers to trade such that countries realize gains from trade and economies of scale (Krugman et. al. 2012: 5). In addition, FTAs establish international governance institutions, such as the WTO, that facilitate trade. Sociologist Min Zhou found that the institutions that FTAs create serve to promote trade flows (Zhou 2015). By removing barriers to trade and creating institutions that facilitate trade, FTAs are a rational means of raising national incomes. In early-mid 2015, Congress was engaged in a heated debate concerning "trade promotion authority" which would allow an "up or down" vote for the implementation of the TPP. The White House published a report on the benefits of FTAs and claimed that "…the *main impact* of [TPP] will be to reduce foreign barriers to U.S. exports, rather than further opening U.S. markets to imports" (White House 2015, emphasis added). Following this logic, distinguished economist Gregory Mankiw published an op-ed on the vote

and asserted, “If Congress were to take an exam in Economics 101, would it pass? We are about to find out” (2015). If an FTA facilitates trade according to comparative advantages then that trade policy is “rational” because it produces mutual gains, even if they are very small, and opposition to the FTA is “irrational.”

Economists and political scientists have advanced several explanations of “irrational” opposition to FTAs. One is the role of money in politics, Congress can be “bought” for trade policy votes (Grossman & Helpman 1994). Another is a problem of “collective action.” Trade produces “winners” and “losers,” the “winners” are the public who experience small gains via reduced consumer prices. The “losers” are import-sensitive industries. Since the “losses” are concentrated in import-sensitive industries, those constituencies become politically organized, but since gains from trade spread out among the public, then the public is less politically invested in FTAs (Krugman et. al. 2012: 250). Yet another reason are the “mistaken” beliefs of voters who understand that FTAs bring undesirable foreign competition that increases inequality and destroys jobs (Caplan 2011; Mankiw 2015).

The theory of comparative advantage explains the universal benefits of free trade so it is a framework to evaluate trade actions as rational or irrational. However, the concept of economic rationality has a limited application to twenty-first century trade issues and their political motivations. The theory of comparative advantage does not apply to trade policy in two respects, (1) it does not address politically constructed comparative advantages, and (2) it does not account for the role of trade institutions as international governance institutions that have authority over public issues that go well beyond trade.

The theory of comparative advantage does not offer any assessment of the economic rationality of comparative advantages that have political determinations rather than market determinations. For example, currency manipulation creates national comparative advantages because it reduces the prices of national goods in international markets, thereby promoting national exports. Candidate Trump promised to label China a currency manipulator, a position that has bipartisan support in Congress. Currency manipulation falls outside the scope of comparative advantage because the value of a national currency is the result of political decisions and not the free market. Yet currency devaluations create comparative advantages. The theory of comparative advantage offers no insights into to whether trade with a currency manipulator is economically rational. For that matter, the theory of comparative advantage is silent on the rationality of trade between nations that have grossly different labor and environmental practices, which condition their comparative costs. In this context, the theory of comparative advantage can only offer a limited assessment of the political motivations of trade policy.

Similarly, U.S. trade policy and trade institutions reorganize national authority around international markets and property claims. In so doing, nations relinquish state sovereignty to multilateral trade institutions. Multilateral trade institutions gain authority to regulate public issues that go well beyond trade and the theory of comparative advantage. Ranking Congressman Sander Levin explained in a House debate over the TPP in 2015,

> "What do David Ricardo and Adam Smith have to say about the inclusion of investor-state dispute settlement in our trade agreements? Nothing, to my knowledge. What do they have to say about providing a twelve-year monopoly for the sale of biologic medicines? About the need to ensure that our trading partners meet basic labor and environmental standards? How about the issue of

> currency manipulation? What does the theory of comparative advantage have to say about those issues? Absolutely nothing – and yet those are the issues at the crux of the TPP negotiations today" (Levin 2015).

In short, the theory of comparative advantage focuses narrowly on the concept of economic rationality, which does not account for much of the political and legal content of U.S. trade policy. For this reason, the theory of comparative advantage does not explain the political motivations of the Trump administration's most pressing trade priorities - national sovereignty and confronting trading partners that use "unfair" trade practices (USTR 2017: 1-3).

IV.B. "U.S. FTAs as neoliberalism"

There is a wealth of social sciences literature characterizing FTAs as "neoliberal" political projects to construct a global economy according to "free market" principles. Celebrated anthropologist David Harvey defined "neoliberalism,"

> "…a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices" (2005: 2).

While most studies accept that the U.S. was the principle driving force behind the construction of "neoliberal" globalization, "neoliberalism" had to emerge in other countries for a "neoliberal" trading order to institutionalize. Scholars disagree on the

motivations of neoliberalism in developed and developing countries, or they emphasize different actors and processes, but there is consensus that U.S. FTAs embody "neoliberal" governance (Gowan 1999; Sklair 2002; Dumenil & Levy 2004; Harvey 2005; Chorev 2007; Prashad 2013; Dreiling & Darves 2016).

Sociologist Nitsan Chorev concluded that U.S. FTAs do not simply remove the state from the market according to free market principles. Rather, U.S. FTAs are political projects that replace old protectionist institutions with new "neoliberal" institutions (2005; 2007; 2010). Chorev identified that the main objective of "neoliberal globalism" is to "make national economic activities competitive in [the] global market…by subjecting domestic constituencies to market-based rather than state-managed growth strategies" (2005: 320). U.S. FTAs, including the WTO, are global governance institutions because they establish new forms of authority that are independent of nation-states yet are binding upon nation-states, including dispute settlement procedures (Chorev 2005). For sociologist Saskia Sassen, these new forms of authority established by FTAs reshaped the relationship between the public and private domain such that public interest regulatory norms became the maximization of market efficiency (2008: 186).

Social scientists arrived at the conclusion that FTAs are neoliberal governance by studying the political actors in trade policy and the processes and conflicts between them. In the U.S., FTAs were in the interests of exporters and MNCs and contrary to the interests of labor unions and import-sensitive industries (Chorev 2010). In the making of U.S. trade policy and U.S. FTAs, MNCs had to "defeat" working-class interests and protectionist political actors, in so doing, U.S. FTAs reflect the interests of MNCs (Panitch & Giddin 2012). MNCs from across economic sectors organized policy organizations and networks, often with members in and out of trade policymaking positions, so as to design and implement U.S. FTAs (Chorev 2007; Kelsey

2008; Dreiling & Darves 2011; 2016). In turn, U.S. FTAs inspired new forms of transnational resistance to them, from labor unions, environmental organizations, and consumer advocacy groups (Kay 2005; Evans & Kay 2008; Gallagher 2014).

Existing "institutionalist" studies share the conclusion that U.S. MNCs are the dominant political actor in determining U.S. trade policy, in turn, U.S. MNCs use trade policy to condition international market outcomes. Sociologist Nitsan Chorev concluded, "As a result, today's protectionist sentiments pose little threat to the durability of economic globalization." (2007: 11). Prior to the Trump administration, institutional analyses of U.S. trade policy had concluded that the champions of "free trade" had successfully captured the most significant trade policy-making institutions. However, President Trump announced that U.S. trade policy would no longer be determined by "special interests" but it would be guided by an "America First" nationalism. President Trump's withdrawal of the U.S. from the TTP in January, 2017 marked a new direction in trade policy. The U.S.' TPP reversal was a decisive defeat of U.S. MNCs and other "free trade" advocates and it was a victory for "nationalists" and social movements. Therefore, "free trade" political actors and institutions are not as durable as previous "institutionalist" studies had concluded. For this, "neoliberalism" can no longer fully account for the motivations and content of U.S. trade policy and agreements.

V. Karl Polanyi's "Double Movement" and U.S. Trade Policy Actor

The social sciences literature that have assigned a political logic to U.S. trade policy are inconsistent with Trump's "America First" trade policy. I propose that Karl Polanyi's "double movement" theory can be used a framework to bridge this gap. Among

the most cited theoretical investigations into the relationship between states and markets is Karl Polanyi's *The Great Transformation: The Political and Economic Origins of Our Time* (1944). Polanyi deconstructed classical liberal economics and its modern incarnations, which rely on conceptual models of capitalist markets as self-regulating by the "natural" forces of supply and demand. Polanyi argued, "No market economy separated from the political sphere is possible; yet it was such a construction which underlay classical economics since David Ricardo and apart from which its concepts and assumptions were incomprehensible" (2001: 205). Contrary to the assumptions of free market economics, Polanyi demonstrated that "the economy" is actually a social and political entity. In Polanyi's terms, the "free market" is not possible because in every day practice, capitalist states create, determine, condition, support, and protect markets.

For Polanyi, the implementation of so-called "free market" policies inspired diverse resistance from political actors seeking protections from market failures and abuses, a conflict he described as a "double movement." Polanyi explained, "For a century the dynamics of modern society was governed by a double movement: the market expanded continuously but this movement was met by a countermovement checking the expansion in definite directions" (2001: 136). Polanyi observed that domestic and international "free market" policies received generous support from the banking and trading classes, while the working and landed classes sought social protections and market interventions, including, industry standards, financial regulations, and labor and environmental protections (2001: 138-9). Polanyi mulled that this contradiction produced "deep seated institutional strain" within states as conflicting social groups vied for political power (2001: 140).

Polanyi's purpose was to demonstrate that the implementation of "free market" policies led to economic and political crises in 1930s Europe. Polanyi argued that many European nations

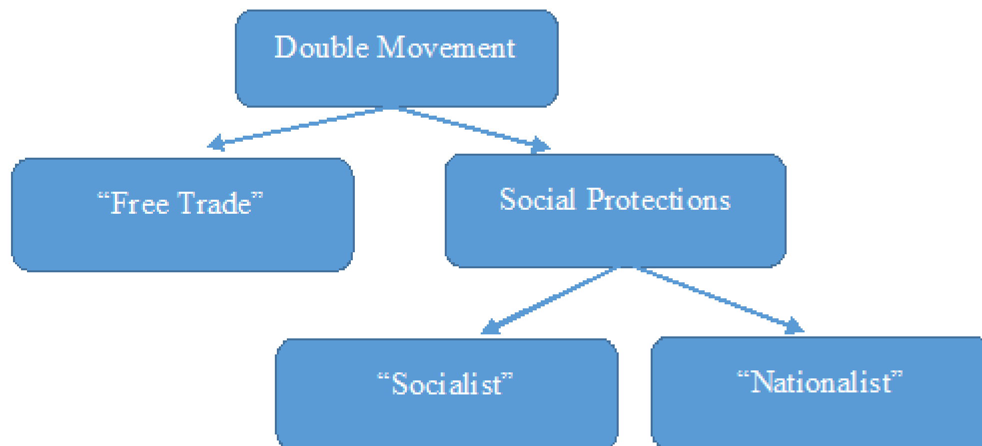
responded to capital flight, rising unemployment, and social and racial tensions by electing socialist and fascist leaders who promised social protections from unfettered markets. For Polanyi, socialism was governance guided by subordinating markets to democratic control, but this threatened private property rights (2001: 242). Conversely, fascism involved implementing social protections from markets at the expense of the "extirpation" of democratic institutions (2001: 242). The fascist tradeoff of greater social protections for less freedom and democracy was justified by nationalism, "The nascent fascist movement put itself almost everywhere into the service of the national issue; it could hardly have survived without this 'pickup' job" (Polanyi 2001: 249). Therefore, Polanyi had assigned a logic to fascist governance – nationalist social protections from market failures in exchange for losses of freedom and democracy. Polanyi concluded that there may be times and places in which socialists and fascists have similar economic policies, however, each have opposite principles of freedom and democracy (2001: 267).

V.A. Polanyi's "Double Movement" as Ideal Types of U.S. Trade Policy Positions

While today's world is entirely different from Polanyi's, his "double movement" framework is still useful. To apply Polanyi's "double movement" to U.S. trade debates, I constructed ideal types of U.S. trade policy positions. Ideal types are pure theoretical categories, although they are rarely empirically observable because in "real life" there are grey areas and overlaps (Weber 1944). Based on Polanyi's "double movement," I present three ideal types of U.S. trade policy orientations - "free trade," "socialism," and "nationalism." All three are different forms of government control of the economy, albeit with starkly different policy directions. U.S. trade

policymakers and actors rarely fit an ideal type perfectly due to conflicting political interests and tradeoffs.

Figure One: Polanyi's "Double Movement" as Ideal Types of U.S. Trade Policy Positions




V.B. "Free trade" policies

Some sections of U.S. trade deals are concerned with trade in goods and services. There are strong arguments that the legal content of these sections are organized by the theory of comparative advantage and other standard free trade principles. However, the majority of the legal content of U.S. trade deals are regulatory. That is, the legal content relates to issues of governance. In U.S. FTAs, states succeed sovereignty to international governance institutions, including, the WTO, the IMF, and the World Bank. In turn, international economic governance institutions are organized around "free market" principles, in which the regulatory norm is market efficiency (Sassen 2008). International economic governance institutions embody market-based governance (Chorev 2007; Sassen 2008). Therefore, the objective of "free trade" politics are to use FTAs and trade institutions to impose market-based governance, particularly on developing countries with histories of socialist and nationalist policies.

V.C. Social Protections

In contrast to "free trade" policies, social protections do not refer to trade protectionism, which are tariff and non-tariff barriers to trade. In Polanyi's terms, social protections are ad hoc policies that are intended to protect workers, the environment, productive industry, and financial stability. In this case, some social protection policies support free trade while others support trade protectionism. I identify two ideal types of socially protective trade policy, "socialism" and "nationalism."

*"Socialist" trade policies*

Thea Lee, Policy Director of U.S. labor union AFL-CIO, pleaded during a House hearing on U.S. trade and investment policy in 2009, "…it is important that we clarify that the interests of the U.S. are not entirely synonymous with the interests of U.S. MNCs" (cited in House 2009). Since the U.S. began to negotiate the WTO, U.S. MNCs have been the most significant actor in U.S. trade policy formation while competing stakeholders have been marginalized, including, labor unions, environmental organizations, and consumer advocacy groups (Dreiling & Darves 2016). In Thea Lee's testimony, she was imploring that trade policy include public interests and not only private interests. Sociologist Fred Block updated Polanyi's definition of "socialism" as "the project of deepening democracy and subjecting the market to democratic control" (2015: 62). To that end, "socialist" trade policies are formed in democratic processes, specifically, public trade policy-making institutions that include the input from all stakeholders and not just U.S. MNCs.

*"Nationalist" trade policies*

Soon after taking office, the Trump administration released its rhetorical vision of an "America First Foreign Policy" (White House 2017). The document accused that past U.S. trade deals were negotiated in the exclusive interests of the "Washington establishment," and that President Trump will implement trade policies to "put America first" (2017). "Nationalist" trade policies prioritize national interests over multinational interests and national sovereignty over multilateral governance. The Trump administration's top two trade policy priorities are, "(1) defend U.S. national sovereignty over trade policy; (2) strictly enforce U.S. trade laws" (USTR 2017: 2). Each represents significant policy breaks from past practice. On the regulatory side, the USTR's report asserted that, "…the Trump Administration will aggressively defend American sovereignty over matters of trade policy" (USTR 2017: 3). The Trump administration's "2017 Trade Policy Agenda" put considerable emphasis on stressing U.S. sovereignty in relation to the WTO's dispute settlement system, setting precedent for the U.S. to ignore WTO rulings that the Trump administration would consider violations of U.S. sovereignty. On the income side, the priority to "strictly enforce U.S. trade laws" is setting precedent to use trade remedy laws to restrict imports from non-market economies that use "unfair trade practices" (read: China). Protectionist restrictions on China's imports would be a nationalistic break from past U.S. trade practice.

## VI. Data and Method

*Method: process tracing*

To compare these ideal types of trade policy positions to actual trade events, I do a process tracing of trade negotiations. Process tracing is a qualitative method often used in political science and international relations, defined by political scientist David Collier as "the systematic examination of diagnostic evidence selected and analyzed in light of research questions and hypotheses posed by the investigator" (2011: 823). The method focuses on the unfolding of events over time by utilizing "diagnostic evidence" at particular moments in time to explain the outcome of a dependent variable. That is, the causation(s) of a dependent variable are determined by observing "snapshots" of its development over time. According to Collier, process tracing is a distinctive methodology in three ways: causal-process observations in which causal evidence is qualitative, careful description to capture trajectories of change and causation, and close attention to the sequencing of independent, dependent, and intervening variables.

In my project, the dependent variables are the final texts of the NAFTA and the TPP investment and financial services chapters. The independent variables are the different political actors shaping the drafts and negotiating process, such as, negotiating teams and their competing proposals for the same provisions. I will observe the processes and conflicts between the different political actors that produced the final agreements. This will provide an understanding of the NAFTA and TPP investment and financial services chapters that goes beyond a face-value legal analysis and situates the agreements in a comparative, historical, and sociological context.

*Data:*

Data sources include primary and secondary sources. Primary sources include: draft texts and competing proposals; press releases; government officials' letters, reports, documents, statements; news articles; Congressional testimonies; Congressional research documents;

stakeholder letters, publications, press releases, and presentations; leaked information from negotiations, including negotiating documents, notes, and emails. Secondary sources include: publications on negotiations from third party commentators and analysts.

## VI. Outline of the Manuscript

My study builds on existing "institutionalist" studies on U.S. trade policy by offering an explanation of the transitions of political power in U.S. trade policy, specifically, the switch from "free trade" policies to "nationalist" trade policies under the Trump administration. I use the negotiations of the North American Free Trade Agreement (NAFTA) and TPP investment agreements as case studies. The investment agreements of an FTA are the investment chapter and the financial services chapter. These two chapters facilitate capital flows between the countries in the FTA, therefore, U.S. investment agreements are core components of U.S. trade policy and U.S. FTAs.

I will use the investment agreements of the NAFTA and the TPP as case studies to examine why a U.S. international investment agreement is made or unmade. My focus is how the politics of support and opposition to these agreements interacted with trade institutions and political processes. Within these processes and conflicts, competing political actors became either policy-makers or policy-takers. I will show how and why "free trade" political actors successfully negotiated and implemented the NAFTA, and how and why "free trade" political actors unsuccessfully implemented the TPP due to overwhelming political opposition from "nationalist" and "socialist" actors.

I organize the reminder of the manuscript as follows, in chapter two I present an account of the historical origins of U.S. international investment policy, its role in trade policy, and the

stakes of investment negotiations. In chapter three, I present a process tracing of the negotiations of the investment agreements of the NAFTA, and I offer an analysis of the outcomes in terms of Polanyi's "double movement," in which "free trade" actors triumphed over the "nationalist" and "socialist" actors in all three countries. In chapter four, I synthesize the economic and regulatory effects of the NAFTA investment agreements. I will use this information to clarify trade policy positions and to measure trade rhetoric against trade policy, including Trump's "America First" trade policy. In chapter five, I present a process tracing of the negotiations of the investment agreements of the TPP, and I offer an analysis of the outcomes in terms of Polanyi's "double movement," in which "nationalist" and "socialist" actors defeated the "free trade" actors in the U.S. In chapter six, I compare the NAFTA and TPP investment agreements to determine the direction of U.S. investment policy, which offers further clarifications about the stakes of trade policy debates.

In chapter seven, I conclude using my analysis of the NAFTA and TPP to explain the political motivations of the Trump administration's "America First" trade policy. I argue that after more than twenty years of U.S. FTAs and the WTO, and the collapse of international markets in 2008 and its long-term effects, voters were seeking social protections from unfettered "free markets." In comparison to the "nationalist" actors in the NAFTA negotiations in the early 1990s, I argue that Trump's "nationalist" trade promises had far more currency with voters in 2016 due to the polarizing effects of U.S. trade and investment agreements. Specifically, as employment shares shifted from manufacturing to services, the white working class in rust belt/swing states had the most to lose. By 2016, Trump was the first Republican nominee in over thirty years to run on a "nationalist" trade policy platform, thereby distinguishing himself from the "free trade" agenda of the "Washington establishment." Trump won the vote of the rust belt

white working class by pledging to empower them with an “America First” foreign policy and putative immigration and criminal justice polices. Trump’s anti-TPP position had widespread appeal because of the activism of broad-based coalitions of labor, environmental, and consumer advocacy groups calling for fundamental reforms to trade policy. In so doing, “nationalist” political currents and social movements had forced major revisions to U.S. trade policy.

# Chapter Two: Historical Origins of U.S. International Investment Agreements

I. Introduction

II. The emergence of the U.S. trade deficit

III. The making of U.S. trade policy

IV. Investment policy in U.S. trade policy

V. U.S. investment policy and global competitors

VI. Conclusion: the stakes of international investment negotiations

"…no government is entitled to expropriate private property, for whatever purpose, without provision for *prompt, adequate, and effective payment therefor*."
-U.S. Secretary of State Hull, August, 1938, responding to Mexico's nationalization of the oil industry without compensation to U.S. oil companies (emphasis added)

"No Party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except…on payment of *prompt, adequate and effective compensation*"
-TPP Investment Chapter, Article 9.8: Expropriation and Compensation, 2016 (emphasis added)

## I. Introduction

In the twenty-first century, in a world of unprecedented global production sharing and financial integration, how much sovereignty should a state have to design and implement market regulations? According to *Oxford* dictionary, sovereignty is "the authority of a state to govern itself or another state." A country's international investment policy addresses the relationship

between sovereignty and foreign direct investment. The U.S. government's official position is codified in the U.S. Model Bilateral Investment Treaty (BIT) program, which originated to replace gunboat diplomacy with developing countries during the Cold War. The USTR, State Department, and the Treasury integrated the U.S. Model BIT into larger trade policy as a means of promoting the global market shares of U.S. MNCs and domestic jobs at home. In this chapter, I provide an account of the origins of the legal content of U.S. international investment agreements. First, I trace the political origins of the U.S. trade deficit, and then I consider how U.S. trade policymakers developed trade policy as a response to the growing trade deficit, among other secondary political considerations. I detail the historical origins of the U.S. Model BIT program and its integration into U.S. trade policy. Lastly, I provide an overview of the differences between U.S. international investment policy and those of global competitors, which explains the stakes of diplomatic conflicts over the legal content of international investment agreements.

## II. The emergence of the U.S. trade deficit

The United State Trade Representative (USTR) is the government agency that coordinates U.S. trade policy and conducts trade and investment negotiations. Between 1986 and 1994, when the USTR negotiated the World Trade Organization (WTO), a central negotiating objective mandated to the USTR by Congress was to establish trade and investment rules that would reduce the U.S. trade deficit.[1] By that time, the U.S. had large and growing trade deficits with East Asia and to a lesser extent Western Europe. Since then, the U.S. trade deficit has multiplied and it has been a source of much political anxiety and conflict, as politicians and

[1] The Omnibus Trade and Competitiveness Act of 1988, Section 1001.

commentators link chronic trade deficits to loss of jobs, income, industrial competitiveness, currency wars, and global savings and investment imbalances. As such, U.S. trade policy must be understood within the context of rising global trade imbalances, which is a multilateral problem whose causes and effects are fiercely debated among policymakers and analysts.

Karl Polanyi famously articulated that markets are not the "natural" evolution of capitalists' animal spirits or an "invisible hand," but rather markets are products of states and commercial and political actors (1944). States assume the core responsibilities of constructing, managing, and protecting capitalist markets, and in so doing they condition distribution. Political scientists Leo Panitch and Sam Gindin argued, "The role of states in maintaining property rights, overseeing contracts, stabilizing currencies, reproducing class relations, and containing crises has always been central to the operation of capitalism" (2012: 1). States, particularly the U.S., were central to the making of global capitalism. Paul Volcker, former Chairman of the Federal Reserve, explained, "I take it almost as an article of faith (a faith that in this case can be backed by facts) that the United States, as the dominant power after World War II and for decades afterwards, was the driving force toward a liberal trading order and the freedom of international investment" (Volcker and Gyohten 1992: 288). The diverse and complex motivations of the U.S. government's pursuit of a "liberal" world order are beyond the scope of this paper (see Panitch & Gindin 2012 for a detailed account). The origins of the U.S. trade deficit are policy decisions by U.S. government officials in the 1970s to secure access to the necessary financing of the trade deficit. U.S. policymakers formulated trade and investment policy in the context of the growing U.S. trade deficit.

*The Bretton Woods system produced tiny trade imbalances*

Emerging from WWII, there was widespread belief that "free market" policies were central to both world wars (Silver 2004: 151). Lead by the U.S., the world leaders of the Atlantic powers met at Bretton Woods to construct multilateral organizations to address international political economy as a root cause of war (Silver 2004: 151). The principle multilateral institutions (the International Monetary Fund, the International Bank for Reconstruction and Development, and the General Agreement on Tariffs and Trade) were empowered to coordinate an international monetary and financial system, finance reconstruction and development, and promote trade (Gindin & Panitch 2012: 10). The Bretton Woods Accord established an international monetary system that placed the U.S. dollar at the center of a fixed exchange rate system, in which all major countries pegged their currencies to the dollar and the dollar was convertible to gold at $35 an ounce. In essence, the dollar became the ultimate means of payment as it became the quoted denomination for all major commodities and international debts. Therefore, the dollar became the global reserve currency as central banks had to hold dollar reserves for possible intervention in foreign exchange markets to maintain the value of their currencies (Gindin & Panitch 2012: 118). The dollar's peg to gold theoretically imposed a restraint on inflation as the gold standard would act as a check on the dollar supply and the U.S.' balance of payments (a country's balance of payments is the sum of its current account and capital account, which according to standard free trade theory, should eventually sum to zero).

A prerequisite to the dollar standard was the depth, liquidity, expansion, and openness of U.S. financial markets, such that dollar denominated financial assets provided the necessary investor confidence to support to the dollar standard. To that end, U.S. government debt (U.S. Treasury securities) became the most "quality" debt in international money markets and the U.S. Treasury bill became the foundation for all calculations of value in the global economy (Gindin

& Panitch 2012: 10). In so doing, the U.S. government institutionalized itself as the world's money manager, charged with maintaining universal confidence in the dollar. Until the 1960s, the dollar standard and the Bretton Woods institutions facilitated strong economic growth in the U.S. and the development of U.S. financial markets, the reconstruction of Europe and Japan, and increasing financial integration between the global north and the global south. The U.S.' political and military expenditures in the Marshall Plan and Korean War laid the basis for development in Europe and Japan, and by the 1960s they would emerge as manufacturing competitors in world markets, which is the reason many commentators conclude that U.S. foreign policy took precedence over domestic economic development in the post-war period (Gindin & Panitch 2012). Trade imbalances were minuscule compared to more contemporary global imbalances. To be sure, world trade flows were tiny compared to the twenty-first century, however, the Bretton Woods system of fixed exchange rates imposed a far more stringent balance of payments constraints on the U.S. and the rest of the world, which led to economic and political constraints on trade imbalances.

*Crisis of Bretton Woods*

The shift from an asset-money (gold) to a debt-money (U.S. government bonds) international monetary system in the first years of the 1970s provided the foundation for the U.S. to finance its chronic trade and budget deficits that have been multiplying since the 1980s. Contrary to many academic accounts, the reinvention of the international monetary system was not was a deliberate plan of U.S. imperialist ambitions. Rather, it was the result of the unsustainability of Bretton Woods and the culmination of various policy decisions made at the international level. These events serendipitously permitted U.S. policymakers to adopt a policy

of "benign neglect" towards the growing budget deficit while securing necessary capital inflows to cover the growing trade deficit (Hudson 2003). Economist Robert Triffin first formalized the structural instability of the Bretton Woods international monetary system in 1959. Triffin testified to Congress that the growth of world trade and capital were outstripping the growth of the world's gold supply, which would inevitably lead to a crisis of confidence in the dollar and in turn the Bretton Woods monetary system (Triffin 1978). Throughout the 1950s, the U.S. was running relatively small balance of payments deficits, meaning more capital was leaving the U.S. than entering. Triffin cogently argued that this condition was unsustainable for the Bretton Woods system of fixed exchange rates,

> "…if the U.S. corrected its persistent balance of payments deficits, the growth of world reserves could not be fed adequately by gold production at $35 an ounce, but that if the U.S. continued to run deficits, its foreign liabilities would inevitably come to exceed by far its ability to convert dollars into gold upon demand and would bring about a 'gold and dollar crisis'" (Triffin 1978: 3).

The persistent U.S. balance of payments deficits resulted in the buildup of dollar reserves in the central banks of Europe and Japan, which were gradually redeeming the dollar reserves for U.S. gold (IMF 2016). The Kennedy administration made the initial attempts to offset capital outflows with a mix of policies, including, increasing the U.S. trade surplus, capital controls, and import taxes (Hudson 2003: 30). However, none of the efforts addressed the underlying dynamics driving the U.S. balance of payments deficits and by the mid-1960s Triffin's prophesy was materializing. The IMF reported, "In 1966, foreign central banks and governments held over 14 billion U.S. dollars. The United States had $13.2 billion in gold reserves, but only $3.2 billion of that was available to cover foreign dollar holdings. The rest was needed to cover domestic

holdings" (2016). World leaders and the international financial community feared that the U.S. would either devalue the dollar, which would cause worldwide deflation and potential social and political instability, or, stop redeeming gold for dollars, which would permit inflationary pressures to undermine confidence in the dollar and lead to social and political instability.

Paul Volcker, Undersecretary of the Treasury, led a research and policy group at the Treasury on the international monetary system and its crisis. On June 23, 1969, the Volcker Groups issued a confidential memo to President Nixon mulling three alternatives to Bretton Woods:

> "…(a) a series of multilateral negotiations pointing toward a fundamental, but 'evolutionary' change in the existing system; (b) suspension of the present United States policy of providing for the conversion of dollars held by foreign monetary authorities at their discretion; and (c) a change, large or small, in the official price of gold" (Volcker Group 1969: 22).

The Volcker Group established that the U.S. budget deficits paid for the U.S.' Cold War military and political expenses overseas as well as domestic economic policy (1969: 7). This U.S. budget deficit provided the rest of the world with dollars to sustain an international payments system and a multilateral trading order. In so doing, the U.S. was able to base its economic leadership on the international role of the dollar, however, this came at the cost of substantial borrowing from surplus countries in the form of short-term dollar liabilities (Volcker Group 1969: 7). Simultaneous to the growing U.S. budget deficits, the U.S. was moving from a trade surplus to a trade deficit state. The Volcker Group identified two fundamental causes of this trade shift – domestic inflation and growing industrial competition from abroad (1969: 18). Therefore, with a growing trade deficit, for the U.S. to achieve an equal balance of payments, it

would need to attract capital inflows. The memo argued that without an equal balance of payments, the U.S. would have faced severe consequences in its ability to borrow in the future and it would have undermined the U.S.' economic leadership and negotiating strength. Above all, the Volcker Group stipulated, "For both the period immediately ahead and the medium-term future, the dominant factor affecting the evolution of the international monetary system (and our success in guiding that evolution) will be our ability to contain domestic inflationary forces" (1969: 19).

An internal memo among the Nixon administration's high-level staff revealed that their objective was to "reassert [U.S.] leadership of international economic and trade policy" (McCracken 1971:7). The memo outlined that "great market strength" for the dollar and globally competitive industries were "indispensable" conditions for international political leadership (McCracken 1971:7). To achieve both of these objectives the Nixon administration first negotiated the international financing of both the U.S. budget deficit, and then negotiated a revaluation of the currencies of surplus countries.

*Financing the growing budget deficit*

As explained by economist Michael Hudson, to finance the growing budget deficit the Nixon administration had "to induce the central banks and treasuries of foreign countries to refrain from cashing in any more dollars for gold, but to accumulate dollar assets in growing amounts, whatever their fears regarding the stability of the dollar" (2003: 263). To that end, the Nixon administration adopted a number of policy positions: to reach political agreements with surplus countries such that they would not buy U.S. gold; to end dollar-gold convertibility; to demonetize gold. The Treasury had made various political agreements with surplus countries

such that they would invest in illiquid (non-marketable) U.S. government debt (U.S. Treasury bills) instead of using their surplus to buy U.S. gold reserves (Hudson 2003: 264-5). Beginning in the early 1960s, the Treasury made such agreements with Canada, Western European countries, and Japan. For example, according to the president of Germany's central bank, in 1971, the U.S. Treasury "implicitly" threatened to withdraw U.S. troops from West Germany [in 1968] if the German central bank did not renounce its rights to convert surplus dollars into American gold (cited in Hudson 2003: 288). However, by the late 1960s, Europe and Japan had little choice but to hold U.S. Treasury bills because the size of their U.S. Treasury bill holdings exceeded the total U.S. gold holdings (Hudson 203: 264).

The June, 1969 memo from the Volcker Group to President Nixon proposed suspending the Bretton Woods dollar-gold convertibility. The memo detailed that the main objective was to strengthen the U.S.' negotiating position because it would present surplus countries with "essentially unpalatable alternatives" as they would have to either "passively hold dollars or permit a gradual appreciation of their currencies" (1969: 38). That is, if the U.S. closed the gold window and Europe, Japan, and other surplus countries chose not to hold and accumulate dollar assets thereafter, then they would devalue the dollar. This would provide U.S. exporters with a competitive devaluation while reducing the value of surplus countries' dollar assets. Therefore, the Volcker Group endorsed suspending dollar-gold convertibility. They surmised, "If successfully carried off, the United States would retrieve for itself a very substantial degree of flexibility in financing future balance of payments deficits and would remain in an extremely strong position for guiding future changes in the international monetary system" (1969: 38). Nixon eventually did close the gold window on August 15, 1971 (discussed below).

In so doing, the Nixon administration effectively told the rest of the world that the U.S. balance of payments deficit and the dollar was their own problem, and European leaders termed the Nixon administration's approach to the U.S. balance of payments deficit as one of "benign neglect" (cited in Hudson 2003: 284). Central banks around the world were able to hold U.S. government debt as reserves because they were supported by the depth and breadth of U.S. capital markets. The Volcker Group explained in their 1969 memo, "Foreign official short- and medium-term dollar holdings ($16.1 billion) and foreign private dollar holdings ($23.4 billion at the end of 1968) are serviced by a complex and highly developed set of banking, investment, and trading facilities both in the U.S. and Europe" (1969: 5). Throughout the 1960s and 70s, dollar-based capital markets in Europe expanded and evolved and international dollar markets were by far the deepest financial markets in the world, which provided the foundation for investor confidence in U.S. government debt. In fact, by the end of the 1970s, European outward FDI to the U.S. accounted for half of total global FDI flows (Gindin & Panitch 2012: 148).

For this reason, the Volcker Group prioritized controlling the domestic inflationary pressures on the dollar in the 1960s and 70s. The memo explained,

> "…the fact that the United States may be less harmfully affected than other countries by the additional strain on international monetary cooperation does not, in itself, make this a happy prospect. These risks could be minimized only if the United States were successful in its anti-inflationary efforts at home and in improving the structure of its balance of payments" (1969: 33).

The inflationary domestic conditions of the 1960s and 70s undermined investor confidence in the dollar, which in turn threatened the U.S. government's credibility vis-à-vis surplus countries holding dollar assets, which would eventually undermine the U.S.' ability to

finance its budget deficit. Therefore, the Volcker Group concluded that suspending the dollar-gold convertibility would only be sustainable if the U.S. could contain inflation to strengthen its balance of payments and industrial and financial competitiveness (1969: 31).

*Currency wars and the beginning of floating exchange rates*

On August 15, 1971, after a wave of unprecedented speculative dumping of the U.S. dollar, European central banks stopped accepting dollars for their own currencies, and the U.S. gold supply reached a critically low level, the Nixon administration decided to cancel the dollar's convertibility to gold (Silber 2012: 79-85). The Nixon administration's aim in their unilateral decision to suspend the gold window was to force an upward revaluation of Europe and Japan's currencies to reverse the declining U.S. trade surplus (Silber 2012: 80; Stein 2010: 40). Some commentators refer to these acts as "currency wars" because countries were implementing "beggar-thy-neighbor" policies by competitively manipulating their exchange rates to promote national exports at the expense of competing countries (Rickards 2012).

President Nixon's key economic advisors, led by the Treasury Secretary John Connally, argued that the cause of the shrinking trade surplus was an overvalued dollar. Connally wanted to pressure Europe and Japan to devalue against the dollar (Stein 2010: 37). The Nixon administration justified their position because of the U.S.' overseas military expenditures were in the "common interests" of Europe and Japan (Stein 2010: 41). After meeting with finance ministers from West Europe, Canada, and Japan, Treasury Secretary Connally "said blandly for the television cameras as he left the afternoon meeting…'We had a problem and we are sharing it with the world just like we shared our prosperity…That's what friends are for'" (cited in

Hudson 2003: 290). Connally was demanding exchange rate adjustments from the rest of the world that would return the U.S. to full employment (cited in Hudson 2003: 290).

At that meeting, the Atlantic powers renegotiated fixed exchange rates against gold, however, in a world of increasingly mobile capital, those fixed exchange rates were politically impossible to maintain and they abandoned fixed exchange rates in 1973. The multilateral abandonment of fixed exchange rates cemented the dollar's role as the global reserve currency and the ability of the U.S. to rely on the rest of the world to finance its budget and trade deficits. Countries with trade surpluses could not use their dollars to purchase gold but only U.S. Treasury securities. Ironically, the Nixon administration initially intended to suspend dollar-gold convertibility to shift the U.S. trade balance back into surplus. However, it had the long-term effect of permitting the endless expansion of the U.S. trade deficit as foreign governments recycled their trade surpluses into U.S. government debt. However, domestic social and political conflicts throughout the 1970s produced inflation that undermined investor confidence in the dollar (Stein 2010). This threatened the U.S. ability to cover its balance of payments and provide economic and political leadership, not to mention the negotiating strength of the U.S.

*Stabilizing the dollar to finance the trade deficit*

The rampant "stagflation" (a combination of high unemployment and high inflation) of the 1970s had multiple determinations, and it resulted in a crisis of profitability for U.S. industries and a loss of confidence in the dollar as the world reserve currency (Gindin & Panitch 2012: 137; Krippner 2011: 16). Domestically, the high inflation of the 1970s had devastating effects, including by making investment and production inefficient, eroding returns on financial assets, and reducing capital investment (Bluestone & Bennett 1982). At the international level,

inflation undermined the dollar as world reserve currency and the creditability of the U.S. government. Arthur Burns, Chairman of the Federal Reserve between 1970-8, identified public sector labor unions and welfare programs (which he viewed as a subsidy to striking workers) in the 1960s and 70s as driving a wage-price inflationary spiral (cited in Gindin & Panitch 2012: 141). Paul Volcker succeeded Burns as Chairman of the Federal Reserve and had a similar diagnosis, sociologist Michael McCarthy observed,

> "Above all else, the members of the FOMC and Volcker himself operated with a cost-push theory of inflation that specifically pointed to labor power as the driver. Despite their public comments to contrary, privately they understood that inflation was more about the balance of class forces than the amount of money in the economy. And this reflected in the monetary policies they pursued" (McCarthy 2016).

Paul Volcker announced The Federal Reserve's new "monetarist" policy to break inflation in October, 1979 (Gindin & Panitch 2012: 168). Consequently, at the end of Carter's presidency the federal funds rate was at 19.1% and they remained at that level six months into the Reagan presidency, a period some commentators refer to as "the Volcker shock" (Gindin & Panitch 2012: 168). The Volcker shock thrusted the U.S. into the deepest economic downturn since the Great Depression, consequently, inflation was finally broken when unemployment rose from its 1979 level of 6% to reach above 10% in the fall of 1982 (Gindin & Panitch 2012: 168). It was at this point that Volcker announced the end of monetarist restraint and shifted to monetary easing. Economic growth finally resumed in 1983, and inflation came down to just over 3% and it remained at about that level for the rest of the century (Gindin & Panitch 2012: 168).

Domestically, “the Volcker shock” secured broad and lasting anti-inflationary conditions by facilitating a shift in the balance of class forces. According to Steven Hayward, biographer of President Reagan, Paul Volcker praised Reagan’s firing of 12,000 public sector union strikers in the airline industry as “the single most important anti-inflationary step that Reagan took” because it influenced other labor negotiations (2010: 173). In 1979, as U.S. automaker Chrysler faced bankruptcy, the United Auto Workers made wage concessions and allowed for the outsourcing of production to non-union plants (Gindin & Panitch 2012: 171). These concessions became “the template” for the spread of similar concessions throughout US industry, including “airlines, meatpacking, agricultural implements, trucking, grocery, rubber, among smaller steel firms, and in public employment” (Gindin & Panitch 2012: 171-2). This was met with the Reagan administration’s cutbacks to welfare, food stamps, Medicare, public pensions, and unemployment insurance (Gindin & Panitch 2012: 171-2). Therefore, there were two main determinants to the shift of class power that broke inflation: (1) the Volcker shock advanced the U.S. as a “post-industrial” economy, in which employment transitioned from manufacturing to services; and (2) the anti-unionism and cutbacks to the social wage during the Reagan administration.

At the international level, “the Volcker shock” effectively restored confidence in the dollar and saved it as the world’s reserve currency, thereby attracting capital back into U.S. Treasury bills to cover the budget deficit. The breaking of inflation restored confidence in the dollar, which was necessary to secure investor confidence in U.S. capital markets and thereby strengthen the U.S. balance of payments. Surplus countries continue to finance the U.S. trade deficit by recycling their surpluses back into U.S. financial assets, particularly U.S. Treasury

bills. In turn, the U.S. trade deficit allows the U.S. to import cheaper goods, particularly consumer goods, which further holds down inflation.

## III. The making of U.S. trade policy

While the international monetary system was primarily a conflict among the Atlantic powers, world trade and trade policy was further complicated by challenges to the Atlantic powers from the global south. On November 16, 1975, the heads of state of the U.S., Canada, Japan, and Western Europe converged in Rambouillet, France to discuss world monetary and trade affairs. Despite the currency conflicts, stagflation in the major economies, and growing trade and payments imbalances, each of the world leaders vowed to resist domestic calls for import restrictions and protectionism. German Chancellor Schmidt reasoned, "The countries in this room should act together not just because of a deep-rooted liberalism but because the market system benefits us" (Memorandum of Conversation 1975: 407). However, British Prime Minister Wilson responded that protectionism cannot be ruled out as a response to "…lethal attacks by other countries directed at destroying two or three sectors of our economy. These are not lame duck industries" (1975: 407). Chancellor Schmidt's response is worth quoting at length,

> "Harold, you talked of viable industries, and indicated that this excluded lame ducks. You referred to textiles as an example. I am a close friend of the chairman of the textile workers union in Germany. It is a union of a shrinking industry. I would hope that this would not be repeated outside of this room. Given the high level of wages in Europe, I cannot help but believe that in the long run textile industries here will have to vanish. We cannot ward off cheaper competition from outside…wages in East Asia are very low compared with

ours…The German textile industry is viable, but will vanish in ten or twelve years" (1975: 407).

All of the Atlantic powers collectively mulled a new geography of production, in which industrial competition was not only amongst developed countries, but also from emerging low-wage and labor-intensive manufacturing in East Asia and Eastern Europe. Domestically, beginning in the early 1960s, policymakers were keenly aware that the U.S. was transitioning from an export-oriented to an import-oriented economy, and the Kennedy administration identified a fundamental solution as promoting the export competitiveness of U.S. firms and reducing barriers to trade abroad (Gindin & Panitch 2012: 125). The 1962 Trade Act expanded the trade negotiating powers of the Executive branch and established the government agency that would become the USTR in preparation for the General Agreement on Tariffs and Trade (GATT) Kennedy Round of negotiations (1963-7) (Gindin & Panitch 2012: 125).

By the early 1970s, U.S. MNCs began lobbying Congress and the President for fundamental reforms to GATT. The GATT's mandate was to be a negotiating forum for only trade in goods. U.S. MNCs sought to include trade in services, investment, and intellectual property issues in the GATT's framework (Kelsey 2008; Feketekuty 1988: 300). In the 1974 Trade Act, for the first time Congress had instructed the President to include services, investment and intellectual property as "fundamental negotiating objectives."[2] In the GATT Tokyo Round (1973-9), the USTR's efforts in bringing the "new issues" into the GATT were rebuked by a large coalition of developing countries, however, it had set a precedent for future negotiations (Feketekuty 1988). Following the Tokyo Round, the U.S. corporate lobbies would

[2] Section 104(A).

institutionalize, multiply, build strategic alliances, and become advisors to trade policymakers to ensure that the new issues would be pursued in future negotiations (Kelsey 2008: 78).

As new technologies revolutionized the cross-border movement of information, data, and capital, the corporate services lobbies sought to secure deregulations of any new markets based on information technology, particularly within developing countries (Feketekuty 1988; Kelsey 2008: 13). A range of sectoral corporate lobbies sought to secure a multilateral agreement on investment for the purposes of protecting foreign investments and securing foreign market access, especially in developing countries (Vandevelde 1988). Securing a multilateral agreement on intellectual property was vital to the U.S.' highly capitalized and knowledge intensive industries in both manufacturing and services. U.S. multinational firms required strong intellectual property rights to secure profits as labor-intensive manufacturing shifted to the global south (Prashad 2013). This convergence of corporate interests motivated U.S. trade policy in the GATT Tokyo Round and into the GATT Uruguay Round (1986-94).

In 1975, political scientist Robert Gilpin identified the structural reasons that U.S. policymakers enthusiastically promoted the interests of U.S. MNCs in trade and investment policy. By the 1970s, U.S. MNCs were already the main importers and exporters of capital, on the dollar standard. As U.S. MNCs expanded, the dollar zone expanded, and U.S. financial markets expanded. In turn, U.S. policymakers depended upon deepening dollar markets and dollar-denominated financial markets to finance overseas political and military expenditures (Gilpin 1975: 161). Gilpin cited Henry Fowler, Treasury Secretary in the mid-1960s, to illustrate the point,

> "[MNCs] have not only a commercial importance – but a highly significant role in the U.S. foreign policy that has met with general approval by

the Atlantic countries…[in order to finance its military position overseas] the U.S. government has consistently sought, and will continue to seek, to expand and extend the role of the [MNC] as an essential instrument of strong and healthy economic progress through the Free World" (cited in Gilpin 1975: 161).

By the mid-1980s, there had been an unprecedented expansion of the U.S. trade deficit, notably with East Asia and to a lesser extent Europe. As the USTR prepared for the GATT Uruguay Round, which produced the WTO, Congress fully embraced the U.S. corporate agenda in services, investment, and intellectual property rights as a means of reducing the U.S. trade deficit. These objectives were codified in The Omnibus Trade and Competitiveness Act of 1988, in which Congress mandated specific negotiating objectives for the USTR in the GATT Uruguay Round. In outlining the premise of the 1988 Omnibus Act, Congress found that, "The United States is confronted with a fundamental disequilibrium in its trade and current account balances and a rapid increase in its net external debt."[3] Therefore, Congress mandated a principle negotiating objective to address "persistent" trade imbalances and countries with structural trade surpluses "by imposing greater responsibility on such countries to undertake policy changes…including expedited implementation of trade agreements where feasible and appropriate."[4] In so doing, rather than restricting imports, Congress and the President sought to reduce the trade deficit via exports. Specifically, policymakers directed trade policy at establishing new multilateral trade agreements in services, investment, and intellectual property to create opportunities for U.S. exporters and enhancing global market shares for U.S. MNCs. The trade strategy of reducing chronic trade deficits with aggressive export programs was

[3] The Omnibus Trade and Competitiveness Act of 1988, Section 1001.
[4] The Omnibus Trade and Competitiveness Act of 1988, Section 1101 (5)

adopted on a bipartisan basis from the Kennedy administration through the Obama administration.

## IV. Investment Policy in U.S. Trade Policy

U.S. investment policy had multiple determinations. At the turn of the twentieth century, the U.S. sought to institutionalize international investment law to protect FDI in developing countries. By the 1970s, the interests of U.S. MNCs and U.S. geopolitical considerations converged to make services, investment, and intellectual property indispensable pillars of U.S. trade policy, and Congress mandated the USTR to expand agreements on those issues around the world. As the U.S. had fully integrated investment policy into trade policy, the USTR had expanded the scope investment law for the purposes of market access and deregulations in developing countries.

### *The Calvo Doctrine vs. the Hull Doctrine*

In 1938, the governments of the U.S. and Mexico were entangled in a conflict over the relationship between international investment law and state sovereignty. The focal point was the location of the rights of foreign investors, were they located in domestic or international law? In that year, Mexico nationalized the entire oil industry, which had been dominated by U.S. and British oil companies (Thomas & Gimblett 2011: 664). During Mexico's 1917 revolution, Mexico adopted a new Constitution and it outlined "strategic areas" of economic activity "in an exclusive manner" to the Mexican State, especially the oil and energy sector.[5] Concurrent to the oil expropriations, the Mexican and U.S. governments were negotiating a settlement from

[5] 1917 Constitution, Article 25

Mexico's land takings of U.S. nationals during Mexico's sweeping land redistribution policy as a result of Mexico's 1917 revolution (See Jayne 2000).

The 1917 Mexican Constitution adopted the Calvo doctrine, which stipulates that foreigners must bring property disputes to domestic courts without recourse to their home governments. In other words, in investment and capital disputes with foreign nationals, the Calvo doctrine emphasized state sovereignty and rejected international law. Carlos Calvo (1824-1906) was an Argentine diplomat who wrote a treatise on international law in the context of European military interventions in Latin America, particularly France's intervention in Argentina and Uruguay from 1838 through 1850 (Del Luca 2003: 20). The Calvo Doctrine was widely adopted in Latin America and it provided that diplomatic protections and interventions by foreign governments on behalf of foreign investors was a violation of state sovereignty (Del Luca 2003: 20).

After Mexico nationalized the oil industry in 1938, the U.S. government pursued a "good neighbor" policy and decided against military intervention in Mexico. The U.S. and British oil companies brought their claims to Mexican Federal Courts. The contentious cases were highly politicized as the Mexican and U.S. governments were sharply divided over two issues - the standard of compensation and that foreign nationals are entitled to a "minimum standard of treatment." In the correspondence between the Mexican Minister of Foreign Affairs and U.S. Secretary of State Cordell Hull, the Mexicans denied that there was any consensus on international law that would oblige compensation for expropriation (Thomas & Gimblett 2011: 664). Mexico acknowledged that compensation was necessary under Mexican Constitutional law, however, they asserted that "…the doctrine which [Mexico] maintains of the subject…is that the time and manner of such payment must be determined by [Mexico's] own laws" (Thomas &

Gimblett 2011: 664). A few weeks later, on August 22, 1938, U.S. Secretary of State Hull responded in what has since become known as the Hull Doctrine. He maintained "a self-evident fact" that not only does international law exist but that "…the applicable precedents and recognized authorities on international law" support the U.S. position (Thomas & Gimblett 2011: 664). Indeed, there had been a range of international arbitral decisions in the 19th and early 20th century establishing such obligations as a rule of international law (Borchard 1940).

In the Mexican Minister of Foreign Affairs note to Secretary Hull on September 2, 1938, the Mexican government contended that the Calvo Doctrine and Mexico's rejection of international investment law was established to defend "weak states against the unjustified pretension of foreigners who, alleging supposed international laws, demanded a privileged position" (Borchard 1940: 450). After provocative political exchanges and threats from U.S. Congress, the cases were eventually settled as Mexico agreed to one lump sum payment in compensation for the land and oil expropriations. However, the underlying cause of the investment dispute – a fundamental opposition between claims to sovereignty and claims to international law - was certainly not new and it was far from resolved.

*From gunboat diplomacy to investor-state dispute settlement (ISDS)*

U.S. investment policy and law, even in its most elementary forms in the 19th and 20th century, emerged from conflicts with developing countries over state sovereignty. During the interwar years, Mexico was joined by the Soviet Union and Romania in implementing far-reaching nationalizations (Thomas & Gimblett 2011). In the League of Nations in 1930, the U.S. attempted to codify international investment law to protect against expropriations and denials of justice to foreign nationals. The representative from China responded with essentially a version

of the Calvo Doctrine in arguing that a foreigner must be prepared for “all local conditions, political and physical, as he is the weather” (Borchard 1940: 451). The conference fell apart as the seventeen “weaker” nations located the rights of foreign investors in domestic law while the twenty-one “great powers” opposed that position as contrary to international law (Borchard 1940: 451).

Following WWII, as countries in the global south gained their independence from colonial rule, the rate of expropriations increased markedly while developing countries continued to reject international investment law. From 1960-9 there were 136 expropriations in developing countries, but from 1970-9 there were 423 and during 1980-92 there were 16 (Minor 1994). Since the 19th century, the U.S., British, and other European powers tended to respond to expropriations with “gunboat diplomacy,” or military intervention in a foreign country to protect commercial interests in that country. The U.S. has a long history of gunboat diplomacy in Latin America and the Caribbean and Asia, as early as 1833 the U.S. had deployed military forces to Argentina to protect private commercial interests during a local insurrection (Collier 1993). At the turn of the 20th century, the U.S. had a particularly active military intervention policy on behalf of on U.S. private commercial interests in Latin America and the Caribbean, mostly motivated by capital and investment disputes (Langley 2001). In 1937, a State Department official commented,

> “It was in large part the influence of pressure groups bent upon selfish gain and immediate material profit that led more than once to our interference in the internal affairs of our Central and South American sister republics, finally resulting in armed intervention and the sowing of fears and deep-seated resentment” (cited in Lowenthal 1978).

Throughout the Cold War, the U.S. continued military and covert operations in the developing world in response to nationalizations and other commercial conflicts. Among the most famous instances in Latin America were the U.S. military ouster of President Jacobo Arbenz in Guatemala in 1954 at the behest of United Fruit Company (Schlesinger et. al. 2005), and the CIA and International Telephone and Telegraph's successful efforts to overthrow the democratically-elected Salvador Allende government in Chile in the early 1970s (Qureshi 2009). As the Cold War pressed on, the U.S. was increasing commercial ties and exporting capital to the developing world (Vandevelde 1988: 208). Simultaneously, investment and capital disputes in the global south became increasingly complicated. In addition to expropriations, developing countries imposed "performance requirements" on multinational corporations (MNCs) to ensure that foreign investors acted in accordance with the national policy objectives of the host state. The U.S. Commerce Department defined performance requirements[6] as "any requirement placed upon a foreign controlled enterprise by a host nation" (Cited in Coughlin 1982: 129).

By 1965, in response to the increasing amount of capital and investment disputes in developing countries, the U.S. and Europe established an investment dispute settlement court at the World Bank.[7] The purpose was to enforce international investment law and "depoliticize" private investment disputes in the developing world by shifting the conflicts to third party arbitrators at the World Bank. The U.S. and European countries developed respective bilateral investment treaties for contract with developing countries that obliged that investment and

[6] Performance requirements include commitments to: regional development, training local workers, research and development, technology transfers, mandatory exports quantities, and mandatory local content inputs in which a certain percentage of the value of the final output is sourced locally.
[7] In 1965, The International Centre for Settlement of Investment Disputes (ICSID or the Centre) at the World Bank was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention).

capital disputes be arbitrated at the World Bank and not in the host country's domestic courts. The provisions are called investor-state dispute settlement (ISDS). In 2015, The United States Trade Representative (USTR), the government agency that coordinates U.S. trade policy and negotiations, explained the origins of ISDS:

> "Military interventions in the early years of U.S. history – gunboat diplomacy – were often in defense of private American commercial interests. As recently as 1974, a United Nations report found that in the previous decade and a half there had been 875 takings of the private property of foreigners by governments in 62 countries for which there was no international legal remedy. Though diplomatic solutions were possible, they were often ineffective and political in character, rather than judicial. ISDS represented a better way" (USTR 2015).

However, until the mid-1980s, the U.S. and Europe were largely unsuccessful in getting significant groups of developing countries to agree to ISDS because most of the global south continued to reject international investment law. The hundreds of expropriations of foreign property and investments by developing countries in the 1960s and 1970s reflected the Charter of Economic Rights and Duties of States, adopted by the United Nations General Assembly in 1974. Article Two proclaimed that every state has "full permanent sovereignty…over all its wealth, natural resources and economic activities" (UN Documents 1974). To that end, Article Two addressed foreign investment and capital and provided that each state has the right to regulate, supervise, and expropriate foreign investment and MNCs within national jurisdiction (UN Documents 1974). The Mexican delegation to the UN had played a leading role in drafting

the 1974 UN Charter and ensuring that the Calvo Doctrine was codified in the document[8] (Shihata 1986: 4).

It was not until after the "third world debt crisis" in the early 1980s that developing countries began to accept international investment law as part of broader social and economic reforms to attract multinational capital (Prashad 2007). In 1982, Panama became the first Latin American country to do so by signing a bilateral investment treaty with the U.S. and thereby ratifying ISDS procedures. In 1991, Mexico finally broke from the Calvo Doctrine and accepted ISDS during the negotiations of the North American Free Trade Agreement (NAFTA) with the U.S. and Canada. For both developed and developing countries, accepting or rejecting international investment law has never been a question of free trade but one of politics. The origins of U.S. investment policy and law was not free trade principles but conflicts with developing countries, in which developing countries made claims to state sovereignty and rejected international law. Similarly, in the twenty-first century, U.S. investment policy in U.S. free trade agreements is not motivated by free trade principles but rather conflicts between state sovereignty to implement market regulations and the rights of multinational investors.

*The U.S. Bilateral Investment Treaty Program*

The U.S. Bilateral Investment Treaty (BIT) codifies the legal rights of multinational investors and investor-state dispute settlement (ISDS) procedures. Kenneth J. Vandevelde was one of the original drafters of the U.S. BIT in the Carter and Reagan administrations. Vandevelde situated the purpose of the U.S. BIT program, "A state's foreign investment policy generally is

---

[8] In addition, Articles Three and Five provided for the creation of raw material cartels; Article Six provided for the creation of "multilateral commodity agreements"; Article Twenty-Eight provided for the creation of a system to "promote just and equitable terms of trade."

an element of its larger economic policy, particularly its understanding of the proper role between the state and economic activity" (2010). In other words, international investment law regulates the boundaries between state and market, specifically, the relationship between multinational investors and host states.

The U.S. BIT program came to fruition under the Reagan administration in the early 1980s. President Reagan explained the 'fundamental premise' of the first U.S. Model BIT, "…foreign investment flows which respond to private market forces will lead to more efficient international production and thereby benefit both home and host countries" (1983). To that end, U.S. trade theorists assert that the U.S. BIT imposes a relationship between the state and market according to three free market principles: (1) states must intervene to protect property rights and contracts; (2) the market should allocate resources and the state should not "chose winners or losers"; and, (3) the state may intervene to correct market failures such as supply public goods or protect against anticompetitive behavior (i.e. monopoly) (Vandevelde 1988).

| Table 1: Core Provisions of the U.S. Model Bilateral Investment Treaty (BIT) | |
|---|---|
| Investment Definition | Broad definition, including: an enterprise, equity and debt securities, loans, interest, real estate and property, profits and returns from enterprise |
| National Treatment | Investments and investors of another Party must be treated "no less favorably" than nationals |
| Most-Favored-Nation | Investments and investors of another Party must be treated "no less favorably" than investments and investors of another Party or non-Party |
| Minimum Standard of Treatment | Investments and investors must be treated with "full protection and security" and "non-discriminatory treatment" |
| Performance Requirements | No Party shall impose or enforce requirements upon an investment or investor of another Party, with an expansive list detailing prohibited performance requirements |
| Transfers | Each Party permits all transfers relating to an investment of an investor of another Party "to be made freely and without delay" |
| Expropriation | No Party may nationalize or expropriate an investment of an investor of another Party, except for public purpose and on a non-discriminatory basis, in which case compensation be "fair market value" |

| Investor-State Dispute Settlement (ISDS) | Foreign investors may bring claims of violations of investor rights against a host state to the World Bank, arbitrators can make monetary awards but not change laws in the state. |
|---|---|

The core investor rights in the U.S. BIT have antecedents in international investment agreements and laws from the late 19th and early 20th century. However, the U.S.' objectives in the BIT program were shaped by conflicts with developing countries during the Cold War, in which developing countries were prone to expropriations, appropriations of intellectual property, highly restrictive investment regimes, and imposed a range of costly regulations on U.S. MNCs. As a response to such "Third World nationalism," the global north codified Hull doctrine in the OECD's adoption in 1961of the binding Code of Liberalization of Capital Movements. U.S. Treasury Secretary Henry Fowler addressed the International Chamber of Commerce in 1965. Fowler shared that the experience of U.S. MNCs in Europe showed that "a vast area of potential conflict" could be minimized provided that host states applied "equal treatment under the law for foreign and domestic enterprises" and exorcised "the specter of state confiscation and state operation of competitive units" (cited in Gindin & Panitch 2012: 116). As the U.S. had growing commercial ties with developing countries, the original U.S. Model BIT (1982) sought to reregulate developing countries to support the interests of U.S. multinational investors in the developing world. Jose Alvarez, another former U.S. BIT negotiator, concurred that the objective was to bind developing countries to investment law that would "resist the forces of change often demanded by the political and economic life of host countries" (cited in 2009: 4).

V. U.S. investment policy and global competitors

*Globalization and free trade agreements (FTAs)*

USTR Ambassador Michael Froman, who oversaw negotiations of the TPP and the U.S.-EU FTA (Transatlantic Trade and Investment Partnership), addressed the think tank Cato Institute in June 2016,

> "But it's important not to conflate trade agreements with globalization. Globalization has impacted the workplace; trade agreements can be part of the solution. Trade agreements allow us to shape globalization to our advantage. They are the vehicle through which we help write the rules of the road for the global trading system, and do so in a way that reflects our interests and our values" (USTR 2016).

In the social sciences, globalization is a complex, interdisciplinary field concerned with the exchange, transfer, and mix of people, places,[9] and things. Trade and investment, global production sharing, and financial integration, and other forms of economic globalization are enabled by technological development and motivated by new supply and demand pulls. However, economic globalization is also a function of international trade and investment law. As stated by USTR Froman, FTAs shape economic globalization by establishing "the rules of the road" for private enterprise in a global economy. Multilateral, regional, and bilateral FTAs establish regulations and market access rules that condition patterns of global trade and investment.

By the end of 2016, out the 423 regional FTAs that are in force worldwide, 19 are U.S. FTAs. Not all FTAs are the same and the U.S.' FTAs are unique. The difference between FTAs is their regulatory reach. The WTO is the least intrusive into a country's policy space, while

[9] A "place" maybe "transferred" as MNCs invest and operate globally, such as the globalization of McDonalds; "places" maybe "mixed" as MNCs adjust their business model to local markets, such a McDonalds tailoring its menu to meet local tastes in a particular country.

U.S.-style FTAs are the most intrusive. In other words, U.S. FTAs contain the most demanding regulatory commitments while the WTO provides countries with the most flexibility to regulate, the FTAs of other countries fall somewhere in between. At issue is not necessary the quantity of regulations contained in the FTA but its quality of regulations in trade-related and investment-related issues. It is necessary to distinguish between the content of different regional FTAs to understand how each relates to processes of globalization.

*FTAs and differential impact on state sovereignty*

The General Agreement on Tariffs and Trade (GATT) was the Bretton Woods institution that governed the multilateral trade system in the post-war years and membership eventually grew to include the vast majority of countries in the world. The GATT's regulatory scope only applied to tariffs on goods and commodities. However, by the GATT Tokyo Round negotiations in the mid-1970s, the USTR was making strong pushes to include "new issues" of intellectual property rights, investment, and services (i.e. "anything you can't drop on your foot"). The USTR's effort was in large measure rebuked by developing countries but the Tokyo Round set precedent for the eventual inclusion of the "new issues" into the GATT Uruguay Round (1986-1994). The highly contentious negotiations during the prolonged Uruguay Round successfully incorporated intellectual property rights, investment, and services into the GATT's regulatory scope and the GATT became the WTO in 1995. However, the USTR's proposals for deep regulatory commitments on the "new issues" were successfully opposed by developing countries. For this reason, the WTO is the trade agreement that has the least impact on state sovereignty to implement market regulations.

A central free trade principle in WTO agreements is “most favored nation,” which stipulates that WTO members must extend the same preferential treatment towards one WTO member as to all other WTO members. However, the WTO provides exceptions for bilateral and regional FTAs.[10] In so doing, FTAs are an exception to WTO commitments because FTAs create preferential trading arrangements. For comparative purposes, the EU is not an FTA but rather a political project to establish a common market with a common currency and harmonized fiscal, monetary, migration, and social policies. From the perspective of the USTR, any FTAs that do not go beyond WTO commitments on the intellectual property rights, investment, and services are considered “low standard” deals; any agreement that goes beyond WTO commitments is called “WTO-plus”; and any FTAs that approximate U.S.-style FTAs are “high standard” deals.

In broad historical terms, the USTR’s policy stance reflects U.S. commercial interests as the global competitiveness of U.S. exporters and U.S. MNCs depends upon deep market access and “high standards” in intellectual property rights, investment, and services. For this reason, U.S. FTAs contain many WTO-plus issues. In the TPP, the USTR included regulations on state-owned enterprises, the digital economy, labor and environment, new intellectual property areas, among others. The Obama administration frequently described the TPP as the U.S.’ “rules of the global economy” in relation to those of China. The competitor to the TPP is the China-led Regional Comprehensive Economic Partnership (RCEP). The RCEP includes the ten[11] countries from the Association of Southeast Asian Nations (ASEAN) plus six[12] additional regional countries. The ASEAN began as a geopolitical grouping in 1967 but they formalized an FTA in

[10] Paragraphs 4 to 10 of Article XXIV of GATT cover trade in goods; Article V of GATS covers trade in services.
[11] Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.
[12] Australia, China, India, Japan, South Korea and New Zealand.

1992 that mostly focused on tariff reductions to facilitate intra-regional trade and attract investment. Since then, the ASEAN signed "low-standard" FTAs with other Asian countries, including, China, India, Japan, and Korea.

The primary goal of the RCEP is to harmonize the various ASEAN agreements into a single FTA (CIL 2011). Therefore, the RCEP assumes ASEAN centrality, which adopts a flexible and sensitive approach to the differential interests of developing countries, whereas the TPP does not (CIL 2011). To that end, the scope of the RCEP is mostly focused on tariff reductions in goods, with some partial WTO-plus elements in services and investment (Xiao 2015: 36). For instance, in the RCEP there are only six non-tariff issues whereas the TPP has twenty (Xiao 2015: 36). In sum, U.S. FTAs seek to "shape globalization" to "reflect U.S. values and interests" by establishing trade and investment rules that go beyond WTO commitments and have far-reaching regulatory implications, whereas China's FTAs are more WTO-consistent which preserves greater policy space to regulate the private forces of globalization.

Table 2: Differences Between International Trade Agreements

| | WTO | TPP | ASEAN | RCEP |
|---|---|---|---|---|
| Membership | Vast majority of the world | Twelve Pacific Rim countries* | Ten ASEAN countries** | ASEAN plus six Asian countries*** |
| Regulatory scope | Global benchmark standards in goods, services, intellectual property, investment | "WTO-plus" including range of new regulatory areas | "WTO-consistent" | Partial "WTO-plus" |
| Sectoral liberalization**** | All sectors: positive list | All sectors: negative list | All sectors: positive list | Goods: blend<br>Services: positive<br>Investment: negative |
| Liberalization standards | All sectors: low | All sectors: high | Goods: high<br>Services: low | Goods: high<br>Services: low |

| | | | | |
|---|---|---|---|---|
| | | | Intellectual Property: low Investment: low | Intellectual Property: low Investment: medium |
| *TPP members include: U.S., Japan, Malaysia, Vietnam, Singapore, Brunei, Australia, New Zealand, Canada, Mexico, Chile and Peru. | | | | |
| **ASEAN members include: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. | | | | |
| ***RCEP members include: The ten ASEAN countries "plus six," including, Australia, China, India, Japan, South Korea and New Zealand. | | | | |
| ****Sectoral liberalization is negotiated on either a "positive list" or "negative list" basis. The positive list approach entails countries choosing which of their economic sectors they will negotiate liberalization; the negative list approach entails countries liberalizing all sectors and then negotiating which sectors will not be liberalized. | | | | |

VI. Conclusion: the stakes of international investment negotiations

The stakes of international investment agreements are their impacts on state sovereignty to regulate foreign direct investment (FDI) and capital flows. There are two areas of debate in negotiations, (1) industrial policy, and (2) the "public-private divide." The regulation MNCs and capital flows are fundamental to industrial policy in both the developed and developing world, with acute consequences to social and economic development in developing countries. Second, in international investment policy, policymakers must balance the private legal rights of "the market" against the states' policy space to regulate MNCs, known as the "public-private divide."

*Foreign direct investment and industrial policy*

The U.S. BIT program also serves as the negotiating template for the investment chapter in U.S. free trade agreements (FTAs), and in many respects, the investment chapter may be considered the "heart" of U.S. FTAs. The investment chapter, in tandem with the financial services chapter, functions to support, facilitate, and protect private flows of capital and investment. Cross-border capital and investment flows play increasingly important roles in both

developed and developing countries. From the perspective of multinational interests in developed countries, “Foreign direct investment (FDI) is the most important vehicle to bring goods and services to foreign markets.” (Sauvant 2009). Ban Ki-Moon, Secretary General of the UN, explained the perspective of multinational interests in developing countries,

> “Increasingly, transnational corporations are engaging with developing and transition economies through a broadening array of production and investment models…[developing countries engage MNCs] to deepen their integration into the rapidly evolving global economy, to strengthen the potential of their home-grown productive capacity, and to improve their international competitiveness” (cited in UNCTD 2011).

As FDI has assumed an integral part of the growth strategies in both the developed and developing world, policymakers and trade negotiators have crafted investment agreements to support and facilitate multinational investment interests. The U.S. and other developed countries are capital-exporters and policy-makers of international investment law, whereas most developing countries (China notwithstanding) are capital-importers and policy-takers (Alschner & Skougarevskiy 2015). For this reason, the social sciences literature widely describes contemporary FTAs as “transnational governance regimes,” because trade and investment agreements export extensive market regulations from developed to developing countries. This has differential impacts in developed and developing countries. For the U.S., the U.S. BIT program reflects the interests of U.S. MNCs that use FDI to increase the scale of their operations and thereby their global market shares. Conversely, developing countries have a wide range of policies towards FDI from MNCs.

The U.S. BIT provisions combine technical rules on market access and regulations. In so doing, the U.S. BIT functions to enhance an investment-friendly climate in developing countries by eliminating "barriers" and restrictions to investment, establishing transparent, common, and predictable rules, and reducing political and social risks to investors (Menghetti 2011). In U.S. FTAs, the investment chapter has complex and substantive interconnections with the other chapters in the FTA. In the most recent U.S. FTA, the Trans-Pacific Partnership (TPP),[13] the investment chapter is a support to the other regulatory chapters, notably, intellectual property, services, competition policy, labor and environmental commitments, tariffs, and rules of origin (rules of origin establish product-specific requirements for regional content as inputs into a final product) (Elms & Low 2013). In all comprehensive FTAs, particularly U.S. FTAs, this "trade-investment-intellectual property-services nexus" provides the legal underpinning of global supply chains, global production sharing, trade in services, and international financial integration (Elms & Low 2013). The investment protections and deregulations contained in the U.S. BIT facilitate MNCs using FDI to achieve economies of scale. In so doing, the U.S. BIT program is a component of U.S. industrial policy to strengthen the global market shares of U.S. MNCs, which has a range of economic and political benefits to the U.S.

Economist Thomas Friedman refers to U.S. investment policies as a "golden straightjacket" on developing countries because U.S. investment agreements enhance market efficiency by constraining arbitrary government regulations (2000). However, many policymakers and commentators in developing countries disagree with Friedman's assessment. For capital-importing developing countries, the ability to regulate FDI is central to development policy. Developing countries that have the policy space to regulate FDI can do so to realize a

[13] Signed by the U.S. in 2016 but not ratified by Congress.

range of industrial development goals. Consider the investment policies of Mexico and China, the two top U.S. trade partners that are developing countries, and their subsequent divergent development paths. Mexico signed the NAFTA, which entailed granting the broadest investor rights and ISDS to multinational capital, while China was only constrained by the WTO's investment agreement, which grants significant policy space for regulating FDI and capital inflows. Mexico studiously followed the liberalization principles espoused by the U.S. and the IMF and yet Mexico has been losing international competitiveness since the early 2000s. Conversely, in the words of Enrique Dussel Peters, director of The China-Mexico Studies Center, "China was the worst student and got the best grade" (cited in Wang 2006). China rejected the investment liberalization guidelines of the U.S. and IMF and China's industries grew to be highly dynamic and globally competitive.

Mexico dismantled its public sector, committed itself to the unrestrained free movement of capital, and deregulated FDI. As U.S. companies invested in Mexico, most Mexican companies were unsuccessful in integrating their operations with U.S. MNCs, and when U.S. MNCs saw better conditions elsewhere the footloose companies simply left Mexico for the Asia-Pacific, particularly in the information technology and textile sectors (Gallagher & Zarsky 2007). On the other hand, China's nationalistic investment policymakers imposed a range of regulations on FDI and international capital flows while China's public sector dominated domestic markets. China did not permit the free movement of capital and obliged MNCs to partner with China's state-owned enterprises and transfer their technology and intellectual property in exchange for access to China's rapidly growing domestic market (Roach 2014).

In sum, as both Mexico and China imported capital and opened their markets to MNCs, Mexico's domestic industries waned in global markets while Chinese enterprises were able to climb the value-added chain and eventually become globally competitive industries. The key difference was that under the NAFTA, Mexico could not legally regulate investment and capital inflows, while China had far more policy space to do so under WTO commitments and China's policymakers used it to the max. The relationships between state sovereignty and international investment laws are central to development and development policy.

*The "public-private divide"*

Legal debates concerning international investment law focus on the balance between investor rights and regulatory policy space. Legal scholars have a number of different perspectives and interpretations to this dichotomy. For law professor Wenhua Shan, "the featured debate of international investment law-making seems to have shifted from a 'North-South Divide' to a 'Private-Public Debate'" (Shan 2006). That is, throughout the Cold War, most developing countries rejected international investment law, which was representative of the larger conflicts between the global north and the global south. Beginning in the 1980s and 1990s, developing countries turned away from import-substitution industrialization and sought to attract international capital. In so doing, developing countries signed investment agreements with developed countries. For Shan, the content of the debate over international investment law shifted "to be the conflict between the private interests of foreign investors and the public interests of states, namely host states" (2006: 660).

However, while Shan recognized the public-private conflict he did not define it. Law professor Barnali Choudhury framed the debate in terms of a "democracy deficit" (2008). For

Choudhury, "democracy can be characterized both by principles of public participation and accountability" (2008: 783). Choudhury argued that since ISDS arbitrators rule on public interest regulations without input from the public, international investment law contributes to a "democratic deficit." Investment lawyer Suzanne Spears characterized the dichotomy as "a balance between principles regarding the protection and promotion of foreign investment on the one hand and principles regarding the protection of society and the environment on the other" (2010).

Multinational corporations and investors have successfully used ISDS to challenge public interest legislation around the world, motivating an existential debate about ISDS. For example, the NAFTA ISDS cases overwhelming targeted environmental regulations. Around the world, other ISDS cases have successfully challenged public health, labor, financial, and a range of other public interest regulations. Strong investor rights and the offensive use of ISDS have the effect of "locking-in" a government's regulatory environment. However, regulatory norms evolve. For example, the TPP investment chapter contained a complete carve-out of tobacco companies from ISDS. The regulatory norms on tobacco evolved from treating tobacco as a "safe" product to a "dangerous" product, and states introduced public interest legislation accordingly. The TPP's tobacco carve-out confirms MNCs use ISDS as a deregulatory tool.

Tobacco is not the only commodity that is patently against the public interest and in which regulatory norms have evolved. Nor is tobacco the only public issue that has motivated public interest legislation that has been a target of ISDS claims. The U.S. fossil fuel industry understands that they are contributing to global warming, which is against the public interest as global warming causes an increasing frequency of natural disasters,

among other public issues. Yet the oil and gas industry has won billions of dollars in successful ISDS cases, thus weakening climate change and fossil fuel regulations in those countries. Two NAFTA examples include a successful ISDS case against a ban on fracking in Canada, and the pending $15 billion claim against the U.S. for the Obama administration's denial of the Keystone XL oil pipeline. In the lead up to the 2008 global financial crisis, the "toxic assets" that were fraudulently sold to investors all over the world by U.S. multinational banks were malicious to the public welfare as they destabilized the global financial system. Yet, the TPP extends the "minimum standard of treatment" protection to the financial sector and one multinational bank has already successfully used ISDS against emergency financial measures.[14] Similarly, the international regulatory norms on capital controls have been shifting and evolving for at least the last hundred years (Abdelal 2009), yet the TPP cements a stringent and limiting approach to capital controls that domestic lawmakers cannot change. Since at least the industrial revolution, the relationship between capital and labor has been mediated by government and labor standards have consistently changed, yet MNCs have used ISDS to challenge labor protections including a minimum wage bill.[15] Pharmaceutical MNCs have used ISDS to extend patent monopolies on medicines even though many countries have laws recognizing that patent laws evolve over time.[16]

In these examples, MNCs have used ISDS to lock-in a favorable regulatory climate, thereby undermining a country's sovereignty and democratic law-making processes. In other words, international investment law categorically limits the parameters of acceptable national

[14] *Saluka Investments B.V.* vs. *The Czech Republic*, Partial Award, Ad hoc-UNCITRAL Arbitration Rules (2006).
[15] Veolia Propreté v. Arab Republic of Egypt (ICSID Case No. ARB/12/15)
[16] Eli Lilly and Company v. Government of Canada.

policy. For these reasons, a number of countries have renounced any future trade and investment agreement that includes ISDS, including, Germany, India, Brazil, and Ecuador. However, there are thousands of investment agreements with ISDS in force worldwide. States use international investment law to accommodate multinational interests. The widespread international acceptance of ISDS reflects a broader reorientation of national policy agendas towards the needs of MNCs and the demands of global markets. Policymakers around the world support the position that ISDS is a mechanism for resolving frictions in international affairs, and it is therefore a necessary to the global economy.

# Chapter Three: Negotiating the NAFTA Investment and Financial Services Chapters

I. Introduction

II. U.S. trade policy in the NAFTA

III. Negotiations of the investment and financial services chapters

IV. The "double movement" and the NAFTA investment agreements

"In the post-Cold War world, our national security depends on our economic strength…We will ask companies and workers to join in partnership with government to build competitive industries."

-USTR Michael Kantor, 1993, testifying to the Senate on U.S. trade policy and the NAFTA

"For the first time, different social groups have been brought into the negotiations over a trade pact…Trade has become a public issue."

-Rick Swarz, May, 1991, business lobbyist commenting on the unprecedented corporate lobbying effort to win the necessary Congressional votes to extend fast-track to the NAFTA

## I. Introduction

The NAFTA set many precedents in international trade law, especially the investment and financial services chapters. However, the NAFTA also inspired an unprecedented broad-based resistance to international trade law. This chapter documents the origins, contexts, and objectives of U.S. trade policy in the NAFTA investment and financial services chapters. In my process tracing of the negotiations, my dependent variables are the NAFTA investment and financial services chapters; the independent variables are the USTR, domestic political actors, and other country negotiating teams. Using the "double movement" framework, I show that the

USTR, representing the "free traders," secured an unprecedented expansion of the rights of multinational investors and corporations over the objections of the "nationalist" and "socialist" domestic and international political actors.

## II. U.S. Trade Policy in the NAFTA

### II.A. Origins of the NAFTA as U.S. trade policy

*Mexico's restrictive trade and investment regime during the Cold War*

In 1991, USTR Carla Hills explained to Congress the origins of the proposed FTA with Mexico, "Consideration of the FTA initiative is possible because of a reorientation in Mexico away from statist, interventionist policies toward a market-oriented system."[17] The "statist, interventionist policies" that Hills referenced were parts of Mexico's restrictive trade and investment regime during the Cold War. These policies reflected the articles enumerated in the 1974 United Nations Charter of Economic Rights and Duties of States,[18] which the Mexican delegation played a lead role in drafting.[19] In the 1974 UN Charter, developing countries argued from the perspective of dependency theory that unfavorable terms of trade with developed countries alongside unfavorable power relations with multinational corporations (MNCs) were sources of their perpetuating poverty. The Charter implicitly confronted U.S. trade and investment policies during the GATT Tokyo Round (1973-9) by asserting that international

[17] USTR Carla Hills testimony before U.S. Congress. Senate. Committee on Finance. 1990. "United States-Mexico Free Trade Agreement: hearings before the Committee on Finance", One Hundred Second Congress, first session, February 6 and 20, 1991.
[18] UN General Assembly, Resolution adopted by the General Assembly 3281 (XXIX). "Charter of Economic Rights and Duties of States", 12 December 1974, Twenty-ninth Session.
[19] Shihata 1986: 4

commerce be organized around principles of sovereignty, equality, and social justice.[20] Mexico imposed high tariffs, far-reaching investment restrictions, and included the Calvo Doctrine in the Mexican constitution. The Calvo Doctrine was widely incorporated in the constitutions of Latin American countries and it prioritized national sovereignty over foreign investors, including requiring foreign investors to settle dispute claims in domestic courts, which was a direct opposition to U.S. investment policy towards developing countries.[21] In tandem with highly restrictive foreign investment policies, Mexico pursued import substitution industrialization policies to encourage the growth and development of domestic industries. Therefore, USTR Carla Hills testified to Congress that a "sea change" in Mexico's domestic politics was the prerequisite to the NAFTA,

> "While Mexico is a key U.S. trading partner, for many years we had basic disagreements over trade policy. We saw a Mexico whose policies were highly interventionist, characterized by trade protection, a restrictive investment environment, a large degree of state ownership and control of business, and an overly regulated business climate."[22]

---

[20] Each State has the right: to regulate and exercise authority over foreign investment and MNCs within its national jurisdiction, including the right to nationalization and expropriation (Article Two); to create raw material cartels (Article Six) and "multilateral commodity agreements" (Article Thirteen); to regulate/promote technology transfers to developing countries (Article Eighteen); to promote generalized treatment and tariff preferences for developing countries (Article Twenty-Two); to "adjust" and promote "just and equitable terms of trade…in a manner which is remunerative for producers" (Article Twenty-Eight).

[21] According to the USTR, prior to the U.S. Model BIT program, the U.S. exercised "gun-boat diplomacy." See "FACT SHEET: Investor-State Dispute Settlement (ISDS)," Office of the United States Trade Representative, Press Release, March, 2015.

[22] USTR Carla Hills testimony before U.S. Congress. House. Committee on Ways and Means, Subcommittee on Trade. 1990. "US-Mexico Economic Relations," hearings (28 June). 101st Cong., 2nd sess.

*Mexico's sovereign debt crisis and gradual commitment to open commerce*

Mexico's sovereign debt crisis in 1982 triggered the "sea change" in Mexican domestic politics, shifting from inward-looking to outward-looking economic policies (Cameron & Tomlin 2000). Following a banking crisis and facing sovereign default in 1982, Mexico began to gradually respond to low-growth and high-debt with unilateral, bilateral, and multilateral trade and investment liberalizations, notably with Mexico's accession to the GATT in 1986. Since the Mexican economy was so dependent upon oil exports, Mexican President de la Madrid "had made it clear" that low oil prices were the key factor in Mexico's expanding foreign debt, which increased ten-fold up to USD $200 billion between 1984 and 1988. [23] Therefore, de la Madrid insisted that Mexico accede to the GATT to acquire new sources of foreign capital. In so doing, de la Madrid began Mexico's liberalization process by overriding domestic political pressure against joining the GATT, perceived to largely reflect U.S. influences and interests. The Salinas Administration took office in 1988 and pursued unprecedented unilateral liberalizations to make Mexico one of the most open developing countries, often going beyond their formal GATT obligations. Notably, the Salinas administration slashed tariffs, licensing restrictions, reduced the role of government as an owner/operator of businesses,[24] and implemented major unilateral reforms in the "new issues" of investment and intellectual property, near and dear to the heart of U.S. trade policy.[25]

---

[23] Cameron & Tomlin 2000: 58

[24] In 1982 the state owned 1155 enterprises and by 1990 Salinas authorized 801 for divestment and 619 for privatization.

[25] USTR Carla Hills testimony before U.S. Congress. House. Committee on Ways and Means, Subcommittee on Trade. 1990. "US-Mexico Economic Relations," hearings (28 June). 101st Cong., 2nd sess.

While Mexico's domestic political reforms were the "impetus" for the NAFTA, according to USTR Carla Hills, the U.S. "encouraged and supported Mexico in its process of reform."[26] As Mexico was acceding to the GATT they concurrently established with the U.S. a consultative mechanism to discuss trade issues and bilateral sectoral negotiations in agriculture, investment, intellectual property, services, tariffs, and key industries including steel and textiles.[27] Most importantly, in 1989, Mexico became the first country to reach a new debt accord under the Brady Plan, named after then U.S. Treasury Secretary Brady, designed to rearrange the terms of debt service for developing countries. The debt agreement exchanged substantial debt service relief for Mexico with greater assurance of future collectability and further market-oriented reforms. In the Uruguay Round (1986-94), USTR Carla Hills and her Mexican counterpart Minister Jaime Serra became a dynamic lever in the conflicts at the bargaining table between developed and developing countries.[28] The emerging political partnership between the U.S. and Mexico at the end of the Cold War became the origins of the NAFTA.

### II.B. Context of the NAFTA as U.S. trade policy

#### II.B.1. Foreign policy context

*Emerging "regionalism" in a world economy*

Between Mexico's formal request (1990) for an FTA with the U.S. and NAFTA's passage in the U.S. Congress (1993), Congress and the USTR repeatedly justified the agreement as an exigent response to the emergence of regionalism and regional trading blocs as the Cold

[26] Ibid.
[27] Ibid.
[28] USTR Carla Hills testimony before U.S. Congress. Senate. Committee on Finance. 1990. "United States-Mexico Free Trade Agreement : hearings before the Committee on Finance", One Hundred Second Congress, first session, February 6 and 20, 1991.

War closed. Congruent to the NAFTA talks, the EC had quickly moved on from the Cold War and was pursuing political and economic integration that culminated with the founding of the European Union in 1992. In 1993, USTR Michael Kantor argued that European integration policies created new barriers to U.S. exports and investment.[29] Simultaneously, Japan, then second-largest economy in the world, was leading an inward-looking Asian integration on the Pacific Rim. U.S. competitors were expanding their markets in Europe and Asia while barriers to U.S. exports were becoming increasingly problematic. USTR Kantor warned, "…allowing other nations to promote and protect their industries, building profits from secure home markets, while targeting our open market, is a formula for competitive suicide."[30] The USTR and a chorus of congressmen called for an American regionalism. An early NAFTA proponent, Rep. Bill Richardson, pleaded to Congress, "If we are to avoid being 'frozen out' of the world market it is imperative that we look to the future with the same [regional] strategy."[31]

To that end, in 1990, President Bush announced the Enterprise for the Americas Initiative which mounted the goal of a hemisphere-wide FTA from "Anchorage to Tierra del Fuego" called the Free Trade Area of the Americas (FTAA).[32] The U.S.-Mexico FTA was to be the stepping-stone to the FTAA, a plan that was subsequently adopted by Presidents Clinton and Bush II as well. As Canada joined the FTA negotiations, the proposed NAFTA would create an integrated

---

[29] USTR Michael Kantor testimony before U.S. Senate, "U.S. trade policy and NAFTA: hearing before the Committee on Finance", United States Senate, One Hundred Third Congress, first session, March 9, 1993.
[30] Ibid.
[31] Congressman Bill Richardson. US Congress, House. Committee on Ways and Means, Subcommittee on Trade. 1990. "US-Mexico Economic Relations," hearings (28 June). 101st Cong., 2nd sess.
[32] James Baker, Chairman of the Board of Directors of the U.S. Chamber of Commerce, testimony U.S. Congress. Senate. Committee on Finance. 1990. "United States-Mexico Free Trade Agreement : hearings before the Committee on Finance", One Hundred Second Congress, first session, February 6 and 20, 1991.

North American market larger than the EU which would boost the competiveness of the region. In so doing, North American economic integration would increase the region's influence – individually and collectively – to keep markets open in other parts of the world, which became particularly significant as conflicts escalated in the GATT Uruguay Round negotiations.[33]

*U.S. trade strategy in the Uruguay Round*

The NAFTA emerged on North America's trade relations agenda during the GATT Uruguay Round, which were the contentious and prolonged multilateral negotiations that founded the WTO. Since the inception of the NAFTA, the overriding goal of both the U.S. and Mexico's trade strategy was to conclude the Uruguay Round.[34] However, by 1991, the Uruguay Round collapsed over seemingly irreconcilable differences between U.S. and EC in agricultural disputes. As the Uruguay Round stalemate persisted, Washington turned its attention to the NAFTA. In this context, the proposed NAFTA assumed new significance in U.S. trade policy debates, aptly summarized in Sen. Clark Reynold's address to Senate, "The breakdown in the GATT Uruguay Round negotiations makes it all the more important to rely on regional agreements as a 'second best' approach in the direction of ultimate global liberalization."[35]

According to trade policy advisors Fred Bergsten and Jeffrey Schott, the NAFTA "reminded" the EC "that the United States could pursue alternative trade strategies" (1997).

[33] U.S. trade policy and NAFTA: hearing before the Committee on Finance, United States Senate, One Hundred Third Congress, first session, March 9, 1993.
[34] USTR Carla Hills testimony before U.S. Congress. House. Committee on Ways and Means, Subcommittee on Trade. 1990. "US-Mexico Economic Relations," hearings (28 June). 101st Cong., 2nd sess.
[35] Senator Clark Reynolds, U.S. Congress. Senate. Committee on Finance. 1991. "United States-Mexico Free Trade Agreement : hearings before the Committee on Finance", One Hundred Second Congress, first session, February 6 and 20, 1991.

Indeed, the EC released a study on potential effects of the NAFTA,[36] and concluded that the NAFTA is not a threat to the EC but that "an expanded NAFTA would not necessarily be in the Community's best interest."[37] Considering U.S.' ambitions for hemispheric trade and investment integration in the Americas, the EC report "strongly" urged the conclusion of the Uruguay Round and suggested that free trade areas "can be useful building blocks of the world trade regime."[38] Subsequently, the EC found a new resolve to conclude the faltering Uruguay Round and in so doing the NAFTA is inseparable from the founding of the WTO.

### II.B.2. Domestic political context

#### *Renewing fast-track authority*

As the Bush administration pursued the Mexico FTA which became the NAFTA, they immediately had to address the domestic legislative process in Congress because it has the authority to both implement a trade agreement and set the President's negotiating objectives. Beginning in the 1970s, Congress and the Executive branch agreed that in order to make politically expedient deals with trading partners the Executive branch would need the power to negotiate an agreement without interference from Congress. As a result, the 1974 Trade Act established "fast-track negotiating authority" (simply "fast-track") which obliged Congress to "suspend its ordinary legislative procedures" and vote a trade agreement "up or down" with limited debate and no amendments.[39] In addition, fast-track legislation contained Congress' negotiating objectives for the President, among other checks on the Executive including

---

[36] Report of the European Parliament Committee on External Economic Relations on the Free Trade Agreement Between the United States of America, Canada and Mexico.
[37] Cited in Abbott 1993: 15.
[38] Ibid.
[39] Trade Act of 1974

consultations with Congressional committees. In a 1990 Congressional testimony, USTR Carla Hills explained the political importance of fast-track, "Although the Congress cannot preclude negotiations as a legal matter, without the procedural advantages of fast-track authority, the practical impediments to negotiating an agreement would be all but insurmountable."[40] Annex One presents an explanation of the political procedures of fast-track and relevant processes in the development of the Bush administration's negotiating objectives in the NAFTA.

President Bush entered office with fast-track negotiating authority provided by the Omnibus Trade and Competitiveness Act of 1988, which was designed for the Uruguay Round but it legally applied to all trade and investment agreements under negotiation. However, when the legislation was drafted, Congress was expecting the Uruguay Round to be completed by 1991 so Congress set fast-track to expire in June, 1991 with an automatic two-year extension that could be vetoed by a simple majority vote in either the House or Senate. By early 1991 it was evident the Uruguay Round would not be completed that year and the Bush administration would need the two-year extension on fast-track, including for negotiating the NAFTA. On March 1, 1991, President Bush formally requested the two-year extension, and five days later, disapproval resolutions (H.Res. 101, S.Res. 78) were introduced in both houses.

*Congressional resistance to the Bush trade agenda*

The March-May, 1991 political battle for the renewal of fast-track is well documented,[41] however, at issue in this study is the extent to which the fast-track renewal process either

[40] USTR Carla Hills testimony before U.S. Congress. House. Committee on Ways and Means, Subcommittee on Trade. 1990. "US-Mexico Economic Relations," hearings (28 June). 101st Cong., 2nd sess.
[41] See Mayer 1998 and Cameron & Tomlin 2000, among others.

contested or amended the Bush administration's negotiating objectives in the NAFTA. The 1988 Omnibus Act enjoyed broad bipartisan support and it passed the Senate by 85 to 11 votes and the House by 376 to 45 votes.[42] However, the Bush administration's plan to extend this fast-track legislation to the Mexico FTA (NAFTA) inspired unprecedented domestic resistance to U.S. trade policy. During the March to May debates in Congress over the renewal of fast-track, the number of hearings on trade with Mexico exceeded those on the Uruguay Round by almost 10 to 1, even though the Uruguay Round was of far greater significance.[43] A large minority of Democrats were either opposed to the Mexico FTA for fear of loss of jobs or sought to shape its content to reflect labor and environmental concerns. They were bolstered by an unprecedented and increasingly organized alliance among the major labor unions, environmental groups, human rights groups, and consumer advocacy groups, each with a unique set of concerns/demands that were fundamentally opposed to the Bush trade agenda.

On May 1, the Bush administration responded with political concessions to Democrats that included a trade-displaced worker adjustment program, future cooperation with Mexico on health and safety issues, a joint border environmental plan, and appointment of environmental experts to the USTR's trade advisory committees.[44] Simultaneously, the Bush administration engaged in a major outreach effort to win Congress' votes as Bush personally contacted "scores" of lawmakers.[45] On May 9, House Majority Leader Gephardt introduced H.Res. 146 to implement the Bush administration's new labor and environmental commitments even though the commitments were legally non-binding. Major U.S. business groups organized a massive

---

[42] H.R. 4848 (100th): Omnibus Trade and Competitiveness Act of 1988.
[43] Sek 1999: 2.
[44] Ibid.
[45] "'Fast Track' Sprint: Frenzied Lobbying on a Treaty Not Yet Written," by Gary Lee, The Washington Post, Published May 23, 1991.

lobbying campaign to defeat the fast-track disapproval bills, "It's a pan-business effort, I've never seen a larger grouping from the private sector," remarked a top lobbyist from the Emergency Committee for American Trade.[46] At the end of May, the House and Senate voted down the fast-track disapproval resolutions (House: 192 to 231; Senate: 36 to 59) and fast-track was renewed. In sum, the Bush administration was forced to make relatively small (non-binding) concessions to environmental critics to win fast-track. The negotiating objectives from the 1988 Omnibus Act remain unchanged.

### II.C.1. U.S. Objectives in the NAFTA

The official U.S. negotiating objectives in both the Uruguay Round and the NAFTA were detailed by Congress in the 1988 Omnibus Act. The bill was designed to "enhance the competitiveness of American industry,"[47] signifying that for U.S. policymakers, international trade and investment was an industrial strategy. However, the NAFTA also represented the Bush administration's trade strategy vis-à-vis the Uruguay Round and trade policy increasingly reflected foreign policy and security goals. Therefore, the U.S. objectives in the NAFTA had evolved as a carefully combination of industrial strategy, trade strategy, and foreign policy.

| Table 3: Synthesis of U.S. objectives in the NAFTA | | |
|---|---|---|
| Industrial Strategy | Trade Strategy | Foreign Policy |

[46] Cited in Devereaux et. al. 2006: 196.
[47] H.R. 4848 (100th): Omnibus Trade and Competitiveness Act of 1988.

| • Establish WTO-plus standards in North America<br>• Competitive liberalization: leverage negotiations in the Uruguay Round; encourage other developing countries to negotiate FTAs | • Reposition key U.S. industries by shifting production to Mexico<br>• NAFTA was the cornerstone of the Free Trade Area of the Americas (FTAA)<br>• "Asymmetrical trade liberalization" to reduce the trade deficit | • Support and compliment bilateral initiatives on border safety and security (narcotics trafficking, undocumented migration, environmental concerns)<br>• Support democracy in Mexico and promote reforms in Latin America and the Caribbean |
|---|---|---|

*The NAFTA as U.S. industrial strategy*

The 1988 Omnibus Act directed three overall negotiating objectives to the USTR, to obtain: (1) open markets, (2) reductions to barriers to trade, and (3) a more effective system of international trading disciplines and procedures.[48] However, at the Uruguay Round the U.S. faced fierce resistance from developing countries in negotiations over the USTR's proposals in the "new issues" of investment, services, and intellectual property.[49] The purpose of the U.S. proposals on "new issues" was to establish and protect U.S. comparative advantages in advanced manufacturing, advanced services, and high intellectual property content commodities.[50] By extension, supporting U.S. industries (U.S. MNCs) would support U.S. exports and therefore U.S. jobs. In fact, the USTR found that jobs supported by exports paid higher wages in both manufacturing and services.[51] However, due to geopolitical resistance at the Uruguay Round, the USTR was unable to negotiate "high standard" agreements in investment, services, and intellectual property ("high standard" trade agreements are referred to as "WTO-plus"). The

[48] Ibid.
[49] See Stewart 1995 and Kelsey 2008.
[50] Ibid.
[51] USTR Carla Hills testimony before U.S. Congress. House. Committee on Ways and Means, Subcommittee on Trade. 1992. "North American Free Trade Agreement," hearings September 9, 15, 17, and 22, 1992. 102nd Cong.

NAFTA was an opportunity for the U.S. to reach a WTO-plus agreement with a geopolitically important developing country, setting precedent for future trade agreements including the FTAA.

The NAFTA marked the beginning of the U.S. trade policy strategy of "competitive liberalization," which uses bilateral or regional FTAs with "ready and willing" countries to overcome resistance to U.S. trade policy elsewhere. This trade strategy had its roots in the U.S.-Canada FTA (1988). James Baker, then U.S. Treasury Secretary, described the geopolitical significance of the FTA as "a lever to achieve more open trade."[52] He explained, "Other nations are forced to recognize that the U.S. will devise ways to expand trade – with or without them. If they chose not to open markets, they will not reap the benefits."[53] The NAFTA would develop that strategy, President Clinton explained, "[bilateral and regional] agreements, once concluded, can act as a magnet including other countries to drop barriers and to open their trading systems. The [NAFTA] is a good example."[54] That is, the NAFTA would make Mexico and Canada a "magnet" for international capital which would pressure other countries to negotiate with the U.S. The competitive liberalization strategy is a part of U.S. industrial strategy inasmuch as it encourages and facilitates the opening of new markets to U.S. exports and capital.

*The NAFTA as U.S. trade strategy*

The NAFTA was part of a U.S. trade strategy to generalize the maquiladora model in Mexico which would facilitate the competitive restructuring of U.S. manufacturing industries to better compete with East Asia, particularly in autos, electronics, and textiles (Peters 2009). The

---

[52] Baker 1988: 41.
[53] Ibid.
[54] President Clinton, "Remarks at the American University Centennial Celebration," February 26, 1993.

emergence of Asian manufacturing exporters in the 1970s eventually turned some U.S. manufacturers into importers, including in shoes, luggage, toys, games, sporting goods, and bicycles (Watkins 2013). However, other industries shifted assembly operations to Mexico to preserve production in the U.S., notably autos, textiles, and electronics. U.S. imports from Mexico contained much higher U.S. content than imports from Asia, therefore, by importing from Mexico (rather than Asia) manufacturing plants would be maintained in the U.S. By the time the NAFTA came into force cross-border production sharing, or supply chains, had already emerged in autos, textiles, and electronics. The USTR's main private sector advisory committee explained, "With a NAFTA that allows companies to plan long term investments based on economic efficiencies rather than government imposed barriers, costs can be reduced and economies of scale achieved, allowing North American products to compete more effectively in world markets."[55] Those industries, in addition to U.S. financial services and agricultural exporters, were the main business lobbies promoting the NAFTA (Watkins 2013).

The Bush administration's vision for the Free Trade Area of the Americas (FTAA) was not simply about expanding U.S. market shares in Latin America and the Caribbean. Another central motivation in the FTAA was to leverage European and Asian negotiators so as to "keep their markets open" (Destler 2005). Joan Spero, an executive at American Express and a leading corporate lobbyist, reasoned to Congress,

> "U.S. exporters and investors must have access to rapidly growing and increasingly sophisticated Asian markets in order to meet and beat our

[55] "Report of the Investment Policy Advisory Committee for Trade on the North American Free Trade Agreement". September, 1992. Washington, D.C.: Executive Office of the President, *Office of the U.S. Trade Representative.*

competitors. Our positive decision on the NAFTA will confirm to the world that the U.S. is ready to lead and compete in a changing global economy."[56]

The 1988 Omnibus Act was a response to the unprecedented yet structural expansion of the U.S. trade deficit in the 1980s with East Asia and to a lesser extent Europe. Moreover, U.S. exporters were increasingly frustrated by Europe and Japan's problematic, or "unfair," protectionism. USTR Michael Kantor summed up the dilemma, "We will not stand by and pretend that other nations share our commitment to expanded trade and open markets if the real world evidence suggests that they do not."[57] The NAFTA and the Bush administration's plans for the FTAA would leverage negotiations with Europe and East Asia. To that end, the 1988 Omnibus Act, Congress laid out specific negotiating objectives for developing countries[58] and for countries with persistent trade surpluses.[59]

Since the U.S. was the most open country to trade, negotiating partners had relatively higher barriers to trade, especially developing countries. In the Uruguay Round, the USTR sought to lower barriers to trade in areas where the U.S. already had low barriers, and policymakers described this dilemma as achieving "reciprocity" in the exchange of trade obligations. Therefore, in the 1988 Omnibus Act, the principal negotiating objectives of the U.S. towards developing countries were two-fold, (1) to "ensure" that developing countries commit to "reciprocal" trade obligations, and (2) to reduce the "nonreciprocal trade benefits" for the more

---

[56] Cited in "Asia Pacific Economic Cooperation (APEC) and U.S. policy toward Asia," hearing before the Committee on Foreign Affairs, House of Representatives, One Hundred Third Congress, first session, November 15, 1993.
[57] USTR Michael Kantor testimony before U.S. Senate, "U.S. trade policy and NAFTA: hearing before the Committee on Finance", United States Senate, One Hundred Third Congress, first session, March 9, 1993.
[58] The Omnibus Trade and Competitiveness Act of 1988, Section 1101 (4).
[59] The Omnibus Trade and Competitiveness Act of 1988, Section 1101 (5).

advanced developing countries.[60] In the Uruguay Round, solidarity among developing countries prevented the USTR from realizing these objectives. However, in the NAFTA negotiations the U.S. was able to practice its objectives of "asymmetrical trade liberalization" with an important developing country (Bergsten & Schott 1997).

Achieving reciprocal market access was a means to the next negotiating objective, "restoring current account equilibrium,"[61] in other words, balancing total imports and exports. In outlining the premise of the 1988 Omnibus Act, Congress found that, "The United States is confronted with a fundamental disequilibrium in its trade and current account balances and a rapid increase in its net external debt."[62] Therefore, Congress mandated a principle negotiating objective to address "persistent" trade imbalances and countries with structural trade surpluses "by imposing greater responsibility on such countries to undertake policy changes…including expedited implementation of trade agreements where feasible and appropriate."[63] In so doing, Congress sought to "restore" the trade deficit not with protectionism on imports but with an aggressive trade policy on exports.

*The NAFTA as U.S. foreign policy*

As outlined by President Clinton in a foreign policy speech in 1993, "…it is time for us to make trade a priority element of American security," signifying that the Clinton administration had developed a "comprehensive trade policy" that also reflected foreign policy objectives.[64] The

[60] The Omnibus Trade and Competitiveness Act of 1988, Section 1101 (4).
[61] The Omnibus Trade and Competitiveness Act of 1988, Section 1101 (5).
[62] The Omnibus Trade and Competitiveness Act of 1988, Section 1001.
[63] The Omnibus Trade and Competitiveness Act of 1988, Section 1101 (5)
[64] President Clinton, "Remarks at the American University Centennial Celebration," February 26, 1993.

NAFTA reflected foreign policy goals in that it would support and compliment regional partnership and cooperation, which was necessary to advance border security and support democracy in Mexico and Latin America. In early congressional debates on U.S. trade policy in the NAFTA, various congressmen promoted the agreement on foreign policy grounds in that it would ameliorate social and political problems along the U.S.-Mexico border, which extends more than 2000 miles over four states. In 1990, Congressman Bill Richardson of New Mexico catalogued these border problems to Congress, "high unemployment, substandard living and health conditions, drug trafficking, and a continued influx of illegal immigration."[65] Richardson was joined by a coalition of Congressmen from border states in promoting the NAFTA because a strong commercial relationship with Mexico would be the basis of a political partnership that would be necessary to address common bilateral problems along the border. Even more fundamentally, the NAFTA proponents in Congress repeatedly cited reports that the agreement would bring prosperity to Mexico, which they argued, would reduce instances of undocumented immigration and narcotics trafficking.

The emerging U.S.-Mexico political partnership became a symbol of the twenty-first century as U.S. politicians elevated Mexico to a signpost for the rest of Latin America's "fragile democracies"[66] seeking to prevent policy reversion to their nationalist and socialist policies of the Cold War. The U.S.-Mexico partnership that was the foundation of the NAFTA quickly became necessary to U.S. foreign policy to advance free trade and investment in Latin America

---

[65] Congressman Bill Richardson. US Congress, House. Committee on Ways and Means, Subcommittee on Trade. 1990. "US-Mexico Economic Relations," hearings (28 June). 101st Cong., 2nd sess.

[66] Congressmen Jim Kolbe, U.S. Congress. House. Committee on Ways and Means, Subcommittee on Trade. 1990. "US-Mexico Economic Relations," hearings (28 June). 101st Cong., 2nd sess.

and the Caribbean. Concurrent to the NAFTA, other regional trade agreements in Latin America were emerging, notably the Southern Common Market, and President Bush had made a political commitment to Chile for an FTA after completion of the NAFTA.[67] In addition, many Latin American countries began to undertake their own unilateral market-oriented economic and political reforms, often as part of IMF structural adjustment programs. As Latin America began to turn the page on its Cold War policies, U.S. policymakers recognized that the region needed Mexico to be "an example of success with a market-oriented economy."[68] In 1993, President Salinas met with leaders from twelve Latin American nations in Chile and described the regional importance of the NAFTA,

> "[NAFTA is] …a fundamental test of American relations not only with Mexico but also throughout the hemisphere…When negotiations for the treaty began, many people thought Mexico was turning its back on Latin America, and events have shown the opposite to be true. For Latin America, the free trade agreement has come to mean a different policy of the U.S. toward the region."[69]

II.C.2. U.S. negotiating objectives in the NAFTA investment chapter (Chapter 11)

Even from before the Uruguay Round, the U.S. had a well-developed international investment policy, which was eventually codified in the 1984 U.S. Model Bilateral Investment Treaty (BIT). In NAFTA negotiations, the Treasury imported the 1991 Model BIT to their

---

[67] Wethington 1994: 11.
[68] Congressmen Jim Kolbe, U.S. Congress. House. Committee on Ways and Means, Subcommittee on Trade. 1990. "US-Mexico Economic Relations," hearings (28 June). 101st Cong., 2nd sess.
[69] "Salinas Calls NAFTA a Test of U.S. Relations With All Latin America" by Tim Golden, October 19, 1993, *The New York Times*.

negotiating position, which was a slightly revised version of the 1984 Model BIT. The U.S.' objectives in the BIT program are summarized in Chapter One.

### II.C.3. U.S. Negotiating Objectives in Financial Services (Chapter 14)

As in the beginning of the Uruguay Round, investment and financial services were negotiated by the U.S. Treasury Department while most other working groups were negotiated by the USTR. At the Uruguay Round, the Treasury proposed a separate financial services agreement that would not be included in the GATS and it lobbied hard towards that end.[70] The Treasury argued that regulations on financial institutions were "substantially different from those governing other services because, among other things, special controls were necessary to prevent bank failures."[71] To that end, the U.S.-Canada FTA had a separate chapter for financial services and the NAFTA would significantly build upon that foundation.

The NAFTA financial services chapter was the first financial services agreement to merge free trade theory with banking law, in that it applied free trade principles to the agreement. The Treasury specifically sought this approach for a number of reasons, including, to facilitate the free movement of capital. International financial services provide critical infrastructure to international commerce. Krista Schefer, international investment law expert, explained,

> "Closely connected to movement in investment is trade in financial services. The transfer of funds, necessary for setting up a business and engaging in international transactions, as well as repatriation of profits or income across national borders, requires the interaction of banks, non-bank financial institutions,

[70] Stewart 1995: 2365.
[71] Cited in Stewart 1995: 2365.

insurance corporations, and security brokerages, on either side of the border, if not around the world" (1999: 271).

Moreover, international financial institutions facilitate greater efficiency in multinational commercial activities by minimizing transaction costs in making foreign direct investment. A central purpose of the NAFTA financial services chapter was to lower the costs of doing business between the "three amigos," thereby facilitating and encouraging regional trade and investment. Indeed, a main reason Canada joined the NAFTA was to prevent investment diversion to the U.S. and Mexico.[72] Similarly, several East Asian countries declared the NAFTA as "sneaky protectionism" because by lowering intra-NAFTA transaction costs the agreement would likely divert investment to North America.[73]

The application of free trade principles to financial services also reflected the aggressive interests of U.S. financial institutions seeking both new markets and new profit from increased trade flows. According to Wethington, the U.S. financial services negotiators entered negotiations "having formulated certain core, substantive negotiating objectives" (1994: 11). The right to pre-establishment[74] and national treatment were essential and there would be no NAFTA without these provisions in financial services. The right of establishment was to give U.S. companies "unimpeded access" to the Mexican and Canadian markets. National treatment guaranteed U.S. firms non-discriminatory treatment, and in drafting the agreement U.S.

---

[72] See Schefer 1999: 271; Cameron & Tomlin 2000.
[73] Schefer 1999: 271.
[74] Right to pre-establishment is a clause in the national treatment provision that extends the national treatment provision to the pre-investment stage (ex-ante) not simply the investment stage (ex-post). The pre-investment phase refers to the entry of investments and investors of a Party such that they have the right to establish an investment in the host state on terms no less favorable than those that apply to domestic investors in the host state (national treatment). The post-investment phase refers to the operations of the investment.

negotiators added the provision of "equal competitive opportunity." The emphasis on "equal competitive opportunity" was essential for situations in which law may read in neutral fashion but in practice it leaves U.S. firms at competitive disadvantage.[75] Provisions allowing for the entry of new products and data processing would provide them with the free right to enterprise. Indeed, since the 1970s, a fundamental objective of U.S. financial services industries was to secure deregulations in developing countries on new financial products based on the use of information technology (Feketekuty 1988). Moreover, since policymakers situated the NAFTA in a context of a long-term pursuit of a hemispheric free trade agreement, the financial services negotiators were "extremely cognizant of the precedential effect" of the agreement.[76]

However, U.S. financial services negotiators placed little emphasis on regulation. Olin Wethington, the principle U.S. negotiator in financial services, published their negotiating objectives after the NAFTA was concluded (1994). None of Wethington's objectives addressed regulation except reference to specific exceptions to national treatment in accordance with "internationally recognized [regulatory] principles" (1994: 18). In other words, the financial services chapter would address regulation up to the standards of "internationally recognized" regulations, which were codified by the IMF and followed "free market" orthodoxy.[77] Krista Schefer observed,

> "As most of the negotiators came from a trade or free-market economic background, the main Chapter 14 provisions demonstrate a firm commitment to the principles of free trade (market access, non-discriminatory treatment,

[75] Wethington 1994: 11.
[76] Wethinton 1994: 10.
[77] See NAFTA Article 2104: Balance of Payments

arbitration-based dispute settlement procedures) and a lesser consideration of the interests of financial service regulators and practitioners" (1999: 120).

| Table 4: Core Provisions of the NAFTA Financial Services Chapter | |
|---|---|
| Scope and Coverage | Applies to financial institutions of another Party, investments and investors of another Party, cross-border trade in financial services, and it incorporates the Transfers provision (1109) from the Investment Chapter |
| Establishment | An investor of another Party has the right to establish "in the juridical form chosen by such investor" |
| Cross-border trade | No Party may adopt any measure restricting cross-border trade in financial services, including purchase of services in another Party |
| National Treatment | The same principle as the investment provision and it requires that Parties provide equal competitive opportunities rather than outcomes |
| Most-Favored-Nation | The same principle as the investment provision, although emphasis is placed on ensuring that prudential measures are non-discriminatory |
| New Financial Services and Data Processing | Parties shall permit a financial institution of another Party to provide "any new financial service" and shall permit the free transfer of data across borders |
| "Balance of Payments" Exceptions | Parties may violate obligations in the event of a balance of payments crisis, although under highly specific conditions |
| Dispute Settlement | Disputes are done on a state-to-state basis; the financial services chapter incorporated the "transfers" and "expropriation" provisions from the investment chapter and subjected each to ISDS. |

## III. The NAFTA negotiations in investment (Chapter 11) and financial services (Chapter 14)

### III.A. The NAFTA opening rounds (June to September, 1991)

As NAFTA negotiations began, trade ministers from the U.S., Mexico, and Canada divided the negotiations into nineteen working groups within six broad areas: market access for goods; services; investment; intellectual property; dispute settlement; and trade rules on subsidies, dumping, and rules of origin.[78] The USTR was Carla Hills and her office appointed officials from the Treasury to head the investment and financial services working groups, consistent with the negotiating format from the Uruguay Round.

| Table 5: The NAFTA opening rounds (June to September, 1991) |
|---|

[78] Cameron & Tomlin 2000: 82.

| Negotiating issues in investment and financial services | Domestic interactions with the USTR | | | Mexico | Canada |
|---|---|---|---|---|---|
| | Labor unions, NGOs, civil society organizations | Business lobbies, private sector trade policy advisors | Congress and government agencies | | |
| Investor rights and investor-state dispute settlement (ISDS) | ddf | Labor and environmental concerns do not belong in the NAFTA | Large minority wary of offshoring and Mexico as "pollution haven" | Rejects expropriation and ISDS | Unsuccessfully counters U.S. Model BIT with U.S.-Canada FTA |
| Market access for FDI | | Demands high value deal | | N/A | Demands right to screen FDI |
| Investor rights and FDI in financial services | N/A | The private sector "framed parameters of domestic political acceptability" | Apply free trade principles to financial services/banking law | No national treatment, cap on foreign market share, long transition period | U.S. wants branching, Canada wants changes to U.S. banking law |

III.A.1. Investor rights and investor-state dispute settlement (ISDS)

*USTR tables the Model BIT*

In the account of political scientists Maxwell Cameron and Brian Tomlin, at the beginning of the investment negotiations the USTR tabled the U.S. Model BIT while Canada proposed to use the U.S.-Canada FTA as the point of departure (2000: 100-101). The U.S. Model BIT contained far more comprehensive and stronger investor rights than the FTA, and both the U.S. and Canada attempted to persuade Mexico to join their side. There were two fundamental differences between the U.S. BIT and the U.S.-Canada FTA, first, the U.S. Model BIT assumes a "negative list" approach to sectoral liberalization while the U.S.-Canada FTA had a "positive list" like the WTO. A "negative list" agreement assumes complete liberalization of all economic

sectors and with sectoral exceptions that are negotiated, whereas the "positive list" only liberalizes certain negotiated sectors. The second difference between the U.S. BIT and the U.S.-Canada FTA was the dispute settlement provisions, in which the U.S. Model BIT delineated a set of procedures for investors to bring claims against states to the International Centre for Settlement of Investment Dispute at the World Bank, and arbitration panels can make legally-binding monetary awards. Conversely, the U.S.-Canada FTA directed disputes to a binational committee or the GATT. However, concurrent to the NAFTA, Canada was negotiating a BIT with Argentina[79] that utilized the same dispute settlement procedures as the U.S. Model BIT, and in the all of official draft texts of the Investment Chapter, Canada had never bracketed the dispute settlement clauses. Therefore, since the beginning of (or early into) negotiations, Canada was either in favor of (or not opposed to) the dispute settlement procedures tabled by the U.S.[80]

Despite Canada's movement towards the U.S. on the negative list approach and dispute settlement, there were fundamental differences between the two sides. Canada sought to narrow the definition of investment in the U.S. BIT, thereby narrowing the scope of the entire chapter. In addition, Canada insisted on maintaining the right to screen foreign investments which the U.S.-Canada FTA had allowed, and the U.S. sought to eliminate this carve-out. The FTA permitted a

---

[79] "Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investments", 1993.

[80] In Cameron and Tomlin's account of the negotiations, both Mexico and Canada initially rejected the U.S. BIT dispute settlement provisions. However, Cameron and Tomlin make no indication of Canada eventually accepting dispute settlement. Further, in all of the official draft texts of the Investment Chapter, published after Cameron and Tomlin's research, Canada had never bracketed the dispute settlement clauses while Mexico did. Therefore, there is no indication that Canada was opposed to dispute settlement, although there is clear evidence Canada insisted on a carve-out for their investment screening act. Therefore, it appears that only Mexico was opposed to dispute settlement from the beginning of negotiations, contrary to Cameron and Tomlin's account.

Canadian law which sanctioned government review of direct acquisitions valued over Can$150 million, and Canada resisted the U.S. until the end of negotiations.

The U.S. BIT provisions posed two significant problems for Mexico, firstly, the U.S. BIT expropriation clause provides that compensation must be "prompt, adequate, and effective." This language was unacceptable to Mexico as it was the language used by the U.S. when Mexico expropriated U.S. oil companies in 1938.[81] Secondly, Mexico did not accept the BIT dispute settlement procedures, and Mexico took this position due to Calvo Clause in the Mexican constitution, which was adopted from the Calvo Doctrine (discussed in Chapter One), and it mandated that foreign investors can only seek disputes in local courts with no recourse to their home state.

*Investment-related labor and environmental concerns*

Labor union representatives testified to Congress that an FTA with Mexico would not boost U.S. exports because Mexico lacked consumption power to buy U.S. goods, rather, the NAFTA would worsen labor conditions in all countries. This argument had currency with a growing number of House Democrats who were wary of offshoring to Mexico, some cited a general lack of enforcement of labor and environmental standards in Mexico as an "unfair trade subsidy"[82] that would distort investment towards Mexico. They warned that offshoring to Mexico would put downward pressure on wages, working conditions, and employment. In addition, some argued that Mexico would become a "pollution haven" for dirty industry as plants would relocate to Mexico in search of lower environmental standards/costs, causing

[81] Cameron & Tomlin 2000: 100-101.
[82] United States-Mexico Free Trade Agreement : hearings before the Committee on Finance, United States Senate, One Hundred Second Congress, first session, February 6 and 20, 1991.

environmental deterioration especially in the border region. During the early rounds of negotiations, the coalition of labor, environmental, and other citizens groups protested their exclusion from negotiations and began to "shadow the negotiators wherever they went" (Mayer 1998: 126). Environmental groups filed a law suit against the USTR on the grounds that the NAFTA and the GATT Uruguay Round required environmental impact assessments. Former U.S. Treasury Secretary James Baker, advisor to the USTR, responded by asserting that the NAFTA was not the "appropriate mechanism for labor and environment concerns."[83]

III.A.2. Investor rights and FDI in financial services

Each country had a consultation process with representatives of financial services subsectors. Olin Wethington reflected that the U.S. consultation process with the private sector "…framed, early in the process, the parameters of domestic political acceptability and became a two-way education process on specific issues, with both government and the private sector learning and exploring the limits of negotiating feasibility" (1994: 21). To this end, from the beginning of the negotiations there was a "high degree of convergence" on core principles between the USTR and the private sector, particularly in establishment, national treatment, and Mexico's transition period.[84] In negotiations, the majority of sticking points concerned how much liberalization and how soon. Wethington reflected,

> "Much of the NAFTA negotiations in the financial services sector concerned the elements of the transition period - its length, the speed of the

[83] James Baker, testimony before Senate, 1991. "United States-Mexico Free Trade Agreement : hearings before the Committee on Finance, United States Senate, One Hundred Second Congress, first session, February 6 and 20, 1991."
[84] Wethington 1994: 21.

liberalization during the transition, the extent of market share for the U.S. and Canadian firms…and certain special rules that would apply only to the transition period" (1994: 55).

Negotiations were slow to begin as Mexico initially did not agree to negotiate financial services on the grounds that they had just reprivatized their banks and they feared U.S. competition. The U.S. responded that without a financial services agreement there would be no NAFTA.[85] Mexico conceded and then called for a permanent 5% cap on foreign ownership of financial institutions and the Mexicans did not accept the core issue of national treatment, the U.S. responded that is "not serious."[86] Both the U.S. and Mexico were "nowhere" near an agreement.[87] Both the U.S. and Canada wanted build on the FTA and establish the right to open retail and commercial bank branches, but the U.S. claimed it was unable to permit branching due to interstate banking laws and the Glass-Steagall Act, in turn Canada would not give anything on the issue.

III.B. From fact-finding to drafting (October 1991 to January 1992)

Table 6: From fact-finding to drafting (October 1991 to January 1992)

| Negotiating issues in investment and financial services | Domestic interactions with the USTR | | | Mexico | Canada |
|---|---|---|---|---|---|
| | Labor unions, NGOs, civil society organizations | Business lobbies, private sector trade policy advisors | Congress and government agencies | | |
| Investor rights and | Successfully motivate | Maintains that NAFTA is not | Offshoring concerns | Concedes to U.S. BIT | Continues to push for |

[85] Cameron & Tomlin 2000: 84.
[86] Cameron & Tomlin 2000: 98-9.
[87] "Negotiators remain far apart in NAFTA talks on financial services," *Inside U.S. Trade,* Jan 31, 1992.

<table>
<tr><td>investor-state dispute settlement (ISDS)</td><td rowspan="3">USTR to address investment-related environmental concerns, although unclear to what extent</td><td rowspan="2">forum for labor and environmental concerns; all BIT provisions necessary</td><td rowspan="2">leads some Congress members to oppose the NAFTA</td><td rowspan="2">provisions; unsuccessfully tables performance requirements</td><td>narrower definition of investment</td></tr>
<tr><td>Market access for FDI</td><td>Maintains right to screen FDI</td></tr>
<tr><td>Investor rights and FDI in financial services</td><td>Mexico has political motivations for maintaining control of banking system</td><td>Treasury drafts balance of payments safeguard provision</td><td>Accepts establishment; rejects national treatment; demands caps to market share</td><td>Pushes for repeal of Glass-Steagall</td></tr>
</table>

III.B.1. Investor rights and investor-state dispute settlement (ISDS)

*Investor rights*

By the meetings of January 7-10, 1992, each side had "cut and pasted" its wish list onto a draft text.[88] Mexico continued to reject the U.S. BIT expropriation and dispute settlement procedures through the initial January 16, 1992 draft.[89] Mexico had not proposed an expropriation text although it had agreed that the subject should be covered in "in a manner consistent with its Constitution, which does not preclude fair market value."[90] The U.S. was continuing to push for a broad definition of investment and "national treatment" over the objections of Canada and Mexico.[91] In 1989, during the GATT Uruguay Round, Mexico had sided with India in support of performance requirements designed to support domestic industrial development. In January, 1992, Mexico had proposed voluntary performance requirements in

[88] *Inside U.S. Trade*. "NAFTA working group on investment still in early stages of negotiations." Jan 31, 1992
[89] NAFTA Investment Chapter Draft, January 16, 1992, (Available: https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file57_5923.pdf)
[90] Ibid.
[91] "NAFTA working group on investment still in early stages of negotiations," *Inside U.S. Trade*, Jan 31, 1992

which “a company could voluntarily agree to meet a certain content requirement in exchange for a subsidy payment.”[92] The U.S. and Canada rejected this proposal for voluntary performance requirements and investment incentives. As investment talks progressed, Mexico began to accept the investor rights and ISDS enforcement that it originally rejected and Mexican negotiators would come closer to the U.S. position in favor of strong investment disciplines because Mexico’s objective was to attract U.S. capital (Cameron & Tomlin 2000: 100-101).

*Investment-related labor and environmental concerns*

A GATT dispute panel ruled that a U.S. environmental law that protected wild dolphins was in violation of GATT obligations because it prohibited imports of Mexican tuna. Public Citizen spokeswoman Lori Wallach explained, “This case is the smoking gun, we have seen GATT actually declaring that a U.S. environmental law must go” (cited in Mayer 1998: 128). Sixty-three congressmen joined environmentalists in protesting the ruling with concerns of the implications of the ruling for other U.S. environmental laws (Mayer 1998: 128). Congressmen easily made connections to the NAFTA negotiations denouncing Mexico as a partner in protecting the environment and advancing the “pollution haven” argument in which Mexico would attract offshoring due to its lax environmental standards/enforcement. Mexican President Salinas responded to the concerns of U.S. congress that Mexico would ignore the GATT ruling and implement a new law to prevent the killing of dolphins (Mayer 1998: 128). U.S. negotiators responded by inserting into the investment chapter draft, “Language on the environment may be provided for this chapter and/or generically.”[93]

[92] Ibid.
[93] NAFTA Investment Chapter Draft, January 16, 1992.

III.B.2. Investor rights and FDI in financial services

In a January, 1992, the Mexican financial services negotiators prepared a document for their counterparty negotiators in the U.S. Treasury. In the document, the Mexicans were in broad agreement with U.S. liberalization objectives: "Behind the program for opening the domestic financial system under NAFTA is the assumption that allowing foreign intermediaries to operate in Mexico could contribute to economic efficiency and facilitate the globalization of the financial sector."[94] However, the Mexican financial services negotiators retained the objective of minimizing risks of instability that might result from "too sudden and too significant infusion of foreign competition."[95] Therefore, by January, 1992, Mexico had agreed to the right of establishment of foreign firms but was demanding a transition period until roughly 2010, with permanent limitations on foreign ownership and foreign market share afterwards. Further, Mexico was unwilling to accept the principle of "national treatment," which the U.S. and Canada outlined as an "essential condition" to the agreement.[96]

The U.S. negotiators responded that financial instability was not the core Mexican motivation for insisting on permanent caps to foreign ownership and market share, but rather, there were political motivations. U.S. negotiator Olin Wethington reflected, "The political element stemmed from a strongly held view in certain Mexican political circles that the financial system must be maintained under the control of Mexican nationals" (1994: 13). To that end, Mexican negotiating documents characterized the Mexican banking and financial system

---

[94] Cited in Wethington 1994: 13.
[95] Ibid.
[96] *Inside U.S. Trade*. Published: Jan 31, 1992. "Negotiators remain far apart in NAFTA talks on financial services."

generally as a "national asset" and "essential to the country's economic security."[97] The Mexican negotiating document asserted the necessity of permanent ceilings on foreign ownership of banks - "…a ceiling is needed to assure adequate domestic control of the banking system so vital to the national economy…"[98] However, the U.S. rejected any permanent limitations on the principle of national treatment.[99]

As negotiators prepared the first draft of the financial services agreement, they remained "far apart" in seven areas: national treatment, coverage of agreement, administration of trade laws and regulations, commercial presence, which services to include and exclude, transparency of rules and regulations, and the extraterritorial application of U.S. laws.[100] In addition, the U.S. was pressing for the agreement to cover financial services rather than financial firms, whereas Mexico and Canada countered that the agreement should cover only firms subject to government regulation. Mexico introduced a "sweeping proposal" that would ban financial service providers from many programs that included government involvement, such as student loans, pension funds, and export/import financing, and the U.S. rejected these exclusions. Canada insisted upon the removal of Glass-Steagall restrictions on foreign banks and securities affiliates in U.S. markets.[101] Moreover, Canada sought to enlarge the ability of its securities firms to provide cross-border securities services into the U.S. Towards Mexico, Canada was generally in line with U.S. objectives but the Canadians did not make demands of Mexico as the U.S. did. Simultaneously, in the "transfers" provision, the U.S. Treasury indicated that it would provide an

---

[97] Cited in Wethington 1994: 13.
[98] Cited in Wethington 1994: 13.
[99] *Inside U.S. Trade.* Published: Jan 31, 1992. "Negotiators remain far apart in NAFTA talks on financial services."
[100] Ibid
[101] Wethington 1994: 16.

emergency "safeguard" provision for balance of payment crises, although the language was not yet drafted.[102]

## III.C. "The Dallas Jamboree" and aftermath (February to April 1992)

Before the Dallas meeting there was a conclusion of the main draft text at the Uruguay Round, although the U.S. and EU were still engaged in a standoff over agriculture. The negotiations at Dallas assumed greater significance because concluding NAFTA would demonstrate to the EU that the U.S. had an attractive non-agreement alternative to the Uruguay Round. Presidents Bush and Salinas ratcheted up the pressure on their negotiators to complete the NAFTA as soon as possible and the Dallas meeting was dubbed the "jamboree," or large gathering. In Dallas, all of the working groups met with chief negotiators for outstanding issues to be decided at a higher political level.

| Table 7: "The Dallas Jamboree" and aftermath (February to April 1992) | | | | | |
|---|---|---|---|---|---|
| Negotiating issues in investment and financial services | Domestic interactions with the USTR | | | Mexico | Canada |
| | Labor unions, NGOs, civil society organizations | Business lobbies, private sector trade policy advisors | Congress and government agencies | | |
| Investor rights and investor-state dispute settlement (ISDS) | Leaked copy of negotiating text confirms labor and environmental concerns | NAFTA should not address labor and environment; | NAFTA is embraced as alternative to Uruguay Round; debate over labor and environmental concerns | Expropriation language had to avoid Calvo doctrine | Concedes to U.S. investment definition |
| Market access for FDI | | | | N/A | U.S. concedes to Canada's FDI screen |
| Investor rights and FDI in | N/A | Scope needs to be financial | | Unsuccessfully defends "national | Sides with U.S. vis-à-vis Mex.; |

[102] NAFTA Investment Chapter Draft, January 16, 1992.

| financial services | | services and not just firms; pressures Mex. | | treatment" exception | still pushes for reforms to Glass-Steagall |
|---|---|---|---|---|---|

III.C.1. Investor rights and investor-state dispute settlement (ISDS)

*Investor rights and ISDS*

At Dallas, under pressure to conclude the NAFTA, Mexico finally conceded "expropriation" and ISDS. In drafting the "expropriation" provision, negotiators had to figure out how to word the obligation without violating the Mexican constitution, which permitted expropriation on the grounds of national interest.[103] An anonymous negotiator explained the tradeoff, "We had to craft the expropriation language not using the words 'prompt, adequate, and effective.' There are three paragraphs, and if you read them, you find that what they say is exactly those three words, but in substitute language."[104] In market access talks, the U.S. had conceded to Canada's demand to maintain its foreign investment screen but the USTR sought to reduce its scope.

*Investment-related labor and environmental concerns*

A leaked copy of the draft text from the Dallas jamboree was published in March by the Washington DC journal *Inside U.S. Trade*. It had confirmed all of the warnings of NAFTA critics. The Sierra Club responded in a statement: "It's pure and simple, the document does not

[103] Cameron & Tomlin 2000: 112.
[104] Cited in Cameron & Tomlin 2000: 112.

pay attention to anything but expanding trade….The best you get is meaningless language or no mention of the environment."[105]

III.C.2. Investor rights and FDI in financial services

Similar to the investment negotiations, the Mexican financial services negotiating team closely followed their directive to finish negotiations as soon as possible. At Dallas, the Mexicans accepted the principle of national treatment in financial services.[106] In addition, while they maintained demands for a permanent cap on foreign market share, they abandoned their fight for permanent caps on foreign ownership in banking. However, the Mexican negotiators immediately repented this concession because they did so without any exchanges with the U.S. or Canada, to the delight of those parties. As a result, U.S. negotiators became "hungry for more." An anonymous negotiator recalled, "They were giving things away; so I am going to keep asking until they stop giving."[107] As the U.S. continued to push for the agreement to cover financial services rather than financial firms, negotiators upped the ante, insisting that there would be no NAFTA unless every financial intermediary who wanted access to the Mexican market got it (Cameron and Tomlin 2000: 114).

Mexican financial markets had come to expect a NAFTA agreement, and the success of NAFTA negotiations were already "factored into the market."[108] Therefore, any indication of failure to reach an agreement would make Mexican markets highly volatile. The U.S. negotiating strategy was to "keep demanding, and be patient."[109] The U.S. knew that Mexico was anxious for

---

[105] Cited in Mayer 1998: 133.
[106] Cameron & Tomlin 2000: 114.
[107] Cited in Cameron & Tomlin 2000: 114.
[108] Wethington 1994: 19.
[109] Cited in Cameron & Tomlin 2000: 114.

a deal as the country was in dire need of foreign capital. Therefore, U.S. negotiators were patient, and when the Mexican markets became impatient, the U.S. would push Mexican negotiators for concessions. The Mexican negotiators felt pressure from their superiors to conclude the agreement as soon as possible and they would make tremendous concessions in a number of working groups, especially investment and financial services.

III.D. Reaching an agreement (May to August 1992)

<table>
<tr><td colspan="6">Table 8: Reaching an agreement (May to August 1992)</td></tr>
<tr><td rowspan="2">Negotiating issues in investment and financial services</td><td colspan="3">Domestic interactions with the USTR</td><td rowspan="2">Mexico</td><td rowspan="2">Canada</td></tr>
<tr><td>Labor unions, NGOs, civil society organizations</td><td>Business lobbies, private sector trade policy advisors</td><td>Congress and government agencies</td></tr>
<tr><td>Investor rights and investor-state dispute settlement (ISDS)</td><td rowspan="3">Unsuccessfully argued that the NAFTA would increase offshoring and decrease employment; unsuccessfully lobbied for labor and environmental provisions; presented studies contesting official studies</td><td>Concerns over Canada and Mexico’s FDI screens</td><td rowspan="2">Official study shows investment will be boon to all NAFTA; Congress warns environmental concerns must be addressed</td><td colspan="2">By May brackets were removed around investor rights and ISDS, indicating Mexico and Canada were unsuccessful in reforming U.S. BIT provisions</td></tr>
<tr><td>Market access for FDI</td><td>Limit sectoral exceptions to investment obligations</td><td colspan="2">Talks are contentious; U.S. bargains for high threshold for Canada’s FDI screen while Mexico demands FDI screen also</td></tr>
<tr><td>Investor rights and FDI in financial services</td><td>Financial services lobby threatens to erode Congressional support for NAFTA without Mexican concessions</td><td>USTR and Treasury hold meetings with financial services lobby and must placate the lobby’s demands</td><td>No permanent caps acceptable to U.S. industry, Mexico joins Canada in insisting reforms to U.S. banking laws Glass-Steagall</td><td>Reforms to Glass-Steagall not possible under NAFTA framework</td></tr>
</table>

III.D.1. Investor rights and investor-state dispute settlement (ISDS)

By the end of May, Mexico and Canada had conceded to all of the U.S. BIT provisions and talks had progressed to negotiating which sectors would be exempt from the investment chapter provisions. Mexico secured the most exceptions (89) although many were transitional and to be phased out over time, followed by the U.S. (50) and Canada (48). Notably, all three parties exempted government provided social services, telecommunications services, and maritime and transportation sectors. Canada fought to protect their culture industries from foreign investment while Mexico barred foreign investment in oil, gas, and petroleum. In addition, Canada was persistent in maintaining investment screening of takeovers valued above Can$150 million, and Mexico responded by also calling for an equivalent mechanism. The U.S. rejected both, except for national security reasons, as in U.S. legislation. However, by August, the U.S. conceded to both Canada and Mexico on permitting investment screening so as to conclude the NAFTA, and the right to review investment acquisitions was carved out of the dispute settlement coverage.[110]

*Investment-related labor and environmental concerns*

The leaked draft text from the Dallas Jamboree was fuel to fire for opposition to the NAFTA. A coalition of environmental groups, which included some fast track supporters, presented the USTR with a list of demands. USTR Carla Hills "appeared uninterested" until a number of Congressmen testified that the NAFTA would not make it past Congress unless

---

[110] NAFTA Investment Chapter Draft, August 11, 1992, (available: https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file865_5907.pdf)

environmental concerns were met.[111] Hills responded in her testimony to Congress in September, 1992,

> "Mexico will not become a pollution haven because it costs more for our companies to move to Mexico than it does to comply with our U.S. environmental standards. We did not negotiate this agreement to permit Mexico to enforce our environmental laws or any of our other laws any more than we are going to enforce theirs."[112]

That is, the USTR concluded that the NAFTA would not turn Mexico into a "pollution haven" because, "environmental compliance costs play a minimal role in relocation decisions because they represent a small share of total costs for most industries."[113] The USTR even claimed the contrary, the "NAFTA encourages environmentally sound investments" and "will enhance environmental protection."[114] Therefore, to placate Congress, the USTR would "green the text" including the investment chapter, but the environmental provisions were framed as moral obligations and not legally enforceable provisions.

Similarly, the USTR concluded that neither Mexico's low wages nor poor labor conditions would attract U.S. FDI, because, "The total cost of production is what matters in relocation decisions, not wages alone."[115] To the contrary, the USTR sold the investment provisions to Congress as a "win-win" agreement for all parties, because, "U.S investments

---

[111] Cited in Mayer 1998: 134.
[112] USTR Carla Hills testimony before U.S. Congress. House. Committee on Ways and Means, Subcommittee on Trade. 1992. "North American Free Trade Agreement," hearings September 9, 15, 17, and 22, 1992. 102nd Cong.
[113] "Myths & realities: the North American Free Trade Agreement". August, 1992. Washington, D.C.: *Office of the U.S. Trade Representative*.
[114] "Investment: the North American Free Trade Agreement". August, 1992. Washington, D.C.: *Office of the U.S. Trade Representative*.
[115] Ibid

generate increased U.S. exports."[116] In August, 1992, the USTR press release on the investment chapter explained that, "Integrated production in North America will make U.S. firms more competitive against European and Japanese producers," and the elimination of performance requirements in Mexico "will increase the demand for inputs sourced from the United States."[117] Therefore, the USTR argued that the investment provisions will encourage job growth.

In May, 1992, at the request of the USTR, the U.S. International Trade Commission surveyed and evaluated the various economic analyses of NAFTA. The subsequent report found that:

> "[T]here is a surprising degree of unanimity in the results regarding the aggregate effects of NAFTA. All three countries are expected to gain from a NAFTA. These independent studies found that NAFTA would increase U.S. growth, jobs, and wages. They found that NAFTA would increase U.S. real GDP by up to 0.5 percent per year once it is fully implemented. They projected aggregate U.S. employment increases ranging from under 0.1 percent to 2.5 percent. The studies further project aggregate increases in U.S. real wages of between 0.1 percent to 0.3 percent."[118]

The President and the USTR announced these findings to Congress and the public. In so doing, the USTR rejected the concerns of labor representatives in all three countries. Simultaneously, the USTR's negotiation of the investment chapter was strongly endorsed[119] by

---

[116] Ibid
[117] Ibid
[118] "White House Fact Sheet: The North American Free Trade Agreement". August 12, 1992. Washington, D.C.: *The White House*.
[119] "Report of the Investment Policy Advisory Committee for Trade on the North American Free Trade Agreement". September, 1992. Washington, D.C.: Executive Office of the President, *Office of the U.S. Trade Representative*

the Investment Policy Advisory Committee for Trade, the advisory committee that interfaces the USTR with private sector perspectives.

III.D.2. Investor rights and FDI in financial services

In May, there was a deadlock in the financial services working group. At the Dallas jamboree, Mexico had abandoned its fight for permanent caps on foreign ownership but insisted on permanent caps on foreign market share in financial services and they refused to give more market access. By May, Mexico had offered to "modify its demands" for a permanent cap on the foreign market share in the financial sector.[120] The U.S. negotiators consulted with financial services corporate representatives and they were "furious."[121] The USTR and the Treasury then got "hit with a lobbying barrage."[122] The U.S. financial services industry feared that such an agreement would set "dangerous precedent" for future financial services negotiations with other states. The major financial services lobbies wrote to USTR,

> "The extent of liberalization in financial services will determine our ability to support the final NAFTA agreement….Financial industry commitment to the Mexican market will be undermined by any form of permanent cap even if used for 'safeguard purposes.' These proposed restrictions are unacceptable in terms of U.S. liberalization goals"[123].

---

[120] "U.S., Mexico Still Unable to Resolve NAFTA Financial Services Dispute," *Inside U.S. Trade,* May 22, 1992.
[121] Cited in Mayer 1998: 136.
[122] Ibid.
[123] "U.S., Mexico Still Unable to Resolve NAFTA Financial Services Dispute," *Inside U.S. Trade,* May 22, 1992.

The Treasury responded to Mexico that the U.S. financial services industry rejected the Mexican proposal as "inadequate" and countered with a proposal that featured no permanent caps within "some reasonable transition period"[124]. The standoff continued through June, as Mexico was seeking tradeoff concessions with the U.S. and Canada. Mexico argued that the U.S. cannot truly offer national treatment due to interstate banking laws and Glass Steagall and Mexico joined Canada in demanding changes to Glass-Steagall. However, Mexico indicated that it was willing to modify its demand of a permanent 12 percent cap on foreign share of the financial services market for safe guards blocking further expansion.[125]

USTR Carla Hills and Treasury Secretary Nick Brady met with the financial services lobby, where the lobby group demanded an improved deal or they would not offer financial support to the pro-NAFTA lobby, which would make passing the NAFTA in the congress very difficult.[126] Hills and Brady returned to the Mexican negotiators with the ultimatum, and the Mexicans understood that they could not get the NAFTA without the five largest banks in the U.S. Mexico issued a new proposal with no permanent caps, but with a lengthy transition period and for safeguards that would prevent rapid increases of foreign ownership. This new proposal would be the basis of the final agreement and in July the U.S. and Mexico had reached a deal. The USTR presented the agreement to the public and Congress as unprecedented support to U.S. comparative advantages in financial services.[127]

---

[124] Ibid
[125] *Inside U.S. Trade.* Published: June 5, 1992. "NAFTA Talks Stall in Financial Services Market Access Working Group."
[126] Mayer 1998: 136.
[127] "Services: the North American Free Trade Agreement." August, 1992. Washington, D.C.: *Office of the U.S. Trade Representative*.

Canada still continued its demand for changes to U.S. interstate banking laws and Glass-Steagall.[128] The U.S. responded that repealing Glass-Steagall would require permission from the Federal Reserve and it would not consider the demand, but foreign firms will be afforded same rights as domestic firms. By the conclusion of negotiations the following issues between U.S. and Canada remained unresolved: U.S. restrictions on interstate banking and Glass-Steagall restrictions on affiliations between banks and securities firms.[129] Those unresolved issues were deferred for future negotiations, except for inclusion of hortatory language in the final agreement.

*Financial regulation and the "balance of payments" exception*

The final agreement ventured into uncharted legal territory by seeking a tradeoff between allowing for freer flows of capital and financial services while maintaining a "reasonable" level of financial and monetary security. To this end, the liberalization of financial services could only become viable by relying on exceptions to free trade principles (Schefer 1999: 402). The U.S. Treasury inserted an emergency provision in the case of "balance of payments" crises in which massive cross-border capital flows may destabilize a country's financial system and/or exchange rate (which was immediately put to the test during the 1995 Mexican Peso crisis, discussed in the next chapter).[130] The "balance of payments" exception can be broadly characterized as language on capital controls, which allow exceptions to a country's investment chapter obligations under the "transfers" provision to allow for the absolute free movement of capital. However, the

[128] *Inside U.S. Trade.* Published: July 3, 1992. "U.S. Mexico Reach Deal in NAFTA Financial Services, Canada Balks."
[129] Wethington 1994: 22.
[130] Article 2104: Balance of Payments

provisions of the "balance of payments" exception are highly conditional, in which they must: only take specific forms under specific conditions; be implemented under the supervision of the International Monetary Fund (IMF); be temporary; be non-discriminatory; and meet an ambiguous standard "to not be more burdensome than necessary."[131] The USTR's private sector advisory committee strongly endorsed the provision,

> "The provisions on transfers substantially meet the ACTPN's objective to allow such transfers to be completely without restriction. The qualification provided to address any possible balance of payments problem is reasonable, and the conditions under which it may be invoked are clearly defined and limited."[132]

That the balance of payments exception is ambiguous, vague, and highly conditional, means that the NAFTA safeguards to financial stability are weak. Simultaneously, by applying free trade principles to financial services, the agreement was intended to increase the mobility of capital, which, according to free market principles, would increase economic growth.

## IV. Polanyi's "double movement" and NAFTA negotiations

In the NAFTA investment and financial services negotiations, U.S. political actors represented all three of the ideal types of trade policy positions. U.S. MNCs, the Bush and Clinton administrations, and bipartisan groups in Congress supported "free trade" policies (market-based governance). Labor unions, environmental organizations, consumer groups, and many Congressional Democrats supported "socialist" trade

---

[131] Ibid.

[132] "Report of the Investment Policy Advisory Committee for Trade on the North American Free Trade Agreement". September, 1992. Washington, D.C.: Executive Office of the President, *Office of the U.S. Trade Representative*

policies (subjecting markets to democratic control). Libertarian politicians and some labor unions supported the "nationalist" trade policies (prioritizing national interests over multinational interests). The Clinton administration's embrace of the core text of the NAFTA and subsequent implementation of the NAFTA was a big victory for the "free trade" actors over the "socialist" and "nationalist" groups. The NAFTA had passed Congress because for at least three reasons, the "free traders" had made a strong case for the necessity of the NAFTA in the context of inevitable globalization, U.S. MNCs had made generous donations to the lawmakers for their votes, and because the "socialist" and "nationalist" actors had less influence in Congress.

*"Free trade" actors in NAFTA investment negotiations*

The 1988 Omnibus Act mandated that the USTR negotiate trade and investment agreements to "restore the trade balance" (reduce the trade deficit) with an aggressive export strategy, which was a central purpose of the NAFTA. Since manufacturing imports from Mexico contained greater U.S. content than similar imports from Asia, manufacturing industries were competitively restructuring into Mexico as a low-wage export platform, notably, the auto, textiles, and information technology industries. In addition, the NAFTA investment and services chapters (including financial services) were designed to increase U.S. service exports in the region and set a model for future agreements in other regions. According to the USTR's private sector advisors, the NAFTA investment chapter would encourage intra-regional investment in manufacturing and services and in so doing facilitate firm-level economies of scale to "compete more effectively in world markets."[133] The private sector argued to the Bush administration, "The United States cannot afford to sit on the sidelines while our major trading partners, Europe

[133] Ibid.

and Japan, develop strategic alliances to enhance their own competitiveness."[134] The Bush administration sold the private sector's plan to the public as an engine of job growth because more globally competitive industries implied more exports and jobs, "U.S investments generate increased U.S. exports."[135] The Bush administration proudly displayed the 1992 ITC report surveying all relevant and authoritative studies and predicted that the NAFTA would increase GDP, employment, and wages in all three countries.[136]

As U.S. financial services negotiators sought freedom of commerce for U.S. financial institutions they simultaneously deregulated trade and investment in financial services. This became evident in the conflict between Mexican regulators and U.S. financial services firms, who eventually threatened to sink the NAFTA in Congress. Mexico eventually conceded to accept ISDS because the USTR and the U.S. business community insisted that ISDS was necessary for Mexico to attract U.S. capital, signifying Mexico's official break with the Calvo Doctrine. The USTR successfully reregulated Mexico and Canada using the NAFTA investment and financial services chapters to support the interests of U.S. MNCs in name of "market efficiency."

*"Socialist" actors in NAFTA investment negotiations*

The USTR's overall objective in the NAFTA investment and financial services agreements was to support the efficiency, competitiveness, and market shares of U.S.

---

[134] Ibid.
[135] "Investment: the North American Free Trade Agreement". August, 1992. Washington, D.C.: *Office of the U.S. Trade Representative*.
[136] "White House Fact Sheet: The North American Free Trade Agreement". August 12, 1992. Washington, D.C.: *The White House*.

industries and therefore U.S. jobs. This objective became codified as broad multinational investor rights enforceable by ISDS. However, throughout negotiations, the core proposals of the USTR and U.S. MNCs faced diverse social and political resistance. In many instances, multinational investor rights and ISDS conflicted with a range of regulatory areas, including, labor, environment, and financial regulation. Labor unions warned that the lack of enforceable (investment-related) labor regulations in Mexico would depress working conditions in the U.S. While the Bush administration opposed enforceable investment-related environmental provisions because other countries should not have the right to *enforce* U.S. environmental laws. In contrast, environmental organizations argued that investor rights and ISDS gave multinational investors the right to *undermine* environmental laws, as demonstrated by the GATT ruling that forbade the U.S.' environmental ban on imports of Mexican tuna.

*"Nationalist" actors in NAFTA investment negotiations*

Perhaps the most well-known "nationalist" politician was Ross Perot, who ran a relatively successful third party campaign in the 1992 Presidential elections. During a debate, Perot famously derided the NAFTA,

> "We have got to stop sending jobs overseas. It's pretty simple: If you're paying $12, $13, $14 an hour for factory workers and you can move your factory South of the border, pay a dollar an hour for labor,...have no health care – that's the most expensive single element in making a car - have no environmental

controls, no pollution controls and no retirement, and you don't care about anything but making money, there will be *a giant sucking sound* going south."[137]

Perot's argument was that NAFTA would enable Mexico to "suck" manufacturing investment away from the U.S., thereby putting downward pressure on employment and wages in the U.S. Some U.S. labor unions shared Perot's sentiments. They did not support the NAFTA along nationalistic lines and advocated protectionist policies (Kay 2004). However, they only influenced a small minority in Congress and President Bush alienated the "nationalists" during the 1992 elections.

[137] "The 1992 Campaign: Transcript of 2d TV Debate Between Bush, Clinton and Perot." *The New York Times*. 16 October 1992.

## Chapter Four: U.S. Effects of the NAFTA Investment Agreements

I. Introduction

II. Regulatory effects

III. Income effects

IV. Feedbacks between regulatory and income effects

V. Clarifying U.S. trade policy positions

"…But as Steven P. Jobs of Apple spoke, President Obama interrupted with an inquiry of his own: what would it take to make iPhones in the United States?...Mr. Jobs's reply was unambiguous. 'Those jobs aren't coming back,' he said…"[138]

"If a single industrial sector might be called the cradle of international commercial arbitration, it would be the energy business. Especially oil and gas."[139]

### I. Introduction

In this chapter I review the NAFTA investment and financial services chapters' regulatory effects and income effects. I divide the chapter into three parts. First, I examine the regulatory effects of the NAFTA investment chapter by identifying trends in the investor-state dispute settlement (ISDS) case law and jurisprudence. Second, I will synthesize studies about the NAFTA investment chapter income effects of the agreement, including, industry, financial

---

[138] "How the U.S. Lost Out on iPhone Work," by Charles Duhigg and Keith Bradsherjan, *The New York Times*, January 21, 2012.
[139] "Energy sector driving major growth in international arbitration," by Anthony Davis, *Lexpert*, Feb 1, 2014.

system, labor, and environmental effects. I will supplement these literature reviews with relevant data. Third, I will review U.S. investment policy debates to see if there are feedbacks between the regulatory and income effects.

## II. Regulatory effects of the NAFTA investment chapter

As of January 1, 2016, the U.S. Department of State reports 49 concluded NAFTA ISDS cases, 17 claims against the U.S., 18 claims against Canada, and 14 claims against Mexico. Canada has paid $172.7 million in awards; Mexico has paid $204.2 million in awards; the U.S. has not lost a case. In this section, I identify two trends in the NAFTA ISDS case law, (1) varying tribunal interpretations of the same provisions, and (2) conflicts with public interest legislation. Next, I examine the regulatory effects of these trends, which amount to an undermining of state sovereignty to regulate multinational investors.

### II.A. NAFTA investor-state dispute settlement (ISDS) trends

#### II.A.1. Uneven implementation

While Canada and Mexico have nearly lost as many cases as won under the NAFTA ISDS, the U.S. has not lost a single case (see Appendix Two). In fact, under every FTA and BIT that the U.S. is party to, the U.S. has not lost one ISDS case. ISDS proponents hold this up as evidence that ISDS merely functions to export U.S. legal standards while the claims of ISDS opponents are unfounded; ISDS opponents warn that the U.S. does not have any ISDS agreements with any of the large capital-exporting states so it has not faced many challenges and

that trade politics condition tribunals' decision making. As Rep. Doggett testified before the Subcommittee on Trade,

> "…the fact that the U.S. has yet to have a ruling against it, I think has to be considered against the backdrop of the fact that the trade lawyers who are the arbitrators in these panels are well aware of what the impact would be if the U.S. did lose a major decision."[140]

Tribunals have three members, one is appointed by the claimant, one is appointed by the defendant, and the third is agreed upon by both parties; in general, most arbitrators have legal background in relevant trade and investment law.[141] The partiality of tribunals has been frequently questioned.[142] In one famous instance, Judge Abner Mikva, a former Congressman and retired DC circuit court judge, was the U.S.-appointed arbitrator in *Loewen v. United States* (2003) filed under NAFTA ISDS. After the U.S. appointed Judge Mikva, he recounted a meeting with U.S. Department of Justice officials in a candid recording. The officials told him, "You know, Judge, if we lose this case we could lose NAFTA." Judge Mikva replied, "Well, if you want to put pressure on me, then that does it."[143] In fact, Mikva revealed that he was the dissenting opinion as the other two arbitrators were intent on finding against the U.S. The *Loewen* case was later dismissed on a legal technicality.

---

[140] Cited in Hearing before the Committee of Ways and Means, US House of Representatives on "Investment Protection in US Trade and Investment Agreements," One Hundred Eleventh Congress, First Session, May 14, 2009.
[141] "Selection and Appointment of Tribunal Members - ICSID Convention Arbitration," *International Centre for Settlement of Investment Disputes*, The World Bank.
[142] "Moral Hazard in International Dispute Resolution," Professor Jan Paulsson, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, 29 April 2010.
[143] Judge Abner Mikva, Audiotape: Symposium on Environmental Law and the Judiciary, Pace Law School, December 6-8, 2004.

Certainly, one piece of anecdotal evidence hardly demonstrates that all ISDS tribunals are politicized. However, two studies of international commercial arbitrations found that dissenting opinions were almost invariably (in more than 95% of the cases) written by the arbitrator nominated by the losing party, and these same results are replicated for ISDS cases (Redfern 2003; Romero 2005). In other words, in the vast majority of ISDS cases, arbitrators find in favor of the party that appointed them. As explained by investment law expert Jan Paulsson, "The problem is that the inevitability of such calculations proves that unilateral appointments are inconsistent with the fundamental premise of arbitration: mutual confidence in arbitrators."[144] In the context of the uneven implementation of the NAFTA ISDS, at stake is that the bias of the arbitrators becomes colored by U.S. trade politics.

The original drafters of the U.S. Model BIT had never considered that the U.S. could be a respondent to an ISDS case because the BIT program was designed for developing countries that were not capital-exporters (Vandevelde 2009: 285). Years later, business lobbies and supportive Congress members frequently justify ISDS by arguing that it functions to "raise legal standards"[145] in developing countries and ISDS is "…aimed mainly at prospective trading partners."[146] In fact, the USTR explained that the original purpose of ISDS was to "de-politicize" conflicts between U.S. firms and developing countries by shifting capital disputes to the

---

[144] "Moral Hazard in International Dispute Resolution," Professor Jan Paulsson, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, 29 April 2010.
[145] Committee of Ways and Means, US House of Representatives on "Investment Protection in US Trade and Investment Agreements," One Hundred Eleventh Congress, First Session, May 14, 2009.
[146] "A Spring Thaw in US Trade Policy," *Goldman Sachs*, US Economics Analyst: Issue No: 15/17, April 24, 2015.

jurisdiction of third-party arbitrators at the World Bank. However, the uneven implementation of the NAFTA ISDS suggests that investment disputes are just as politicized as ever.

II.A.2. Varying tribunal interpretations of the same provisions

In the NAFTA ISDS case law, the two most cited provisions have been the 'minimum standard of treatment' and 'expropriation' articles. These two articles have also been the most controversial because they each contain vague language, which has led to varying interpretations of the same provisions and uncertainty over future tribunals. The 'minimum standard of treatment' provision is illustrative of the conflict.

The main provision of the 'minimum standard of treatment' article is 'fair and equitable treatment and full protection and security' of foreign investments. After the NAFTA came into force, the article was immediately problematic as companies assumed liberal interpretations of the provision 'fair and equitable treatment' and brought claims against all three governments. This led the NAFTA Free Trade Commission to issue an Interpretative Note (2001) of the provision, which tied the definition of "fair and equitable treatment" to "customary international law."[147] Appendix Three provides an account of this decision. This revision scaled back the strength of the 'minimum standard of treatment' article. However, the language remained sufficiently vague such that it can be interpreted both broadly and narrowly. Investors have claimed that 'customary international law' is an evolutionary concept that can change with legal norms, while states have argued that 'customary international law' is limited to several specific situations, notably, the denial of justice and due process.

[147] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions,' 31 July 2001.

This conflict became illustrated in *Glamis vs. The United States* (2009),[148] in which Glamis Gold, a Canadian mining company, brought claims against the U.S. by arguing that 'fair and equitable treatment' means that governments must maintain stable and predictable regulatory environments to protect investors' expectations. In other words, once an investment contract is made with a government an investor has an expectation of the regulatory environment for that investment, and governments breach 'fair and equitable treatment' when they make regulatory changes that later (negatively) affect the investment. In defense, the State Department argued[149] that a change in the law does not violate 'fair and equitable treatment' because under the 2001 Interpretative Note it is not a denial of justice for the law to change. Glamis contested that there are plenty of NAFTA tribunal rulings demonstrating that the standard of 'fair and equitable treatment' can evolve and past tribunals have decided that the provision should assure a stable regulatory environment, which means the government has a duty not to change the law.

The 'minimum standard of treatment' was cited in 29 of the 35 decided NAFTA cases. In a number of these 29 cases, arbitral tribunals have applied an 'evolutionary' approach to 'fair and equitable treatment' that is based on the decisions of past tribunals, as argued by Glamis. This demonstrates a fundamental ambiguity in the interpretations of 'minimum standard of treatment.' Beginning with the 2004 Model BIT, the U.S. also tied the 'expropriations' article to 'customary international law,' and this has done little to constrain tribunals from making broad interpretations of the 'expropriations' article.[150]

---

[148] Glamis Gold, Ltd. v. The United States of America.
[149] U.S. Counter-Memorial, Glamis Gold Ltd., v. United States ofAmerica, September 19, 2006, at p. 220.
[150] See award for Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11.

II.A.3. Conflicts with public interest legislation

As MNCs increasingly utilized ISDS they have challenged a range of public interest laws. In the NAFTA ISDS cases, environmental legislation is by far the most targeted.[151] These results are similar on a global scale, by 2012, out of the 450 total worldwide ISDS cases, environmental policies had been most at risk of ISDS claims, especially from the oil, gas, and mining sectors.[152] In fact, in all ISDS cases, oil, gas and mining sectors account for 25% of all claims.[153] In 2014 alone, energy and mining companies brought half of ISDS claims. A handful of NAFTA cases are illustrative. Among the most well-known is *Lone Pine Resources Inc. v. Government of Canada,*[154] in which the Canadian state of Quebec instituted a moratorium on shale gas exploration and development, including fracking. Lone Pine, a U.S. oil and gas firm, immediately brought an ISDS claim citing 'minimum standard of treatment' and 'expropriation' charging that Canada 'acted with no cognizable public purpose,' and violated their 'valuable right to mine for oil and gas under the St. Lawrence River.' The tribunal found in favor of Lone Pine and awarded the company $118.9 million USD. In a more recent NAFTA case, after years of public opposition to TransCanada's proposed Keystone XL oil pipeline, which would funnel Canadian oil sands crude to the U.S. Gulf coast, President

---

[151] Scott Sinclair, 'NAFTA Chapter 11 Investor-State Disputes to January 1, 2015,' *Canadian Centre for Policy Alternatives* (2015).

[152] Sierra Club, 'Trading Away Our Climate? How Investment Rules Threaten the Environment and Climate Protection', 12 November 2012.

[153] Anthony Davis, 'Energy sector driving major growth in international arbitration', *Lexpert,* 1 February 2014.

[154] Lone Pine Resources Inc. v. The Government of Canada, ICSID Case No. UNCT/15/2.

Obama determined that the pipeline was not in the national interest and denied its construction. In June, 2016, TransCanada brought a NAFTA ISDS claim amounting to $15 billion USD.[155]

States have won about half of all decided NAFTA cases, and the tribunals have dismissed a number of claims targeting environmental legislation. Notably, in *Methanex v. United* the tribunal dismissed Methanex's claims against California in 2004 on jurisdictional grounds. The tribunal ruled in favor of the U.S. that California's public health ban on methanol was a measure of general application and therefore been not related to the company Methanex. This ruling affirmed that states do retain policy space for environmental laws. On the other hand, outside of the NAFTA, by 2012 there were 274 decided ISDS cases and nearly 60% were either settled or were decided in favor of the investor.[157] In these cases MNCs have challenged not only environmental measures but a range of other public interest laws, including labor, public health, and financial regulations. Moreover, the rate of new ISDS cases has been increasing dramatically - while fewer than 50 cases were filed in the first three decades of the ISDS system, there were at least 50 cases each year from 2011-2015 (with 70 in 2015).

Public interest groups have argued that the effect of ISDS has been a 'regulatory chill' on proposed legislation, in which governments modify, amend, or withdraw legislation due to the threat of ISDS. In North America, in the mid-1990s, Canada sought to introduce plain packaging regulations and U.S. tobacco multinational Phillip Morris

---

[155] However, TransCanada cancelled their ISDS case against the U.S. after the Trump administration overturned Obama's denial of the pipeline.
[156] Methanex Corporation v. United States of America.
[157] See Sierra Club, above n 20.

along with Carla Hills, former USTR who negotiated the NAFTA, threatened Canada with an ISDS challenge. Subsequently, Canada abandoned its plain packaging proposal and opted for a larger size of the health warning label on packages.[158] In sum, ISDS makes governments accountable before investors and the case law demonstrates that ISDS produces fundamental conflicts between private and public interests.

II.B. Regulatory effects of NAFTA ISDS

The NAFTA investor protections and ISDS can foreclose possibilities of governments implementing new regulations even when regulatory norms evolve. In so doing, ISDS embodies a trade-off between the rights of multinational investors and sovereignty to regulate them. For example, the NAFTA ISDS directly and indirectly undermined state sovereignty with respect to climate change regulations and emergency financial measures.

II.B.1. Direct undermining of state sovereignty: climate change regulations

In 1977, a senior scientist at U.S. oil giant Exxon Mobile concluded in a company report, '…the most likely manner in which mankind is influencing the global climate is through carbon dioxide release from the burning of fossil fuels.'[159] In 2015, investigative journalists found that Exxon Mobile has decades of internal documents showing that its own scientists and executives knew that burning fossil fuels contributes to global warming and that the executives suppressed the findings.[160] Publicly, Exxon Mobile denied global warming in their effort to fight off

[158] See Sinclair, above n 19, at 37.
[159] Neela Banerjee, Lisa Song and David Hasemyer, 'Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago,' *Inside Climate News*, 16 September 2015.
[160] Ibid.

government regulations. Simultaneously, Exxon Mobile had used the NAFTA ISDS as a deregulatory tool. In 2015, Exxon Mobile won $17.3 million USD from the government of Canada against a 'performance requirement' that required Exxon Mobile to help finance petroleum-focused research and development in Newfoundland and Labrador.[161] This case complemented other NAFTA ISDS cases in which U.S. oil company Lone Pine had successfully won a case against a ban on fracking in Canada, and TransCanada's $15 billion dollar claim against the U.S. for the Obama administration's denial of the Keystone XL pipeline.

International consensus has been shifting to accept human-caused global warming as a fact, and regulatory norms have also evolved to reflect this, which Exxon Mobile well understood. Therefore, the fossil fuel industry's explicit use of ISDS as a deregulatory tool curtails state sovereignty to implement climate change regulations. In other international investment agreements, the fossil fuel and mining industries are by far the most active in bringing ISDS cases against governments, particularly developing countries.

II.B.2. Indirect undermining of state sovereignty: emergency financial regulations

The NAFTA investment chapter's 'transfers' article obliges the free movement of capital. The only exception is the 'balance of payments' provision that allows states to regulate the cross-border movement of capital during crises, which can only be implemented under highly specific conditions (a policy mix known as 'capital controls').

[161] Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4.

In both the 1995 Mexican Peso crisis and the 2008 global financial crisis, Mexican policymakers did not attempt to implement the NAFTA balance of payments exception. However, since the 2008 global financial crisis, many developing countries in Latin America and Asia have underscored capital controls as fundamental to development policy.[162] In 2012, the IMF announced a 'new institutional view,' which claims that the free movement of capital rests on weak economic theory, and it has 'heightened macroeconomic volatility and vulnerability to crises.'[163] The IMF's new institutional stance calls for situational capital controls (i.e. capital controls on a case-by-case basis).

The debates and merits of capital controls notwithstanding, both the U.S. and Mexican policymakers' commitment to the free movement of capital removed capital controls as a policy option for confronting economic crises in the region. This steadfast commitment to the free movement of capital is institutionalized in the NAFTA investment and financial services chapters. As explained by the U.S. negotiators of those chapters, their purpose was to 'lock-in' Mexico's commitment to the free movement of capital in case of future political shifts away from free trade doctrine in Mexico.[164] Therefore, the NAFTA's stringent restrictions on capital controls reflects pre-2008 regulatory norms as international policy consensus has shifted towards supporting certain regulations on capital movements.

---

[162] Kevin P. Gallagher, *Ruling Capital: Emerging Markets and the Reregulation of Cross-Border Finance,* (Ithaca: Cornell University Press, 2014).
[163] International Monetary Fund, '*The Liberalization and Management of Capital Flows: An Institutional View*,' (Washington DC: International Monetary Fund, 2012) 12.
[164] Olin Wethington, *Financial Market Liberalization: The NAFTA Framework*, (Minnesota: West Publishing Company, 1994) 5-12.

There has only been one NAFTA ISDS case ruling on financial regulations, *Fireman's Fund v. United Mexican States* (2003).[165] Following the 1995 Mexican Peso crisis, the Mexican Central Bank had assisted Mexican financial institutions with Peso-denominated debt instruments but had denied the same treatment to the Fireman Fund, a U.S. insurance company, which then claimed it to be a violation of the NAFTA's 'national treatment' provision. In the tribunal's ruling, the arbitrators had never questioned the right of investors to challenge a government policy in response to financial crisis. In fact, the tribunal ruled that ISDS arbitrators can determine the 'reasonableness' of emergency financial regulations. Moreover, the tribunal interpretation stated that investors can challenge emergency financial regulations during crises as expropriations. In 2006, under a European BIT, an ISDS tribunal awarded a foreign bank $236 million because the government did not provide the foreign bank with the same bail-out as national banks.[166] In short, although Mexican policymakers do not support the use of capital controls, the NAFTA provisions foreclose the possibility of their implementation while ISDS leaves open the possibility for investors to challenge capital controls and other emergency financial measures.

### III. Income effects of NAFTA investment chapter

In this section I survey the first-order income effects of the NAFTA investment chapter, and then introduce some second-order income effects. I mostly focus on the

---

[165] Fireman's Fund Insurance Company v. The United Mexican States, ICSID Case No. ARB(AF)/02/1.

[166] *Saluka Investments B. V. vs. The Czech Republic*, Partial Award, Ad hoc-UNCITRAL Arbitration Rules (2006).

U.S.-Mexico investment relationship for two reasons, (1) considering the U.S.-Canada relationship, it is impossible to separate the effect of the NAFTA investment chapter from previous bilateral investment agreements, and (2) the U.S. BIT program was originally designed for contract with developing countries, focusing on the U.S.-Mexico relationship will highlight the effects of investment agreements between the U.S. and developing countries.

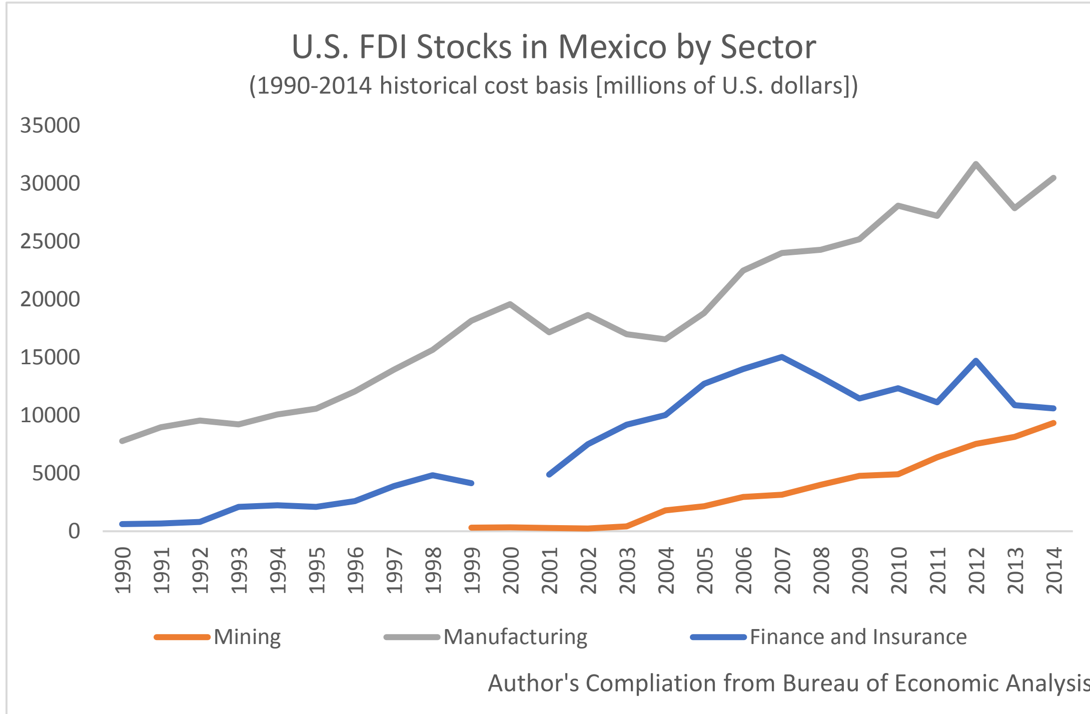
III.A. Increased regional economies of scale

The immediate income effect of the NAFTA investment chapter was to facilitate economies of scale for regional MNCs. In a meticulous survey of the assets and sales of Fortune 500 companies during the early 2000s, economists Alan Rugman and Chang Hoon Oh found that most MNCs operate regionally rather than globally.[167] That is, the vast majority of U.S., European, and Asian MNCs both produce and sell on a home region basis. Rugman and Hoon Oh conclude that MNCs tend to dominate in their home region while marginally investing and operating in other regions. For example, there are many European and Japanese MNCs investing in North America, but the 'home' U.S. MNCs have most of the market share in North America, and there are similar patterns in Europe and Asia.[168] The NAFTA facilitated regional economies of scale for U.S. MNCs while European and Asian MNCs contested the North American market. Following the implementation of the NAFTA, U.S. FDI to Mexico has been concentrated in manufacturing, followed by financial services and mining.

---

[167] Alan Rugman and Chang Hoon Oh, 'Friedman's Follies: Insights on the Globalization/Regionalization Debate,' *Business and Politics*, Vol. 10, No. 2 (2008).
[168] Ibid at 13.

Figure Two: U.S. FDI Stocks in Mexico by Sector




IV.A.1. Regional economies of scale in manufacturing

U.S. trade policymakers negotiating the NAFTA investment chapter had two goals - to maintain the global competitiveness of U.S. MNCs and to support jobs in the U.S. The USTR's main private sector advisory committee explained, 'With a NAFTA that allows companies to plan long term investments…costs can be reduced and economies of scale achieved, allowing North American products to compete more effectively in world markets.'[169] The U.S. sought to integrate production with Mexico such that U.S. industries would better compete with East Asia, particularly in autos, electronics, and textiles. The NAFTA investment chapter provided the legal underpinning to this trade strategy as U.S. FDI entered Mexico. U.S. imports from Mexico

---

[169] Office of the U.S. Trade Representative, 'Report of the Investment Policy Advisory Committee for Trade on the North American Free Trade Agreement, (Washington, D.C.: Executive Office of the President), September 1992.

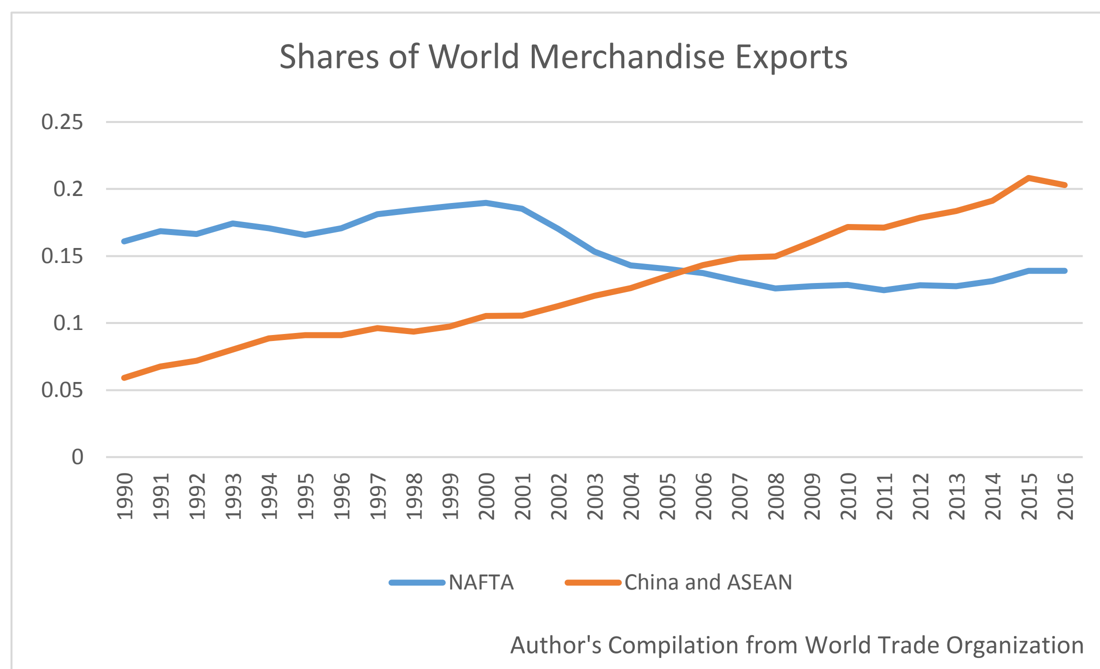
contained much higher U.S. content than competing imports from East Asia, therefore, by importing from Mexico (rather than East Asia) domestic manufacturing could be sustained. Prior to the NAFTA, Mexican goods imports contained roughly 5 percent U.S. content, twenty years later, one report estimated that figure climbed to 40 percent, demonstrating the success of the NAFTA.[170] Conversely, U.S. imports from China are estimated to have only 4 percent U.S. content.[171]

The NAFTA investment chapter facilitated globally competitive regional value chains in autos and transportation equipment, information technology, and textiles and apparel. These value chains enabled the U.S. and Mexico to co-produce for export to the world. The NAFTA trade strategy was relatively successful from the NAFTA entering into force in 1994 until 2001, as North America's annual shares of world merchandise exports outpaced those of East Asia during that time. During that same period, all three NAFTA countries experienced growth in GDP, employment, and productivity. However, after China joined the WTO in 2001, competition from East Asia, led by China, either caused a disarticulation of North American supply chains or undercut their competitiveness.[172]

---

[170] M. Angeles Villareal and Ian F. Fergusson, 'NAFTA at 20: Overview and trade effects,' *Congressional Research Service* (Washington, DC), 21 February 2013, 15.
[171] Ibid at 15.
[172] See Enrique Dussel Peters & Kevin Gallagher, above n 42; See Michèle Rioux, Mathieu Ares, & Ping Huang, above n 41.

Figure Three: North America vs. East Asia, Shares of Total World Merchandise Exports




Competition from China notwithstanding, vertically integrated production with Mexico benefited U.S. firms. Economists Theodore H. Moran and Lindsay Oldenski analyzed confidential firm-level data from U.S. Bureau of Economic Analysis on the international activities of U.S. MNCs between the years 1990 and 2009. They found that U.S. MNCs that have offshored to Mexico have become more globally competitive and in turn they have increased their investment and employment in the U.S.[173] Their findings are consistent with other studies that observe that U.S. outward FDI has helped U.S. firms to achieve globally competitive economies of scale and in turn expand domestic operations and employment.[174]

[173] Theodore H. Moran and Lindsay Oldenski, 'How US Investments in Mexico Have Increased Investment and Jobs at Home,' in 'NAFTA 20 Years Later,' *PIIE Briefing No. 14-3* (Washington DC: Peterson Institute for International Economics), November 2014.
[174] Mihir A. Desai, C. Fritz Foley, James R. Hines, 'Domestic Effects of the Foreign Activities of U.S. Multinationals,' *American Economic Journal: Economic Policy*, Vol. 1, No. 1 (2009); Lee Branstetter, 'Facts and Fallacies about US FDI in China (with apologies to Rob Feenstra),' in R.

*Information technology (IT) value chains*

By 2011, the NAFTA had facilitated the emergence of the IT sector as a key source of dynamism for North America, IT manufacturing accounted for 18% of trilateral trade in North America ($179 billion) (Gallagher & Zarsky 2007; Rioux et. al. 2015). However, since the 1990s the industry had undergone profound changes. In 2001, Mexico was the largest supplier of IT goods to the U.S. and had 15.7% market share, yet by 2010 Mexico's share of the U.S. market shrank to 15%; in that same time period China increased its share of the U.S. IT import market from 13.4% (2001) to 49.5% (2011).[175]

The central motivation of Mexico in the NAFTA was to attract manufacturing FDI and Mexican policymakers identified information technology as a key sector for export to the U.S. (Gallagher & Zarsky 2007). Following NAFTA, the plan was successful as a handful of the "global flagships" of the IT industry quickly established manufacturing operations in Guadalajara, Mexico, including Hewlett-Packard and IBM. Several of the large contracting manufacturing firms followed the flagships to Guadalajara, and in turn, they contracted the manufacturing of parts to suppliers throughout East Asia. In 2000-1, the bursting of technology bubble produced a crisis of overcapacity in the IT industry just as China was joining the WTO. Every multinational IT firm that relocated from Guadalajara headed for China. Analysts Kevin Gallagher and Lyuba Zarsky observed, "With its large domestic market, low wages, and significant IT manufacturing capacities (built up over 20 years by state-led development policies), China became the production platform *du jour*" (2007: 8). Between 2000 and 2011, Chinese exports of IT goods to NAFTA grew by 360 percent, reaching nearly $154 billion; in the

---

F & S. W. (eds) *China's Growing Role in World Trade* (Chicago: University of Chicago Press, 2010).

[175] Rioux et. al. 2015: 269.

same time period U.S. exports to NAFTA grew by 14 percent, Mexico's grew by 59 percent, and Canada's decreased by 56 percent.[176] Moreover, the U.S. market share of IT goods in Canada and Mexico shrank while to China's grew. These trends demonstrate that China's vast gains in trade in IT goods were at the expense of North America.

By the 1990s, China had emerged as the core of MNCs location strategy for two reasons - China had a large and growing internal market and it was a low-cost export platform (Gallagher & Zarsky 2007: 112). Global flagships of the IT industry, and their contracting manufacturers, would base their supply chain in China for final assembly of finished goods and importing parts and components to China from East Asia and to a lesser extent the U.S. and Europe. A famous example is the production of iPhones in Foxconn assembly plants in China. The extent and sophistication of China-East Asia supply chains were unparalleled in the world and became a key source of growth and dynamism for the East Asian countries, particularly supply chains in electrical machinery and semiconductor devices (Prema-chandra 2010: 15). However, not only did Chinese IT manufacturing assume comparative advantage in the low-value added assembly stages, but China has moved up the value chain at unprecedented speeds. Beginning in the 1980s, China had begun to develop its IT sector with careful industrial policy. Chinese policymakers implemented a strategy to develop its domestic firms while inviting the global flagship IT firms to establish joint partnerships with Chinese firms. In exchange for market access, China required the TNCs to transfer technology, establish R&D centers, source to local firms, and train Chinese employees (Gallagher & Zarsky 2007: 112). In so doing, Chinese IT firms have assumed diverse points of the value chain, laying the foundation for China's rapid ascent to become the world's largest IT exporter by 2004. While the NAFTA investment chapter forbids requiring firms to

---

[176] Rioux et. al. 2015: 267.

establish joint ventures with technology transfers and R&D, the WTO permitted China the policy space to do so and China used it to the max.

*Textile and apparel value chains*

The NAFTA rules of origin, investment chapter, and reduction of related tariffs led to the development of a vertically integrated North American textile-apparel chain that flourished briefly in the late 1990s, particularly in Mexico. Rules of origin oblige a certain amount of North American content in the final good, thereby protecting against import competition. Mexico's textile and clothing chain is highly integrated with the U.S. for use of both inputs and export of the finished goods. In fact, the sector uses a high number imported inputs from the U.S. and uses the highest U.S. value added in its exports, far more than China and the rest of world.[177] However, following 2000, China, India, Bangladesh and Pakistan substantially increased their share of global production and trade while the U.S. experienced a steady decline in textile production and trade.

The end of the Multifibre Arrangement in 2005 further led developing countries (largely China) to increase their shares of global textile and apparel production, deteriorating the NAFTA region's textile and clothing value chain. Since 2005, in Mexico's textile and clothing sector, value added as a proportion of the total value of output has been lower than pre-NAFTA levels and fell by more than a quarter from 2000 to 2010.[178] Therefore, beginning in 2000 as North America's textile and clothing value chain faced increasing import competition from across the Pacific, it disintegrated the NAFTA supply chain. From 1990 to 2000, Mexico's textile and

---

[177] Peters & Gallagher 2013b: 98.
[178] Peters & Gallagher 2013b: 97.

clothing exports to the U.S. grew by an average annual rate of 30.7 percent, from 2000 to 2010 it contracted by 4.4 percent per year. In that same period, U.S. textile and clothing imports from China grew from 12 percent of total textile and clothing imports to 42 percent (Peters & Gallagher 2013b: 98). Simultaneously, textile and clothing manufacture as a share of U.S. GDP and employment sharply contracted.

*Automotive value chains*

Prior to the NAFTA, the North American auto industry produced vehicles for their respective domestic markets, due to transportation costs, tariffs, and regulatory constraints. The NAFTA led to a highly complex and integrated automotive production supply chain.[179] The North American automotive chain that emerged was facilitated by the NAFTA auto rules of origin, investment chapter, and tariff reductions, thereby protecting the sector from competition from Asian and Chinese firms in both absolute and relative terms. Between 2000 and 2010, Mexico's auto sector has received over $10 billion in FDI as an export platform to the U.S. and U.S. auto firms are by far Mexico's largest producers and exporters, the "big three" (General Motors, Chrysler and Ford) accounted more than 60 percent of exports prior to NAFTA and 52.4 percent in 2009.[180] By 2011, Mexico had surpassed Canada and Japan as the leading supplier of automotive goods to the U.S., accounting for 26 percent ($64.4 billion) of total U.S. motor vehicle and auto parts imports. While the post-NAFTA restructuring of the auto industry

[179] Between 1993 and 2013, Mexico increased its trade in auto parts with the U.S. by 189 percent in exports and 389 percent in imports; Canada's trade in auto parts with the U.S. grew by 46 percent in exports and 31 percent in imports (Villarreal & Fergusson 2013: 16). In the same time period, Mexico's exports of vehicles to the U.S. grew by 2300 percent and their imports by 984 percent; Canada's exports of vehicles to the U.S. grew by 220 percent and it imports by 67 percent (Villarreal & Fergusson 2013: 16).

[180] Peters & Gallagher 2013b: 98.

produced a U.S. trade deficit with Mexico in automotive production, Mexico's low-wage export platform has allowed automakers to amortize the large fixed costs of capital-intensive production facilities in the U.S., helping to sustain the entire North American industry.[181] However, Chinese automotive production has been growing at unprecedented clips, suggesting competition in the near future.

While the North American automotive value chain has been a symbol of the success of NAFTA as a competitive integration plan, Mexican producers have begun to significantly import Chinese auto parts into their supply chain. In 2005, Chinese auto parts were 3.2 percent of Mexico's total imported auto parts, by 2009, that figure had climbed to nearly 10 percent.[182] By 2010, China was the world's top exporter of tires and tubes. Moreover, China has quickly risen to be the largest automotive producer in the world. In the early 1990s, China accounted for less than 1 percent of global automotive output, by 2009 China accounted for 23.5 percent of global output becoming the world's top producer.[183] China has not yet begun to export cars on any significant scale because China's auto sector has been producing for China's internal market. However, as the pace of China's domestic consumption slows, it is likely that China will seek to increase automotive exports.

III.A.2. Regional economies of scale in financial services

In response to the Mexican Peso crisis in 1995, Mexican policymakers opened financial services to foreign investment before the NAFTA liberalization schedule came into force. The

---

[181] "NAFTA May Have Saved Many Autoworkers' Jobs" by Eduardo Porter, *New York Times*, March 29, 2016.
[182] Peters & Gallagher 2013b: 99.
[183] Peters & Gallagher 2013b: 99.

IMF and the World Bank encouraged the private recapitalization of the Mexican banking system by foreign banks because it would be foundational to a 'sound and stable' financial system.[184] As a result, by 1997, Mexico raised the ceiling on foreign investment from 30 to 49 percent and entirely repealed restrictions on foreign ownership of financial institutions in 1999, fully opening Mexico to FDI in financial services. Mexico's banking system quickly became dominated by foreign banks. Between 1999 and 2002, foreign bank market share jumped from 20 to 82 percent, mostly by cross-border mergers and acquisitions from the U.S., Canada, and Spain.[185]

As Mexico's banks became foreign owned they adopted foreign bank lending, borrowing, and risk management practices. International banks have used communications and information technology to create new financial markets and introduce new financial products, notably, household and consumption loans and financial market mediation.[186] U.S. financial services FDI transplanted these same banking practices into Mexico. Just as the widgets produced for export by Mexican maquiladoras were 'Made in Mexico,' the household loans and derivatives that originated from foreign banks in Mexico were 'Made in the USA.'

The NAFTA investment and financial services chapter opened Mexico to foreign banks which facilitated economies of scale in the regional financial services industry,

---

[184] Paulo dos Santos, 'A Policy Wrapped in "Analysis"—The World Bank's Case for Foreign Banks,' in K. B., B. F. & E. V. (eds), *The Political Economy of Development: The World Bank, Neoliberalism and Development Research,* (London: Pluto, 2012).
[185] Stephen H. Haber and Aldo Musacchio, 'These Are the Good Old Days: Foreign Entry and the Mexican Banking System,' *NBER Working Paper*: No. 18713 (2013).
[186] Costas Lapavitsas and Paulo dos Santos, 'Globalization and Contemporary Banking: On the Impact of New Technology,' *Contributions to Political Economy*, Vol. 27, No. 1, 2008.

contributing to the consolidation of the global banking industry (i.e. 'too big to fail').[187] Foreign bank operations and trading with developing countries have become key sources of bank profitability. Appendix One provides an overview of U.S. bank operations in Mexico. According to the Bureau of Economic Analysis, in 1999, the U.S. exported to Mexico $19.514 billion in financial services, which steadily expanded until a two year plateau in 2008 at over $60 billion, then continued to climb to $87.774 billion by 2014. In 2014, Mexico accounted for nearly a quarter of total U.S. financial services exports to Latin America. In 2007, U.S. financial services affiliates in Mexico generated $6.989 billion in services supplied, and by 2014 that figure grew to $11.985 billion. However, these figures are underestimates due to Mexico's hub in the global trillion dollar narcotics trade and the extensive money laundering activities of foreign banks in Mexico on account of the drug cartels.[188]

III.A.3. Mining and fossil fuels

Mexico is one of the world's leading producers of silver, copper, gold, and zinc. In terms of mining investment attraction, Mexico ranks fourth in the world and first in Latin America.[189] Mexico's mining sector is largely dependent upon FDI and majority comes from Canadian firms followed by U.S. investors.[190] Scale dynamics in mining and fossil fuel extraction are complicated by fluctuations in the prices of the commodities. However, mining is typically a first

---

[187] Ibid.
[188] If illicit drugs were counted among official statistics they could be among Mexico's top five exports to the U.S.; international banks including HSBC and Wachovia have been found money laundering billions of dollars for Mexican drug cartels, providing significant liquidity and revenue for the banking system that is unaccounted (See: Rajeev Syal, 'Drug money saved banks in global crisis, claims UN advisor,' *The Guardian*, 13 December 2009).
[189] Deloitte & Touche LLP, 'Mining in Mexico,' 2012.
[190] ProMexico, 'Mexico Mining,' *ProMexico: Inversion Y Comercio* (2015).

step in manufacturing value chains, and the Mexican market has enabled regional MNCs and investors to achieve economies of scale.

During NAFTA negotiations, Mexico made its energy sector off limits to FDI and so that the state-owned oil company could retain a monopoly and Mexico could use its revenue to finance the budget. In response to a mix of political and economic conditions, Mexican President Enrique Pena Nieto opened the energy sector to private investment in 2014 to boost investment, exploration, and productivity in the sector. Although U.S. FDI in Mexico's fossil fuels is only beginning, U.S. oil and gas companies have been large investors in Canada's abundant oil and gas, facilitating regional economies of scale for U.S. MNCs in fossil fuel extraction.

III.A.4. Regional economies of scale and increased productivity growth

There is a large and growing body of literature documenting that trade and investment liberalization increases productivity growth. Economists Jan De Loecker and Pinelopi Goldberg conducted a review of literature on this relationship and concluded, '…there is one robust finding that emerges from this literature: globalization improves industry performance.'[191] However, there no consensus on the causal relationship between trade and productivity. A 2015 report by the White House pointed to several different channels, notably, that trade and investment liberalization facilitates firm-level economies of scale which then increases firm productivity growth.[192] The White House report then goes on to cite a number of studies in which '…the common mechanism is

---

[191] Jan De Loecker & Pinelopi Koujianou Goldberg, 'Firm Performance in a Global Market,' *Annual Review of Economics* Vol. 6, No. 1 (2014).
[192] The White House, 'The Economic Benefits of U.S. Trade,' May 2015, at 8.

that exporting induces investments in technology.'[193] For example, in the auto industry, Mexico's low-wage export platform has allowed U.S. automakers to amortize their investments in capital-intensive production facilities in the U.S., thereby sustaining the entire North American auto industry.[194] Similarly, the development of information technology has made service industries more productive and allowed the increased offshoring of services.[195] In so doing, U.S. outward FDI in both manufacturing and services has increased productivity growth for U.S. firms in those sectors. The NAFTA investment chapter directly and indirectly facilitated economies of scale, which increased firm-level productivity growth and contributed to the dynamism of U.S. MNCs.

### IV.B. Second-order income effects

The NAFTA investment chapter not only facilitated the global competitiveness of U.S. MNCs but it had second-order income effects. They include: (1) intensified regional financial instability, (2) heightened job polarization in the U.S. and Mexico, and (3) amplified regional environmental damage. These income effects are relevant to regional economies of scale inasmuch as they shift costs from the private sector to the public sector. Due to the scope of this paper, I summarize them below.

#### IV.B.1. Intensified regional financial instability

The NAFTA investment chapter 'transfers' article obliges the absolute free movement of capital. This provision, in tandem with other deregulatory provisions in the investment and

---

[193] Ibid at 8.

[194] Eduardo Porter, 'NAFTA May Have Saved Many Autoworkers' Jobs,' *The New York Times*, 29 March 2016.

[195] Bradford Jensen, *Global Trade in Services: Fear, Facts, and Offshoring*, (Washington DC: Peterson Institute for International Economics, 2011).

financial services chapters, facilitated regional financial integration. However, these deregulations have a costly trade-off with financial instability.[196] Financial crises redistributed income from the private to public sector by three channels: the direct social costs of bank bail-outs from governments as multinational banks 'socialized' their losses; increased financial instability leading to credit crunches followed by recessions which impose far greater societal costs then the direct cost of bail-outs;[197] the free movement of capital as the main channel by which financial crises spread internationally.[198] Each of these occurred in North America during the 1995 Mexican Peso crisis and especially the 2008 global financial crisis.[199] While the NAFTA was certainly not the cause of these crises, the NAFTA removed policy options for preventing and responding to them.[200] This underscores how financial integration has a costly trade-off with financial stability.

*The NAFTA and the 1995 Mexican Peso Crisis*

Immediately after the NAFTA came into force Mexico fell into a severe and unprecedented balance of payments crisis leading Mexico to face a default on its sovereign debt. The connection between the 1995 peso crisis to the NAFTA is subject to debate, however, Mexican authorities attributed the causes of the currency crisis to unprecedented and rapid (unilateral) liberalization of the Mexican financial sector. The U.S. and the IMF put together a

[196] José Antonio Ocampo, Shari Spiegel, and Joseph E. Stiglitz (editors), '*Capital Account Liberalization and Development*,' (New York: Oxford University Press, 2008).
[197] Anton Korinek & Jonathan Kreamer, 'The Redistributive Effects of Financial Deregulation,' *Journal of Monetary Economics*: Vol. 68: S55-S67 (2014).
[198] See IMF, above n 31.
[199] Jose Sidaoui, Manuel Ramos-Francia, & Manuel Gabriel Cuadra, 'The global financial crisis and policy response in Mexico,' *BIS papers no. 54* (2011).
[200] Notwithstanding Banco de Mexico's lack of interest in using capital controls during crises.

“historic financial rescue package” of roughly $50 billion (Hufbauer & Schott 2005:10). However, a condition of the bailout was that Mexico had to use $29 billion U.S. dollars to pay the investors of exotic, peso-denominated Mexican government bonds (Felix 2001: 13). For the purposes of context, the value of U.S.’ entire manufacturing FDI stock in Mexico was $10.58 billion in the same year as the U.S. and IMF bail-out. Michel Camdessus, the IMF’s Managing Director, explained this peculiar loan condition in a candid television interview, “…the main reason for attaching this condition to the bailout was to keep Mexico from imposing capital controls to halt the flight to dollars” (cited in Felix 2001: 13). Camdessus explained that if Mexico had implemented capital controls during its balance of payments crisis it would set precedent for other developing countries to do so, which was counter the capital liberalization goals of the IMF. Mexico’s decision not to implement capital controls in response to the 1995 Peso crisis had demonstrated its commitment to the NAFTA goals of financial integration.

*The NAFTA and the 2008 global financial crisis*

In Mexico, the 2007/8 solvency crisis of U.S. banks was magnified by the exposure of Mexican corporations to foreign currency through complex derivatives instruments (Sidaoui et al 2010: 286). Mexican corporations had speculated on complex derivatives instruments in which they were betting against a large and abrupt peso depreciation, which consequently brought a high degree of risk to their balance sheets. In 2008, quick and voluminous capital flight from Mexico triggered a dramatic Peso depreciation and corporations incurred significant losses which had to be met with U.S. dollars (Sidaoui et al 2010: 286). Banco de Mexico observed that corporate losses incurred by derivatives instruments caused “widespread disruption” in domestic financial markets and destabilizing demand for dollars. In response Banco de Mexico had to rely

on financing from (1) emergency "dollar swap lines" (bail-out loan) with the U.S. Central Bank ($30 billion USD), (2) an emergency IMF loan ($47 billion USD), and (3) drawing down Mexico's U.S. dollar reserves (over $90 billion USD). When these emergency measures are summed ($167 billion USD), they amount to 18.66% of Mexico's entire GDP in 2009 ($894.95 billion USD). In short, the risks posed by financial integration have been detrimental to financial stability in Mexico which has imposed massive costs on Mexico and required emergency bail-outs from the U.S. and IMF.

II.B. Effects on employment and jobs in the U.S.

Isolating the effects of trade and investment with Mexico on U.S. labor and jobs has been at best an inexact science and at worst a politicized adventure in creative accounting. The effects of trade with Mexico on the U.S. employment have been very small in relation to the larger macro trends of the vast U.S. economy, nonetheless, any effects have assumed a symbolic significance in trade policy debates as these topics are central to the justifications and motivations of the proponents and opponents of U.S. trade policy. I present a literature review of recent claims of the NAFTA proponents and opponents in Annex Four. Some of the evidence is more plausible than others and this section is a critical analysis of the strengths and weaknesses of recent literature.

*Effects on employment*

To my knowledge, all recent studies find that trade and investment with Mexico has produced a net job loss in the U.S. Net job loss is the sum of jobs lost by import competition and offshoring plus jobs gained by exports. A study produced by the Economic Policy Institute

estimates that between 1994 and 2010 nearly 683,000 U.S. net jobs were lost due to US trade deficits with Mexico (about 40,200 jobs per year) (Scott 2011). A contrasting study from the Peterson Institute for International Economics reports that from 2009 to 2013, the U.S. net job loss by trade with Mexico was roughly 15,000 annually (Hufbauer et. al. 2014). While NAFTA opponents identify the trade deficit as the source of job loss, NAFTA proponents contest that there has been no empirical correlation between unemployment and the trade balance (Hufbauer et. al. 2014). However, contrary to the official unemployment rate, by different unemployment metrics there is a correlation with the trade deficit. Contrasting the trade deficit with the male labor force participation rate, both demonstrate clear secular declines (notwithstanding the dramatic uptick in the trade deficit in 2008 as result of the collapse in spending during the global financial crisis). Including females, the general labor force participation rate follows the same secular decline but begins after 2000, and the ratio of full-time employed to working-age population follows the same trend. Therefore, by different unemployment metrics there is a correlation between the trade deficit and unemployment, but of course correlation is not causation.

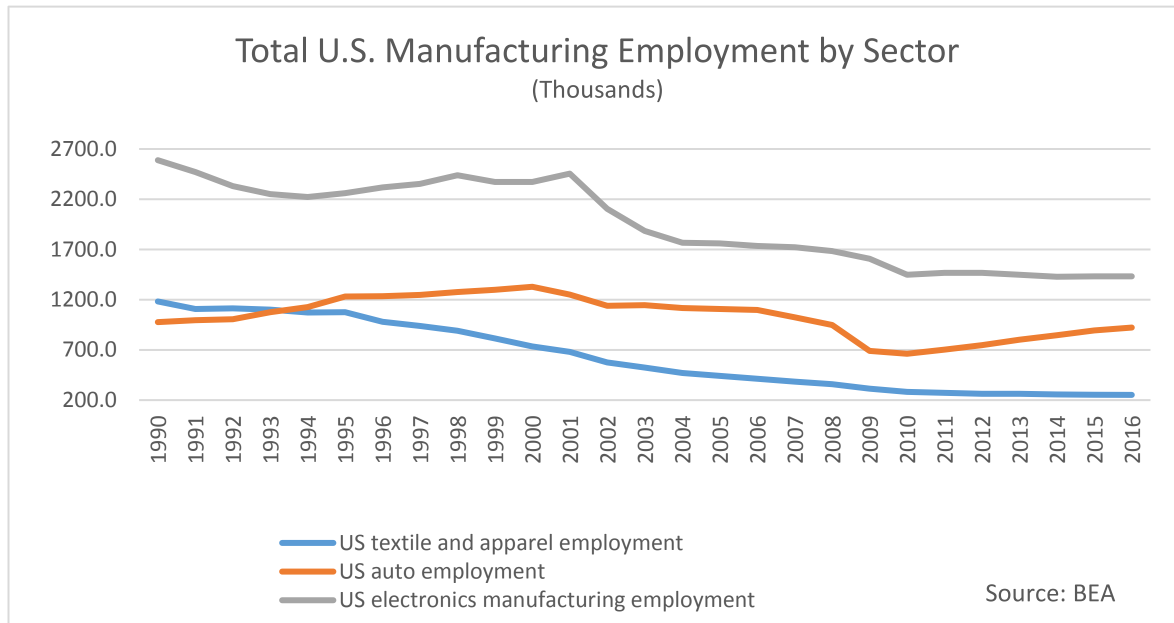
Economists Theodore H. Moran and Lindsay Oldenski find that U.S. MNCs that have offshored to Mexico have become more competitive globally and in turn they have increased their investment and employment in the U.S. (2014). Moran and Oldenski analyzed confidential firm-level data from U.S. Bureau of Economic Analysis on the international activities of U.S. MNCs between the years 1990 and 2009. Their findings are consistent with other studies that observe that U.S. outward FDI has helped U.S. firms to achieve globally competitive economies of scale and in turn expand domestic operations and employment. Moran and Oldenski conclude,

"…any fall in U.S. employment by [U.S. MNCs] is not due to offshoring to Mexico, since this offshoring exerts a net positive force on the domestic operations of U.S. firms" (2014: 41).

Contrary to these conclusions, it does not follow that a firm's employment gains at the micro-level produces job gains at the aggregate, macro-level. Moran and Oldenski (2014) do not consider the likely macro outcome in which firm-level economies of scale produce greater concentration in the industry leading to a fall in aggregate employment in the industry, as has been the secular trend in manufacturing. A range of studies have found that during the NAFTA time period U.S. MNCs have become more concentrated leading to industry consolidation (Acemoglu & Hildebrand 2017; Autor et. al. 2017a; Autor et. al. 2017b). In the same time period, manufacturing employment has suffered secular declines, in the information technology sector alone from 2001 to 2015 employment halved and fell by over 1 million jobs. Therefore, it is problematic to conclude that firm-level employment gains produce aggregate employment gains in an industry or country, and to the contrary it may result in aggregate losses.[201]

[201] Moreover, the economies of scale by (U.S.) MNCs can come at the expense of domestic firms in the FDI host country, a topic seldom addressed by U.S.-based analysts. In a case study of U.S. FDI into Mexico's IT sector, Gallagher and Zarsky found, "Rapid MNC-led growth came at the expense of Mexico's domestic IT firms, which were virtually wiped out" (2007: 9).

Figure Four: Total U.S. Manufacturing Employment by Sector




Lastly, the data used in Moran and Oldenski's study (2014) considers the years 1990 to 2009, a time horizon in which interest rates were secularly declining, firms were increasing their leverage, and regional economic growth was led by the debt-fueled American consumer. Without data from the post-2009 period, the study is omitting a time frame of debt deflation and deleveraging in which firms may have been simultaneously offshoring and contracting domestic operations, such as in the auto industry after receiving a bail-out in 2008. Therefore, it is inconclusive that from 1990 to 2009 offshoring was the *only* variable associated with the observed firm-level employment gains in domestic operations.

*Effects on worker income*

Despite the relatively small net job loss from trade with Mexico, NAFTA proponents claim that for each job lost the U.S. economy makes efficiency gains by importing products more cheaply, thereby lowering prices and giving firms and consumers greater purchasing power. Hufbauer et. al. (2014) estimate that from 2009 to 2013, for each net job lost to Mexico the U.S.

economy gained "several hundred thousand dollars" (2014: 13). However, NAFTA proponents do not address the distribution of gains from trade, generally relegating the discussion to political debates in Congress over displaced workers. Given the well-documented trends towards growing income inequality, there is ambiguous evidence that gains from trade are enjoyed by all. A recent study from Public Citizen (2014) finds that displaced workers experience downward social mobility leading to increased income inequality, rarely addressed by NAFTA proponents. Moreover, the income gains from cheaper Mexican imports do not equal the income loss of downwardly mobile displaced workers, leaving them in worse condition (cited in Public Citizen 2014: 10).

A number of studies find that jobs gained by exports are typically higher-skilled and better paying jobs than were displaced by trade, which is not generally addressed by NAFTA opponents. The pattern that emerges is that trade and investment with Mexico has been contributing to the well-established employment polarization trends in the U.S. (Kalleberg 2013). Employment polarization is the relative contraction of middle-skill occupational shares of total occupations. NAFTA proponents find that jobs gained by exports are higher-skilled and better paid; NAFTA opponents observe that displaced workers gain new employment in lower-skilled and lower income jobs. In fact, recent studies find that offshoring takes the shape of employment polarization (Oldenski 2014; Vallizadeh 2015). Using the same firm-level BEA data from the Moran and Oldenski (2014) study, Oldenski finds that offshoring takes the shape of job polarization by expanding high-skill jobs and a contracting middle-skill jobs (2014). Offshoring to Mexico has contributed to job polarization leading to increased income inequality as high-skill U.S. workers benefit and displaced middle-skill workers experience job and/or income loss.

*Effects on labor unions and wages*

The NAFTA investment chapter contained no language relating to labor standards, and there is little to no evidence that the NAFTA has supported any enforcement of existing labor standards, including child labor, not to mention an improvement in labor conditions as promised by the labor side agreement. In fact, beginning with the NAFTA negotiations there is no evidence that U.S. or Canadian officials approached Mexico about improving labor standards or enforceability of existing standards (Luce & Turner 2012). Since then, the AFL-CIO reports that despite some "modest" victories via the labor side agreement, the lack of an enforcement mechanism of the labor side agreement has led countries to stop responding to violations and complaints (2014). It is impossible to measure the extent to which the general lack of enforcement of labor standards has attracted FDI to Mexico. However, there is diverse and widespread evidence that the suppression of labor rights in Mexico has been key to supporting Mexico's low-wage exports in maquiladoras and mining (AFL-CIO 2014).

NAFTA opponents argue that the treaty has reduced U.S. wages and undermined labor unions inasmuch as it enabled firms to threaten workers with offshoring during wage bargaining sessions. A Cornell University study commissioned by the NAFTA Labor Commission found that since NAFTA, as many as 62 percent of U.S. union drives faced employer threats to relocate abroad, and the factory shut-down rate following successful union certifications tripled (cited in "Public Citizen" 2014: 11). The report found that companies made explicit threats to relocate to Mexico in more than 10 percent of the cases, and in other cases there were implicit threats, such as "given NAFTA we may need to reconsider our options," or handing out statistics to workers on the wage differentials between U.S. and Mexican autoworkers (cited in Hufbauer et. al. 2014: 17).

However, many economists tend to dismiss qualitative evidence as “anecdotal,” particularly NAFTA proponents (Hufbauer et. al. 2014: 17). Using aggregate industry-level data, Autor et. al. (2013) found that import competition from China had a “modest negative effect” on U.S. manufacturing wages but import competition from Mexico had no effect. However, there is little consensus on the relative causes of wage stagnation – technological change, trade and offshoring, declining productivity growth rates, and the myriad of factors causing de-unionization. Since wage stagnation is such an empirically contentious topic, it is problematic to try to isolate the effect of trade with Mexico on manufacturing wages from these other (potential) causes, although there is zero evidence that it supports wage growth. Therefore, import competition from Mexico either has either no effect or negative effects on wages.

*Increased industry consolidation and automation*

Considerations of the link between globalization and increased levels of automation are largely absent in studies on the income effects of the NAFTA (and other agreements). Proponents of U.S. trade policy argue that automation has had a much greater effect on job polarization than globalization (Autor 2013), while opponents of U.S. trade policy tend to be skeptical of this conclusion for a variety of reasons (Schmitt et. al. 2013). Similarly, President Obama and USTR Froman repeatedly argued that automation has a far more significant effect on total employment than offshoring and import competition. In so doing, they conceptually separated offshoring and automation as *mutually exclusive* processes (for one example see The White House 2014). However, there is growing evidence that globalization *causes* increased automation.

There is a large and growing body of literature documenting that trade and investment liberalization increases productivity growth. A recent review of literature on this relationship by De Loecker and Goldberg (2014) concluded, "…there is one robust finding that emerges from this literature: globalization improves industry performance." However, there no consensus on the causes of how trade and investment enhances productivity. A report released by The White House (2015) pointed to several different channels, notably, that trade and investment liberalization facilitates firm-level economies of scale which then increases firm productivity growth. The White House report then goes on to cite a number of studies in which "…the common mechanism is that exporting induces investments in technology" (2015: 8). For example, in the auto industry, Mexico's low-wage export platform has allowed U.S. automakers to amortize their investments in capital-intensive production facilities in the U.S., which increases automation in the industry. Similarly, the development of information technology has made service industries more productive and allowed the increased offshoring of services (Jensen 2011). In so doing, offshoring and automation are *complementary* processes in both manufacturing and services. Moreover, The White House report asserted that, "(1) trade stimulates innovation directly, and (2) trade alters the incentives to innovate" (2015: 11). In short, the NAFTA investment and financial services directly and indirectly facilitated economies of scale and increased automation, and automation has also been demonstrated to be a cause of growing income inequality (Brynjolfsson & McAfee 2014; Autor 2013).

### II.C. Environmental Impact

The NAFTA investment chapter provides that no Party may lower environmental standards to attract investment and that nothing in the agreement prevents a Party from

implementing environmental legislation, although that language is unenforceable. This section surveys literature that assessed outcomes of these provisions. Analyst Kevin P. Gallagher (2009) found that contrary to the fears of environmentalists and public interest groups during negotiations, "NAFTA did not result in Mexico becoming a 'pollution haven' for dirty U.S. firms seeking weaker environmental regulations" (2009: 6). Similarly, analysts Elizabeth Cole and Prescott Ensign concluded that U.S. manufacturing FDI into Mexico has generally been in the lower polluting industries, and in certain cases U.S. FDI had brought cleaner technology to Mexico (2005). Ironically, after NAFTA was enacted the amount of dirty industry decreased more in Mexico than in the United States.

There is little evidence that Mexico became a "pollution haven" for FDI because low-wage manufacturing industries are typically less pollution-intensive than capital-intensive manufacturing. Since NAFTA, capital-intensive and heavy polluting manufacturing industries have actually decreased in Mexico, including cement, pulp and paper, and base metals production.[202] For these capital-intensive enterprises, the costs of environmental regulation are relatively small in deciding production location as there are far larger costs for relocation. Moreover, many capital-intensive and pollution-heavy industries must be physically close to their markets, further dis-incentivizing plant relocation. Conversely, lower-polluting manufacturing industries have low costs of environmental regulation which are also small relative to the gains from low-wage labor.[203]

However, since NAFTA, environmental conditions have especially worsened in Mexico and there is evidence of NAFTA-inspired environmental degradation in the U.S. and Canada

[202] Gallagher 2004: 2.
[203] Cole and Ensign 2005.

(Gallagher 2009; Karpilow et. al. 2014). Although the majority of U.S. and Canadian FDI to Mexico was not motivated by low environmental standards, there is evidence that many foreign firms and domestic firms have not complied with Mexico's low environmental standards in addition to lax enforcement of these standards. In a World Bank survey of over 200 firms in Mexico, foreign firms were no more likely than domestic firms to comply with Mexican environmental law.[204] Rather, Mexico's poor environment record has been caused by the Mexican government's lack of commitment to environmental protection in the post-NAFTA period (Schatan & Carillo 2006). Further, the NAFTA environmental side agreement does not have a legally binding dispute mechanism and lacks the authority to confront these problems.

During NAFTA negotiations, as U.S. public interest groups, environmentalists, and some members of Congress began to pressure Mexican officials on Mexico's environmental record, Mexico doubled spending on environmental protection and initiated an industrial environmental inspection program. However, immediately after NAFTA took effect and the 1995 Mexican Peso Crisis set in, the environmental budget was cut drastically. According to Mexican government statistics, since 1994 real spending on environmental protection declined by roughly $200 million, or 45 percent, and coincidently the number of industrial environmental inspections had also decreased by 45 percent over the same period.[205] Since NAFTA was enacted, as manufacturing and mining FDI have multiplied hazardous and toxic output, government real spending on environmental enforcement and inspection have all declined (Schatan & Carillo 2006).

---

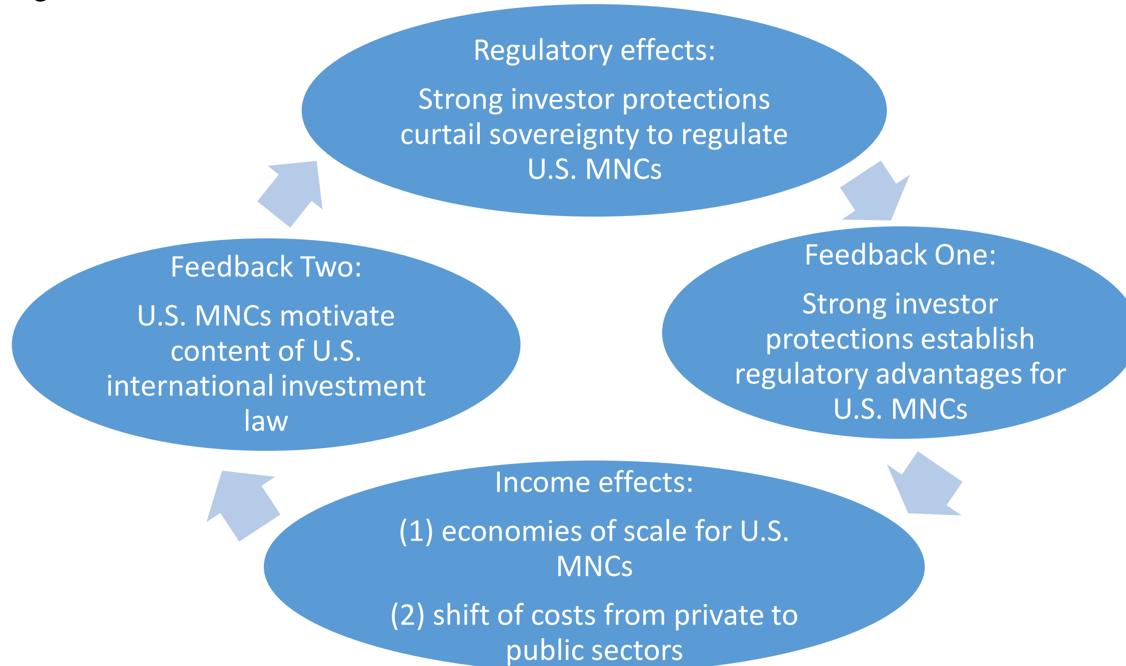
[204] Cited in Gallagher 2004: 3.
[205] Ibid.

According to Mexican government statistics, increased pollution costs 10 percent of Mexican GDP to clean up which not only surpasses Mexican GDP growth but is not a sustainable path to development (Gallagher 2009). Gallagher concludes, "Costly degradation is occurring because the proper mechanisms were not put in place to help Mexico manage its economic growth in an environmentally sustainable manner" (2004: 3). In sum, while the NAFTA did not cause Mexico to become a "pollution haven," the NAFTA lacks an enforcement mechanism for environmental protection while supporting Mexico's export-led growth model that is by no means environmentally sustainable.

## V. Feedbacks between the Income and Regulatory Effects of the NAFTA Investment Chapter

Figure Five illustrates the feedbacks between the income and regulatory effects of the NAFTA investment chapter. The regulatory effects curtailed state sovereignty to regulate regional MNCs, which established regulatory advantages for MNCS (providing the legal underpinning to corporate trade and investment strategy; mitigating social and political risks to FDI; institutionalizing market access and deregulations). In turn, the NAFTA investor protections had two income effects – they facilitated economies of scale for U.S. MNCs but also shifted costs from the private to public sectors.

Figure Five: Feedbacks Between Regulatory and Income Effects of the NAFTA Investment Agreements




*V.A. Feedback one: U.S. investor protections establish regulatory advantages for U.S. MNCs*

*V.A.1. Legal underpinning to corporate strategies*

The NAFTA investment chapter, and its interactions with the other key chapters in the NAFTA, provided the legal foundation to U.S. MNCs' trade and investment strategy. The NAFTA investment chapter has substantive interconnections with the other chapters in the agreement, notably, intellectual property, services, and tariffs. The NAFTA's strong intellectual property rights chapter allowed U.S. MNCs to offshore production to Mexico while retaining the most profitable inputs to the value chain, and it established long and strong patent monopolies, both of which guaranteed market outcomes for U.S. MNCs. Simultaneously, the inclusion of intellectual property in the definition of 'investment' provided U.S. MNCs with additional protection of their regional market shares. The financial services and services chapters, which incorporated key sections of the investment chapter, provided deregulations that reduced costs of

cross-border transactions for regional firms, thereby bolstering regional economies of scale. This 'trade-investment-intellectual property-services nexus' provides the legal underpinning of international supply chains, trade in services, and financial integration.[206] In turn, U.S. MNCs established regional economies of scale that would not only secure their market position in North America but would make them globally competitive in export markets around the world.

*V.A.2. Mitigating political and social risks*

The NAFTA investment chapter enhanced an investment-friendly climate in Mexico by mitigating/eliminating regulations that were perceived to be 'barriers' or restrictions to investment, establishing transparent and predictable rules, and reducing political and social risks to multinational investors. The contentious history of investment disputes, ranging from gunboat diplomacy to controversial ISDS cases, demonstrates that MNCs investing in developing countries are exposed to a variety of social and political risks. In U.S.-Mexico relations alone, beginning with the Mexican revolution in the early twentieth century, there is a provocative history of Mexican authorities expropriating U.S. investments in oil, agriculture, banking, and mining. Beyond expropriation, many countries in the global south have histories of nationalist or socialist policies that have negatively impacted the value of U.S. investments in those countries, such as requiring MNCs to hire domestically, transfer technology, invest in research and development,

---

[206] Deborah K. Elms & Patrick Low (editors), 'Global Value Chains in a Changing World,' *Fung Global Institute* (FGI), *Nanyang Technological University* (NTU) and *World Trade Organization* (WTO) (2013).

among others. U.S. MNCs depend upon investment law to mitigate the social and political risks of investing and operating in developing countries.

*V.A.3. Institutionalizing market access and deregulations*

Beginning with the NAFTA investment chapter, U.S. MNCs began to use investment law for regulatory advantages in foreign markets, as opposed to using investor protections only to mitigate risks. Regional MNCs explicitly used the NAFTA ISDS to strengthen their market position and reduce costs. Several NAFTA ISDS cases demonstrate that as regulatory norms evolve in a country, MNCs use ISDS as a political tool to lock-in a favorable regulatory environment.

Governments around the world have increasingly linked the fossil fuel industry to global warming and oil spills and regulatory norms have evolved to address these public issues. Yet the oil and gas industry has won billions of dollars in successful ISDS cases, thus weakening climate change and fossil fuel regulations in those countries, including the NAFTA cases cited above. Pharmaceutical MNCs have used ISDS to extend patent monopolies on medicines even though many countries have laws recognizing that patent laws evolve over time. In one NAFTA ISDS case, U.S. pharmaceutical company Eli Lilly and Company initiated an ISDS suit after Canada invalidated Eli Lilly's monopoly patent rights for an attention deficit hyperactivity disorder (ADHD) drug.[207] Tobacco has become a local public health issue all over the world as smoking has increased cancer rates which has strained state budgets, motivating governments to regulate tobacco companies, marketing, and products. In turn, tobacco companies have explicitly used

[207] Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2.

ISDS as a deregulatory tool.[208] Similarly, international regulatory norms on the free movement of capital have been shifting and evolving for at least the last hundred years, yet the NAFTA investment chapter cemented a stringent and limiting approach to capital controls that domestic lawmakers could not change even if they wanted to.

For some industries, such as fossil fuels, mining, and tobacco, ISDS is an indispensable tool for foreign market access and deregulations in those markets. In so doing, ISDS-inspired deregulations shifts costs from the private to public sectors. For example, deregulations of the fossil fuel and mining industries shift the costs of their carbon-emissions and pollution to local publics. In another example, deregulations of tobacco benefits the market share of tobacco MNCs while increasing public health expenditures for states.

*V.B. Feedback two: U.S. MNCs motivate the content of U.S. investment policy and law*

*V.B.1. Conflicts between U.S. MNCs and regulators*

The 2004 U.S. Model BIT revised the 1994 Model BIT, which had replicated the NAFTA investment chapter. The central revisions curtailed investor rights in two controversial areas, the 'minimum standard of treatment' and 'indirect expropriation' articles. In 2001, the U.S. was a defendant under these two provisions. Methanex, a Canadian firm that produces hazardous gas methanol, brought claims against the State of California seeking $970 million in damages for a ban on a fuel additive on the grounds that California denied Methanex the 'minimum standard of treatment' and effectively

[208] Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12; See Scott Sinclair, above n 19, at 37.

expropriated their investment by diminishing their market share. Although the U.S. had won the case, Canada and Mexico had lost cases under the same provisions, and the USTR and State Department claimed that in those cases the tribunal panels had adopted too expansive interpretations of the two provisions. The governments of NAFTA Parties issued an Interpretative Note that tied the legal interpretation of two articles to 'customary international law,' norms that have been 'crystallized' in international law through repeated decisions over centuries. The 2004 Model BIT included this Interpretative Note and therefore the U.S. had weakened investor protections in its official investment policy, contrary to the interests of U.S. MNCs.

In 2009, during the Obama administration's review of the 2004 Model BIT, corporate lobbyists across economic sectors advocated for a return to the NAFTA model. The Obama administration denied this reform and opted to maintain the approach taken in the 2004 Model BIT. They reasoned that the 2004 Model BIT had struck the appropriate balance between the rights of multinational investors against the rights of state regulators. Therefore, policymakers do not always favor multinational interests. However, the 2004 Model BIT did not prevent tribunals from ruling in favor of broad interpretations of the two articles. In fact, the vaguely worded articles provided tribunals with the autonomy to interpret the provisions on both a broad and narrow basis. In so doing, even though the 2004 Model BIT scaled back investor rights from the 1994 NAFTA model, it still afforded strong investor protections.

*V.B.2. Coherence between U.S. MNCs and regulators*

As the Obama administration reviewed the U.S. Model BIT, U.S. business groups united in their position, 'U.S. investors are at a competitive disadvantage compared to many of their key

competitors from countries that already have strong BITs with countries in key growth markets such as China, India and Russia.'[209] In the context of growing global competition, prominent business lobbyist Linda Menghetti explained to Congress, '…strong investment protections are vital and squarely within America's economic and national interest.'[210] In the same Congressional Hearing, Congressman John Larson was just as forthcoming, '…for U.S. foreign investors in other jurisdictions, we want to obtain greater substantive rights for our investors than domestic investors may have in those countries. That is sort of the value of the BIT.'[211]

MNCs rely on FDI for global competitiveness, and in turn, their enhanced market position allows them to expand domestic investment and employment. As MNCs realize larger economies of scale, they become vital sources of jobs, growth, and exports for states. In addition, MNCs are the main actors in the import and export of goods, services, and capital. For these reasons, among others, Congress is highly sensitive to the trade policy needs and concerns of U.S. MNCs. In so doing, U.S. MNCs have the structural political power to motivate the content of U.S. trade law and policy. As the Obama administration mulled proposals from labor unions and environmental groups to weaken investor protections, business lobbyists warned, 'An approach to [weaken investor rights] would reverse decades of U.S. support for strong and binding international rules that largely benefit the U.S. and its investors.'[212] The 2012 U.S. Model BIT included nearly

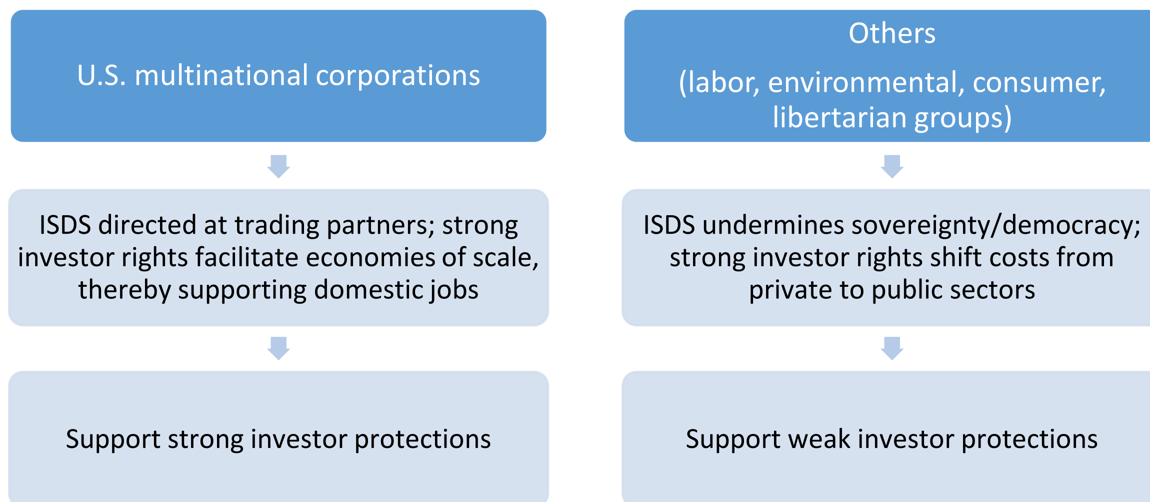
---

[209] Inside U.S. Trade, 'Text: Letter on BIT,' *Inside U.S. Trade*, Vol. 28, No. 3, 22 January 2010.
[210] Testimony before the Subcommittee on Trade of the House of Representatives Committee on Ways and Means: Investment Protection in U.S. Trade and Investment Agreements. *One Hundred Eleventh Congress*, First Session, May 14, 2009, Serial 111–200.
[211] Ibid.
[212] See Linda Menghetti, above n 77.

every proposal from U.S. business lobbies and reject all of the proposals from labor unions, environmental groups, and consumer advocacy groups.[213]

V. Conclusion: clarifying U.S. trade policy positions

Figure Six: Two Policy Positions in U.S. International Investment Law




Highlighting the feedbacks between the income and regulatory effects of the NAFTA investment chapter serves to clarify trade policy positions. U.S. MNCs and sympathetic U.S. politicians emphasize that the regulatory effects only affect other countries and facilitate the global competitiveness of U.S. MNCs, so they favor strong investor protections. Conversely, labor, environmental, public health, consumer advocacy,[214] libertarian groups,[215] and sympathetic politicians argue that strong investor protections undermine shift costs from the private to public sector. Therefore, these groups support weaker investor protections.

---

[213] The competing proposals from various stakeholders for the 2012 U.S. Model BIT were starkly different than those endorsed by the Obama administration.

[214] Some examples of labor, environmental, and consumer advocacy groups: AFL-CIO 2014; Sinclair 2015; Public Citizen 2014

[215] Some examples of libertarian groups' opposition to ISDS: Ikenson 2014; Lester 2015.

The purpose of Obama administration's revision of the 2004 U.S. Model BIT was to ensure that it had the appropriate balance between investors and regulators. In this interagency process, politicians favored one of two policy positions - proposals for strong investor protections and proposals for weaker investor protections. Politicians that supported strong investor protections endorsed the 2004 Model BIT. They dismissed concerns about ISDS because the U.S. has not lost a case and therefore ISDS is directed at the U.S.' trading partners. They emphasized the need for economies of scale for MNCs because MNCs create well-paying jobs and they are the main actors in the import and export of goods, services, and capital. In so doing, the private interests of U.S. MNCs became the public national interest as politicians endorsed proposals from U.S. MNCs in the 2012 Model BIT. This was a bipartisan policy position because it included the Obama administration, the 'New Democrat' coalition in Congress, and the majority of Congressional Republicans.

Conversely, politicians that advocated reform in the 2012 Model BIT sought to weaken investor protections. These politicians represented stakeholder groups from across the political spectrum, including, libertarian organizations, labor unions, environmental groups, and consumer advocacy groups. They asserted that ISDS undermined the U.S. Constitution and democratic processes domestically and abroad. MNCs had used ISDS to challenge a range of public values, such as climate change and public health legislation and financial regulations. Many of these stakeholder groups sought to reverse trends that have shifted costs from the private to public sectors, which is against the interests of U.S. MNCS. Thea Lee, Policy Director of the AFL-CIO, pleaded during a Congressional hearing, '…it is important that we clarify that the interests of the

U.S. are not entirely synonymous with the interests of U.S. multinational corporations.'[216]

Proposals to weaken investor protections were advanced by the majority of Congressional Democrats, a handful of libertarian Republicans, and bipartisan groups at every level of state government.

[216] Testimony before the Subcommittee on Trade of the House of Representatives Committee on Ways and Means: Investment Protection in U.S. Trade and Investment Agreements. *One Hundred Eleventh Congress*, First Session, May 14, 2009, Serial 111–200.

## Chapter Five: Negotiating the TPP Investment and Financial Services Chapters

I. Introduction

II. U.S. trade policy in the TPP

III. TPP negotiations in investment (Chapter 9) and financial services (Chapter 11)

IV. The "double movement" and the TPP investment and financial services chapters

"In our era, the economic and security realms are absolutely integrated."

-U.S. Secretary of State John Kerry, 2015, describing the national security significance of the TPP to a room full of analysts and policymakers at an Atlantic Council event

"…it is important that we clarify that the interests of the U.S. are not entirely synonymous with the interests of U.S. multinational corporations."

- Thea Lee, AFL-CIO Policy Director, 2009, during a Senate Hearing imploring for substantive reforms to U.S. negotiating positions in trade and investment agreements including the TPP

### I. Introduction

In a departure from past U.S. trade policy, the Obama administration's annual policy reports did not address the U.S. trade deficit. Rather, the USTR's stated objective is to increase exports and jobs, which has been the official purpose of the TPP since its inception. However, domestic and international political actors disagreed with the USTR on how to use the TPP to achieve that goal, which entered the domestic and international TPP negotiations with varying degrees of success. In process tracing of the investment negotiations, my dependent variables are the TPP investment and financial services chapters, and my independent variables are the USTR,

domestic political actors, and other country negotiating teams. While the "free trade" actors in the U.S., the USTR and U.S. MNCs, were politically insulated from competing domestic interest groups to write the TPP, "socialist" and "nationalist" political actors ultimately defeated the TPP in the U.S., dealing a significant setback to the "free traders."

## II. U.S. Trade Policy in the TPP

### II.A. Origins of the TPP

*Way station to the FTAAP?*

Although the TPP has an open accession clause for future members, TPP negotiators only sought to include other members of the Asia Pacific Economic Cooperation (APEC).[217] The story of the TPP began with the APEC. The first APEC ministerial meeting was called by Australian Prime Minister Hawke in 1989, and it included trade ministers from 12 Pacific Rim countries.[218] The stimulus for the meeting was a common recognition of "increasing interdependence" across the Asia Pacific, and the founding purpose of APEC was not to establish a trade negotiating forum but a political institution to promote trade and investment in the region.[219] Moreover, the leaders agreed that it was "desirable" to expand APEC's

---

[217] Unites States Trade Representative, Press Release, June, 2010, "TPP question and answer: Colombia and TPP"

[218] Ministers from Australia, Brunei Darussalam, Canada, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, The Philippines, Singapore, Thailand, and the United States gathered in Canberra, Australia on 6-7 November, 1989.

[219] APEC, "First Ministerial Meeting (Canberra, Australia, Nov 6–7, 1989) Chairman's Summary Statement," 1989. The original objectives of APEC were to deepen trans-Pacific integration by strengthening the multilateral trading system and providing a forum for consultations and voluntary cooperation and liberalization.

membership, in particular by including the "Three Chinas" (PRC, Hong Kong, Taiwan) which were "essential" to the region.[220]

In 1993, immediately after President Clinton signed the NAFTA, the U.S. hosted the first heads of state meeting of APEC, which included an expanded membership of 17 countries[221] including the "Three Chinas." In Congressional testimonies, officials from the Clinton administration explained that the Asia Pacific was the fastest growing region in the world, "critical" to the future of the U.S., and therefore strengthening APEC was "necessary."[222] The U.S.' goal was to reduce trade barriers across the Pacific, as the U.S. had large and growing trade deficits with East Asia. The following year, APEC leaders adopted the lofty goal of "complete" trade and investment liberalization in the entire region by the year 2020.

Towards the end of regional trade and investment liberalization, in 1997, APEC agreed to a formal, voluntary sectoral liberalization program. Only two years later it became evident that voluntary liberalization was a "non-starter" and trade ministers would leave the issues to be addressed in the new WTO Doha Round (Kim et al 2011). However, the Doha Round was essentially dead on arrival due to irreconcilable differences in agriculture and the negotiations entirely collapsed by 2006. As the Doha Round faltered, APEC's Business Advisory Council began promoting an APEC-wide FTA as the "only means" that APEC could realize "complete" liberalization, called the Free Trade Area of the Asia Pacific (FTAAP).[223] In the 2006 APEC

[220] APEC, "First Ministerial Meeting (Canberra, Australia, Nov 6–7, 1989) Chairman's Summary Statement," 1989
[221] Ministers from Australia, Brunei Darussalam, Canada, the People's Republic of China, Hong Kong, Indonesia, Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, the Republic of the Philippines, Singapore, Chinese Taipei, Thailand, and the United States of America participated in the Fifth Asia-Pacific Economic Cooperation (APEC) Ministerial Meeting convened in Seattle, Washington November 17-19, 1993.
[222] 1993 Committee on Foreign Affairs, APEC
[223] Cited in Bergstein 2007.

meeting in Vietnam, President Bush urged other APEC members to "seriously consider" negotiating the FTAAP and to "further studies on ways and means to promote" the initiative. However, the FTAAP faced instant obstacles. In 2007, a U.S. Chamber of Commerce spokesperson mulled,

> "Negotiating an FTAAP is a long-term (15-20 year) proposition, and it won't be easy to pull off. On the U.S. side, anti-trade and especially anti-China sentiment is an obvious impediment. In Asia, it isn't certain that China and Japan will be willing to negotiate a high standard FTA that includes most, if not all, economic sectors."[224]

The TPP was the USTR's first step towards the FTAAP.[225] If the FTAAP was the "Plan B" to the failed WTO Doha Round, then the TPP was the "Plan B" to the slug-paced FTAAP.

*TPP Begins*

The TPP grew out of a much smaller FTA originally called the Trans-Pacific Strategic Economic Partnership Agreement, which began on the sidelines of an APEC meeting in 2002 between Chile, New Zealand, and Singapore.[226] The goal was to create a "high standard" trade agreement "which would have the potential to grow into a larger strategic agreement" within APEC, and the agreement had an open accession clause for future members.[227] The legal

---

[224] "Free Trade Agreement Asia Pacific (FTAAP)," U.S. Chamber of Commerce, (available: https://www.uschamber.com/free-trade-agreement-asia-pacific-ftaap)

[225] "Remarks by U.S. Trade Representative Ron Kirk at Singapore Management University on U.S. Asia-Pacific Trade Policy," Office of the United States Trade Representative, Press Release, April, 2011.

[226] Joint Press Statement from Brunei Darussalam, Chile, New Zealand and Singapore Ministers, July, 2005, "Brunei Darussalam, Chile, New Zealand and Singapore Conclude Negotiations on a Trans-Pacific Strategic Economic Partnership Agreement".

[227] Ibid.

language of this FTA was based on the U.S.' FTAs with Singapore and Chile so as to harmonize trade law and minimize difficulty for MNCs.[228] Since it was based on U.S. FTAs it was a "compressive, high standard" agreement that went well beyond WTO commitments, which contrasted the numerous, "low standard" Asian FTAs that focus mainly on tariff reductions. Brunei joined later in the negotiations and the agreement was signed in 2005 except for the investment and financial services chapters, in which negotiations were contentious and were left for future conclusion (Elms 2015: 2). With the WTO Doha Round deadlocked and with the FTAAP a distant prospect, the USTR announced that it would join the investment and financial services negotiations of the small FTA.[229] The U.S.' original motivation was to "…further regional economic integration with like-minded countries committed to high-standard [trade] agreements."[230] Immediately after the USTR's announcement, Australia, Peru and Vietnam also joined the talks and the name of the agreement was shortened to the Trans-Pacific Partnership.

II.B. Trade Policy Contexts

II.B.1. Rule-making in a global economy

*Aftermath of the Doha Round*

As the WTO Doha Round faltered, WTO Director-General, Pascal Lamy, mulled over the state of the global trading system in a speech in Australia in 2012.[231] He reasoned, "This is no longer the world of the twentieth century dominated by the U.S. pillar on one side and the

---

[228] United States Trade Representative, "2008 Trade Policy Agenda".
[229] Ibid.
[230] Ibid.
[231] "The Future of the Multilateral Trading System," Speech by Pascal Lamy, WTO Director-General, at the Richard Snape Lecture, Melbourne, Australia, November, 26, 2012, (available: https://www.wto.org/english/news_e/sppl_e/sppl258_e.htm)

European pillar on the other."[232] Rather, he observed, the twenty-first century is a "multipolar world" in which major developing countries "are no longer policy takers."[233] The major developing countries, notably China, created new supply and demand pulls and had been able to translate their rapid economic growth into increasing geopolitical leverage in a range of international institutions. The Obama administrations trade policy was in large measure a confrontation with the opportunities and challenges associated with the rise of major developing economies, especially China. With the aim of revitalizing the Doha Round, the Obama administration pursued other major deals concurrent to the TPP.[234]

In 2008, the U.S. and China began dialogue for a BIT, as U.S. business lobbies coveted investment opportunities in China, valuing it as a $250 billion dollar market (USCBC 2012). USTR Kirk commented on the U.S.-China BIT, "We firmly believe that China can contribute even more to global prosperity, if it opens its market with the same dedication that has characterized its pursuit of entry into other countries' markets over the past decade."[235] In late 2011, the U.S. and the EU committed to reignite dialogue on investment policy that ended in 2008, largely to address China's unprecedented rise to become a capital exporter and to craft a set of rules "to deal with the expected increase in [FDI] from China."[236] By 2013, this dialogue had expanded into negotiations for the U.S.-EU FTA (Transatlantic Trade and Investment

---

[232] Ibid.
[233] Ibid.
[234] "Remarks by Ambassador Michael Froman at the Council on Foreign Relations: The Strategic Logic of Trade," Remarks by USTR Ambassador Michael Froman at the Council on Foreign Relations, New York, N.Y. June 16, 2014.
[235] "Remarks by U.S. Trade Representative Ron Kirk at Singapore Management University on U.S. Asia-Pacific Trade Policy," Office of the United States Trade Representative, Press Release, April, 2011.
[236] "Revived U.S.-EU Investment Dialogue Will Focus on Third Countries," *Inside U.S. Trade*, Vol. 28, No. 42, October 28, 2011.

Partnership, T-TIP), underscoring the USTR's wrenching concern about creating trade and investment rules that address China's competitive challenges to U.S. industries. A spokesman from the Transatlantic Business Coalition implored Congress,

> "If…[the USTR and EU]…can agree on common standards, these will become global standards for our products around the world rather than China's. This will give us an enormous competitive advantage. The biggest potential benefit of T-TIP is, therefore, in the area of regulation."[237]

*Declining U.S. market shares in East Asia*

East Asia has been home to the world's fastest growing markets, and not only in China. According to the U.S.-ASEAN Business Council, while the ten ASEAN countries may be small markets, cumulatively, the ASEAN region would be a market size comparable to China or India.[238] However, despite the importance of East Asian markets to the U.S., the U.S. was experiencing declining trade and market shares throughout the region, which made the USTR increasingly uneasy. Initially inspired by the Asian financial crisis (1997), East Asian countries pursued FTAs intra-regionally and then extra-regionally, although not with the U.S. In 2000, there were 3 Asian FTAs, by 2011 there were more than 50 with 80 more under negotiation.[239] China was the principle actor in regional FTAs by initiating or being invited to nearly all the

---

[237] Statement of Stuart E. Eizenstat on behalf of the Transatlantic Business Coalition in "U.S.-EU trade and investment partnership negotiations: hearing before the Subcommittee on Trade of the Committee on Ways and Means," *U.S. House of Representatives*, One Hundred Thirteenth Congress, first session, May 16, 2013.
[238] "Experts: U.S. Businesses Would Benefit From ASEAN Single Market," *Inside U.S. Trade*, Vol. 28, No. 47, December 3, 2010.
[239] "The Trans-Pacific Partnership: Opportunities and Challenges", Hearing before the Committee on Finance, *U.S. Senate*, One Hundred Thirteenth Congress, First Session, April 24, 2013.

agreements. China rose to become a global leader in world trade by importing parts and components from the ASEAN countries for final assembly into finished goods for export to the U.S. and EU. China piloted two mega-regional FTAs that were centered on the ASEAN, the first was the "ASEAN plus three" proposal (ASEAN plus China, Japan, and Korea), however, those negotiations stalled due to differences between China and Japan. In response, talks moved forward for the "ASEAN plus six" agreement (ASEAN plus China, Japan, Korea, India, Australia, New Zealand) which eventually materialized into the Regional Comprehensive Economic Partnership (RCEP) with formal negotiations beginning in 2012. Although East Asia has been dependent upon exporting to the U.S. market, the U.S. was not invited to any regional FTAs, except for bilateral FTAs with Australia, Singapore, and (more recently) Korea.

Simultaneously, many East Asian countries signed FTAs with U.S. competitors, including the EU. The consequences were detrimental to the U.S. – the U.S. share of total regional trade in East Asia was eroding while there were rising shares of intra-regional trade and extra-regional trade with U.S. competitors.[240] U.S. policymakers and business analysts were becoming increasingly anxious "solely from the static discriminatory effects" of ASEAN-centric integration.[241] Apart from trade, nearly all East Asian countries maintained highly protective investment regimes, especially in service sectors. In addition, many expanding domestic markets were uncompetitive for U.S. companies seeking to invest there because of the monopolies of state-owned enterprises.[242] Speaking to the Council on Foreign Relations, USTR Froman

---

[240] "Increasing U.S. Exports, Creating American Jobs: Engagement with the Trans-Pacific Partnership", Office of the United States Trade Representative, Press Office Blog, November, 2009.
[241] Ibid.
[242] "The Trans-Pacific Partnership: Opportunities and Challenges", Hearing before the Committee on Finance, *U.S. Senate*, One Hundred Thirteenth Congress, First Session, April 24, 2013.

presented the dilemma, "Washington must make a decision: either lead on global trade or be left on the sidelines. There really is no choice."[243]

*ASEAN is the "fulcrum" of East Asian integration*

In 2009, the new Obama administration cancelled their involvement in all TPP negotiations for the year to allow for an interagency review of trade policy. The Singapore Minister of Trade and Industry responded that East Asian integration would continue without the U.S.[244] He explained that negotiations were moving forward for the "ASEAN plus three" and the "ASEAN plus six" and that if TPP talks continue to delay then the "ASEAN plus" model would be the building block toward the FTAAP.[245] In contrast, USTR Kirk argued that in 2008, as the U.S. joined the TPP the other bigger economies of APEC began to "rethink their approach to FTAAP," with the TPP as a building block rather than the "ASEAN plus" model.[246] As the "ASEAN plus six" institutionalized into the RCEP, the U.S.-led TPP and the China-led RCEP became competing visions of trade and investment rules for East Asia. President Obama summarized the U.S. perspective, "If we do not help to shape the rules so that our businesses and our workers can compete in those markets, then China will set up rules that advantage Chinese workers and Chinese businesses."[247]

---

[243] "Remarks by Ambassador Michael Froman at the Council on Foreign Relations: The Strategic Logic of Trade," Remarks by USTR Ambassador Michael Froman at the Council on Foreign Relations, New York, N.Y. June 16, 2014.
[244] "Singapore Trade Minister Urges TPP Resumption, Sees Crowded Agenda", *Inside U.S. Trade*, Vol. 27, No. 23, June 12, 2009.
[245] Ibid.
[246] Ibid.
[247] "Remarks by President Obama and Prime Minister Renzi of Italy in Joint Press Conference," *The White House*, Office of the Press Secretary, April 17, 2015.

Secretary of State Clinton explicitly identified the ASEAN as the "fulcrum" for East Asia's emerging economic architecture.[248] Obama used trips and speeches to urge ASEAN countries to join the TPP while the USTR and U.S. business community established "Trade and Investment Framework Agreements" with ASEAN countries to facilitate and encourage their entrance into the TPP.[249] Malaysia joined the TPP in spring, 2010, and became the fourth ASEAN member in the TPP, alongside Brunei, Singapore, and Vietnam. However, policymakers understood that any U.S. trade and investment agreements in the region, including the TPP, would require overcoming fierce domestic political and social resistance.

### II.B.2. Domestic Political Context

*Negotiating without Congressional negotiating objectives*

In 2011 the Obama administration introduced legislation to Congress to implement three FTAs negotiated by the Bush administration with South Korea, Panama, and Colombia. The official U.S. ITC study on the three FTAs found that they would increase the U.S. trade deficit and the ensuing Congressional battle over the passage of the agreements demonstrated waning popular support for trade and deep divisions in Congress over the issues. The agreements would narrowly pass Congress, which had a Republican majority at the time, however, about two-thirds of all House Democrats and a growing minority of Republicans voted against the FTAs.[250] As trade politics raised hostilities in Congress, the USTR planned to not pursue Trade Promotion

---

[248] "Clinton's Speech on America's Engagement in the Asia-Pacific, October 2010," Secretary of State Hillary Rodham Clinton, October 28, 2010.
[249] "U.S. to Use TIFA Process to Prepare Interested ASEAN Countries for TPP", *Inside U.S. Trade*, Vol. 28, No. 46, November 26, 2010.
[250] "Trans-Pacific Trade Talks in Malaysia Underscore Secrecy of Negotiations, Problems With Potential Deal," Dec. 7, 2011, Statement of Lori Wallach, Director, *Public Citizen's Global Trade Watch*

Authority (TPA, formerly called "fast-track" authority) until the later stages of the TPP negotiations.[251] Since TPA is the means that Congress provides negotiating objectives to the USTR, Congress was sharply divided and many frequently appealed to the administration for TPA legislation. Ranking Sen. Hatch was a particularly outspoken critic of the administration,

> "…TPA is not something the President asks for after an agreement is negotiated. TPA establishes the foundation upon which trade agreement negotiations and meaningful consultation take place…Federal Register notices and staff-level meetings are not a substitute for TPA. Moreover, many of the elements of the current TPP negotiation do not reflect congressional directives."[252]

USTR Kirk and Ranking House Rep. Levin responded that the USTR did not need negotiating objectives from Congress if Congress and stakeholders would be consulted and engaged in developing the negotiating objectives.[253]

*"Stakeholder engagement" replaces Congressionally mandated negotiating objectives*

The USTR embarked on an unprecedented campaign to engage with a broad range of stakeholders throughout the country via briefings, advisory meetings, comments in federal register notices, and face-to-face stakeholder events. Beginning in the sixth round in Singapore, negotiators began to schedule stakeholder meetings parallel to negotiating rounds, formalizing

[251] "Kirk Says Administration Will Seek Fast Track Authority, Predicts Approval", *Inside U.S. Trade*, Vol. 27, No. 49, December 18, 2009.
[252] Cited in "President's 2012 trade agenda: hearing before the Committee on Finance," United States Senate, One Hundred Twelfth Congress, second session, March 7, 2012.
[253] "Kirk Says Administration Will Seek Fast Track Authority, Predicts Approval", *Inside U.S. Trade*, Vol. 27, No. 49, December 18, 2009.

the stakeholder outreach program.[254] At the meetings, registered stakeholders had an opportunity to make presentations to officials during negotiating rounds and some delegations met privately with negotiators. However, stakeholders and Congress members became increasingly frustrated with the USTR's engagement and stakeholder efforts because the USTR would not divulge its specific negotiating objectives or strategies in a range of key issues.

The USTR responded that at the beginning of negotiations the TPP members had signed a confidentiality agreement, "The understanding calls for each government to disseminate its negotiating proposals, as well as those it receives from its TPP partners, solely to government officials and individuals who are part of the government's domestic trade advisory process."[255] Throughout the negotiations, Congress members and stakeholders frequently called upon the USTR for greater quantity and quality of consultations, higher levels of transparency, access to draft texts and the development of negotiating positions, and Congress members repeatedly introduced (unsuccessful) legislation demanding access to these materials. Concurrently, more than 600 representatives from U.S. MNCs were named official U.S. trade advisors with access to the texts and talks.[256] Through leaks from the negotiations, a broad range of Congress members and stakeholders discovered that their proposals were "virtually ignored" by the USTR, further straining the creditability of stakeholder outreach as a viable replacement to TPA. As negotiations progressed, the USTR shortened the length of stakeholder meetings and in 2013 they discontinued stakeholder meetings altogether as negotiators stopped holding formal

---

[254] Elms 2015: 13.

[255] "Fact Sheet: Transparency and the Trans-Pacific Partnership," Office of the United States Trade Representative, Press Release, June, 2012.

[256] "Trans-Pacific Trade Talks in Malaysia Underscore Secrecy of Negotiations, Problems With Potential Deal," Dec. 7, 2011, Statement of Lori Wallach, Director, *Public Citizen's Global Trade Watch*

negotiating rounds and instead referred to meetings as "check-in sessions" (Elms 2015). Later, as negotiations began to face conclusion, the Obama administration sought TPA from Congress.[257] There is no evidence that the TPA process or legislation influenced the USTR's negotiating objectives in the investment and financial services chapters. The process of the USTR's development of negotiating objectives and an account of the passage TPA is presented in Annex Five.

II.C. U.S. Objectives in TPP

As mandated by TPA, the U.S. ITC had to model and report the potential effects of the TPP before Congress votes to implement it as law. The report was released in May, 2016 and it projected that in the U.S. the TPP would have trivial income effects although mostly net gains, "By year 2047, U.S. real GDP would expand by $67 billion, or by 0.18 percent."[258] The TPP had never been primarily about realizing "gains from trade," rather, its purpose reflects a set of broader political and economic objectives. The Obama administration negotiated the TPP without Congressional mandate and then pushed it through a hostile Congress because the TPP is part of their comprehensive strategy for trade and security in Asia, and their objectives in the TPP reflect a combination of industrial strategy, trade strategy, and foreign policy.

| Table 9: Synthesis of U.S. Objectives in the TPP | | |
|---|---|---|
| Industrial Strategy | Trade Strategy | Foreign Policy |

[257] Bipartisan Congressional Trade Priorities and Accountability Act of 2015.
[258] "Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors," United States International Trade Commission, May 18, 2016, Publication Number: 4607, Investigation Number: TPA-105-001.

| | | |
|---|---|---|
| • Expand U.S. exports and support jobs while countering exclusive, Asian regionalism<br>• Competitive liberalization: expand TPP membership; encourage liberalization in China; leverage WTO outcomes | • Use TPP to realize FTAAP; revitalize the WTO Doha Round<br>• Establish norms in trade- and investment-related transnational governance<br>• Strengthen partnerships with other countries<br>• Spur broad-based economic development | • Compliment and support the "Asia pivot" military and security strategy<br>• Establish mechanisms for cooperation and resolving frictions<br>• Demonstrate that the U.S. is a Pacific power committed to the region |

*TPP as U.S. industrial strategy*

The Bush administration joined the TPP because they were seeking to increase trade and investment links with the world's fastest growing regions in Asia so as to expand U.S. exports and support jobs. Then the 2008 global financial crisis led to an unprecedented "jobless recovery" and the Obama administration made job creation a top priority.[259] U.S. policymakers and their advisors argued that 95 percent of the U.S.' potential customers were abroad, and therefore, exports would be central to the country's economic recovery.[260] To the end of increasing exports, the USTR uses FTAs to establish technical regulations and market access rules that support the global competitiveness of U.S. industries (U.S. MNCs). The objectives of the TPP are an industrial strategy inasmuch as the TPP will (1) establish a legal foundation to trade and investment in the Asia-Pacific that advantages U.S. commercial interests, and (2) will expand TPP membership to as much of APEC as possible, or at least stimulate new Asian trade and investment negotiations with the U.S., including the U.S.-China BIT.

---

[259] President Obama announced the National Export Initiative during his 2010 State of the Union address, "We will double our exports over the next five years, an increase that will support two million jobs in America." The federal government's lead export promotion agency, the International Trade Administration, identified the TPP as one of means to that end as the USTR had publicly sought to conclude the TPP by the end of 2012.
[260] Cited in "Exports' Place on the Path of Economic Recovery," U.S. Senate, Subcommittee on International Trade, Customs, and Global Competitiveness, December 9, 2009.

The first component of the U.S. industrial strategy in the TPP is to establish "WTO-plus" standards in the Asia-Pacific, which function to support and facilitate U.S.-led industries (U.S. MNCs) that are capital-intensive and/or rely upon high intellectual property content economic activities. "WTO-plus" agreements are FTAs that go beyond WTO commitments; the TPP goes beyond the scope of past U.S. FTAs by incorporating new "twenty-first century" issues, especially vis-à-vis pan-Pacific trade and investment. The TPP sets precedent for the most relevant "twenty-first century" issues, including, a range of new intellectual property areas, regulations on state-owned enterprises, digital economy rules, and enforceable labor and environmental standards.[261] The USTR integrated these new issues into the existing U.S. FTA template so as to support the competitiveness of U.S. MNCs in the Asia-Pacific. In fact, according to Deputy USTR Marantis, the USTR developed many of the TPP's new regulations on state-owned enterprises and intellectual property for future negotiations with China[262] (which is also true for sections of the investment and financial services chapters). Simultaneously, establishing FTAs with the Asia-Pacific will serve to boost U.S. trade shares in the region during a time of declining U.S. trade shares and increasing Asian regionalism.

The second component of the U.S. industrial strategy in the TPP is the U.S. trade strategy of "competitive liberalization," in which U.S. trade policymakers use regional FTAs with developing countries to encourage third party developing countries to adopt and/or negotiate market-oriented policies so as to compete for U.S. capital and import markets. Most

---

[261] Signifying that as the U.S. has lost competitiveness to countries with low standards/enforcement in labor and the environment and that policymakers have incorporated relevant regulations as part of the U.S. industrial strategy.
[262] Cited in "Hearing on Trans-Pacific Partnership," Hearing Before the Subcommittee on Trade of the Committee on Ways and Means, *U.S. House of Representatives*, One Hundred Twelfth Congress, First Session, December 14, 2011.

significantly, "competitive liberalization" can leverage outcomes in WTO negotiations, which is timely considering the stalemate of the Doha Round. In the TPP, the U.S. "competitive liberalization" strategy is to encourage other APEC members to either join the TPP or negotiate the FTAAP so as to compete for transnational capital and import markets. With respect to China, U.S. negotiators aimed to use the TPP to encourage domestic reforms in China in the direction of TPP obligations.[263]

*The TPP as U.S. trade strategy*

While working to win support for TPA, USTR Froman detailed the Obama administration's trade strategy in his talk "The Strategic Logic of Trade" at the Council on Foreign Relations in June, 2016. The main goal of the Obama administration's trade strategy was to revitalize the WTO Doha Round, and to this end they had three objectives – (1) "establishing and enforcing the rules of the road," (2) "strengthening U.S. partnerships with other countries," and (3) "spurring broad-based economic development."[264] The trade strategy of "establishing the rules of the road" is in large measure addressing China's competitive challenges in a range of multilateral forums. From the perspective of the USTR, the TPP is the vehicle by which the U.S. could establish its role in the emerging "economic architecture" of the Asia-Pacific that would otherwise be dominated by China.[265] To that end, the TPP establishes a far-reaching set of trade-

[263] "The TPP & RCEP: Regional Trade Agreements with Tim Stratford." *China in the World*. Carnegie-Tsinghua Center. June 30, 2014.
[264] "Remarks by Ambassador Michael Froman at the Council on Foreign Relations: The Strategic Logic of Trade," Remarks by USTR Ambassador Michael Froman at the Council on Foreign Relations, New York, N.Y. June 16, 2014.
[265] "Former Commerce Official Presses For Comprehensive U.S. Asia Strategy," *Inside U.S. Trade*, Vol. 28, No. 12, March 26, 2010.

related and investment-related regulations that reflect U.S. "values and interests" (discussed in Chapter 1, Section II.C.).

USTR Froman explained that the TPP will strengthen U.S. partnerships with countries in Asia in the context of mounting military and security challenges in the region. He reasoned, "For many of the countries that would be party to the TPP, the economic benefits of the agreement are sweetened by the expectations that the U.S. will become more deeply embedded in the region."[266] That is, increasing U.S. commercials ties with Asia strengthens U.S. political partnerships in Asia which is especially important given recent security developments in the region. Lastly, according to USTR Froman, the TPP strives for broad-based, inclusive economic growth and development to both grow markets for U.S. exports and promote political and social stability.[267] And above all, the USTR planned to use the TPP as a pathway to opening negotiations for an FTAAP with an ultimate goal of revitalizing the WTO Doha Round.

*TPP as U.S. foreign policy*

Beginning in 2011, the Obama administration folded the TPP into their broader "Asia pivot"[268] strategy, which is a diplomatic and security strategy in the Asia-Pacific. Beginning with President Obama's original announcement of the Asia pivot strategy in 2011[269] through its later

[266] "Remarks by Ambassador Michael Froman at the Council on Foreign Relations: The Strategic Logic of Trade," Remarks by USTR Ambassador Michael Froman, Council on Foreign Relations, New York, N.Y. June 16, 2014.
[267] Ibid.
[268] U.S. officials have begun to refer to the "Asia Pivot" as the "Rebalance," for purposes of clarity I will refer to it as the "Asia pivot" so as not confuse it with other global "rebalance" strategies, namely the G20 "rebalance" strategy and China's "rebalance" strategy, which are each distinct projects.
[269] "Remarks By President Obama to the Australian Parliament", The White House, Office of the Press Secretary, November, 17, 2011.

formulations,[270] the Asia pivot has three motivations, to advance (1) security, (2) prosperity, and (3) democracy in the Asia-Pacific. The security component[271] of the Asia pivot is to address the range of military and security challenges in the Asia-Pacific, including, escalating military tensions between the U.S. and China in the South China Sea, North Korea's nuclear proliferation, cyber-security, counter-terrorism, among others. As the U.S. developed the Asia pivot objectives and implemented the strategy, the TPP co-evolved to become the "prosperity" component, or the vehicle to advance the economic and social objectives of the strategy. Officials from the Obama administration have consistently described the TPP and the Asia pivot as mutually reinforcing. From the military perspective, Secretary of Defense Chuck Hagel commented on the relationship between TPP and the Asia pivot, "Security is a critical foundation of prosperity. Trade cannot flourish in waters that are contested by force."[272] From the trade perspective, USTR Froman offered, "At a time when there are unresolved territorial and maritime disputes, TPP can reinforce our presence in the region and our interest in establishing methods of cooperation and mechanisms for resolving frictions."[273] To that end, the international

[270] "Fact Sheet: Advancing the Rebalance to Asia and the Pacific", *The White House*, Office of the Press Secretary, November 15, 2015.

[271] According to U.S. Secretary of Defense Leon Panetta, the Asia pivot has four security objectives, (1) promoting international rules and order, (2) deepening and broadening bilateral and multilateral partnerships, (3) enhancing and adapting U.S. presence, and (4) making new investments in capabilities needed to project power and operate in the Asia-Pacific region. Further, Secretary Panetta asserted, "the Navy will reposture its forces from today's roughly 50/50 percent split between the Pacific and the Atlantic to about a 60/40 split between those oceans."

[272] "Malaysian Institute of Defense and Security As Delivered by Secretary of Defense Chuck Hagel," Malaysian Ministry of Defense, Kuala Lumpur, Malaysia, Sunday, August 25, 2013.

[273] "Remarks by Ambassador Michael Froman at the Council on Foreign Relations: The Strategic Logic of Trade," Remarks by USTR Ambassador Michael Froman, Council on Foreign Relations, New York, N.Y. June 16, 2014.

governance regulations and dispute resolution mechanisms contained in the TPP will serve to strengthen the multilateral goals of the Asia pivot.

*U.S. negotiating objectives in the TPP investment and financial services chapters*

Since the development of the U.S. BIT program in the Cold War, the U.S. had well developed negotiating objectives for investment and financial services agreements, broadly, to facilitate and protect the free flow of private capital balanced against the need for public purpose regulations. Since there is a high degree of consistency between the NAFTA and the TPP investment and financial services chapters, the U.S.' negotiating objectives in the NAFTA chapters largely apply to the TPP chapters (Chapter 2, Section II.B. and II.C.). These negotiating objectives advance the overall TPP objectives by promoting intra-TPP commerce, enhancing U.S. commercial ties and partnerships in the region, and providing essential infrastructure to an increasingly digital global economy.

III.A. 2010: TPP negotiations formally begin while Congress attempts to pressure the USTR

The USTR joined the TPP talks in the twilight of the Bush administration and with the uncertainties of incoming President-elect Obama as he had made campaign promises for trade policy reform. In 2009, the new Obama administration suspended all trade negotiations to conduct an interagency review of trade and investment policy. The President avoided making any formal commitments to the TPP throughout the year, largely because the new administration was concerned that none of the larger Asian countries were members of the TPP. In October, Secretary of State Clinton encouraged Japan's membership in the TPP during a meeting with her

Japanese counterpart.[274] Japan was holding domestic, "high-level consultations" to which the Obama administration responded with "substantial gratification."[275] They agreed to begin bilateral consultations during Japan's internal review process, in which the USTR reaffirmed that Japan had to be willing to put all sectors on the negotiating table, including very politically sensitive agricultural industries.[276] During the President's trip to Japan in early November, 2009, he officially announced that the U.S. will join the TPP with its current the seven members (Japan would join in 2012) and then expand to more countries. TPP negotiations formally began in 2010 and there were four negotiating rounds that year. Malaysia expressed interest in joining in the fall and the TPP members unanimously approved. Deputy USTR Marantis explained the U.S. approach to new members, "We will consider and welcome new negotiating partners based on their readiness and ability to bring commercial value, balance, and ambition to the negotiations."[277] Also in 2010, Canada and Mexico informally communicated interest in membership.

III.A.1. 2010 Investment and financial services negotiations

There is little public information about the three negotiating rounds in 2008 between the U.S., New Zealand, Singapore, Chile, and Brunei. However, according to trade policy advisors, the investment chapter was negotiated from the 2004 U.S. Model BIT and the financial services chapter was based on the same chapter from the U.S.-Korea FTA signed in 2007, which is

[274] Ibid.
[275] "U.S. Signals Interest in Japan Moving on Bilateral Issues in TPP Context", *Inside U.S. Trade*, Vol. 28, No. 42, October 29, 2010.
[276] Ibid.
[277] "Remarks by Ambassador Demetrios Marantis at the Center for Strategic and International Studies," January 28, 2010, Center for Strategic and International Studies, Washington, DC.

confirmed by the high degree of consistency between the financial services chapters of the TPP and the U.S.-Korea FTA. In February 2009, the Obama administration announced that they would "review the implementation of our FTAs and BITs to ensure that they advance the public interest."[278] During this interagency review process the U.S. suspended trade and investment negotiations, including the TPP and the U.S-China BIT (which also began in 2008). In spring, 2009, the USTR and the Department of State co-led a review of the 2004 Model BIT, which would determine U.S. negotiating positions in the TPP.

The purpose of the review of the 2004 Model BIT was two-fold, first, it was to ensure that U.S. trade and investment policy struck the right "balance" between advancing U.S. commercial interests abroad while ensuring necessary regulatory space domestically, and second, it was to update the 2004 Model BIT with new issues especially vis-a-vis trade and investment with Asia.[279] The Obama administration's new Model BIT (2012) would serve as the basis for negotiations in both the TPP and the U.S.-China BIT. Therefore, the positions that the U.S. assumed in the TPP investment and financial services negotiations were also developed as negotiating positions for the vitally important U.S.-China BIT, which helps to explain the U.S.' policy orientation in the TPP.

| Table 10: TPP 2010 negotiations formally begin while Congress attempts to pressure the USTR | | | | | | |
|---|---|---|---|---|---|---|
| Negotiating issues in investment and financial services | Domestic interactions with the USTR | | | TPP negotiators | | |
| | Labor unions, NGOs, civil society organizations | Business lobbies, private sector trade policy advisors | Congress | P-4 (Chile, Brunei, New | Australia, Peru, Vietnam, Malaysia | Mexico, Canada, Japan |

[278] Hearing before the Committee of Ways and Means, US House of Representatives on "Investment Protection in US Trade and Investment Agreements," One Hundred Eleventh Congress, First Session, May 14, 2009
[279] Ibid.

|  |  |  |  | Zealand, Singapore) |  | (not yet members) |
|---|---|---|---|---|---|---|
| Investor rights and investor-state dispute settlement (ISDS) | Scale back investor rights to support public purpose regulations; broad exceptions for labor and environmental regulations; reform/eliminate ISDS | Investor rights must be as strong or stronger than competitors' BIT; any exceptions are disadvantageous to the U.S.; ISDS is a priority | Democrat-controlled Congress pressures USTR for reforms reflecting the concerns/ interests of unions and public interest groups; others advocate little change to trade policy to support jobs | New Zealand and Australia demand exclusion from ISDS |  | Canada expresses interest in joining TPP; Japan holds internal review about joining TPP |
| Financial regulations and capital controls | TPP needs to ensure policy space to regulate during financial crisis | Weakening existing investor protections is bad for U.S. economy |  | Not available |  |  |

III.A.2. Investor rights and investor-state dispute settlement (ISDS)

*Investor rights*

In 2009, the State Department established a Subcommittee to make recommendations for a new Model BIT. The Subcommittee was co-chaired by Alan Larson, Senior Advisor at Covington & Burling and also the former undersecretary at the State Department, and Thea Lee, AFL-CIO Policy Director. The Subcommittee fiercely debated in four main areas of the Model BIT and these conflicts quickly entered TPP policy discussions, including: (1) investor rights and investor-state dispute settlement, (2) investment-related labor and environmental concerns, (3) regulations addressing state-owned enterprises, and (4) capital controls and financial

regulations.[280] Broadly, Subcommittee members representing the private sector argued for either no changes to the 2004 Model BIT or a strengthening of investor rights and ISDS to support U.S. firms, employment, and national interests; they were opposed by dissenting Subcommittee members who argued for substantive reforms to investor rights and ISDS to provide for greater policy space for public purpose regulations, including, labor, environmental, and consumer protections. The Subcommittee's final report contained little consensus, conflicting recommendations, and multiple dissenting views, and the final report was submitted to Secretary of State Clinton in October, 2009.[281]

The Obama administration had planned to conclude the review of the Model BIT by the end of 2009 but it would not be officially concluded until 2012. However, by January, 2010, interagency discussions between the State Department and the USTR had "largely been completed," although there remained "significant areas" of dispute.[282] The most problematic complication to the conclusion of the review of the new Model BIT was that in 2009 the Democrats had assumed majority control of both the House and the Senate for the first time since 1995. Democrats had been far more responsive to the critics of U.S. trade and investment policy and they were demanding that the Obama administration make substantive changes to investor rights and ISDS in the Model BIT. In summer of 2009, House Democrats introduced a bill[283] to provide guidance to the Obama administrations' trade and investment policy review and it

---

[280] "Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty," September 30, 2009, U.S. Department of State.
[281] Ibid.
[282] "USTR, State Seek Rapid Conclusion To Review Of U.S. Investment Policy," *Inside U.S. Trade*, Vol. 28, No. 1, January 8, 2010.
[283] "The Trade Reform, Accountability, Development and Employment (TRADE) Act," H.R. 3012, 111th Congress (2009-2010).

contain the same or similar amendments that were presented by the dissenting members of the Subcommittee review. Although the bill was ultimately unsuccessful, it had the support of the majority of House Democrats including nine committee chairs and a handful of House Republicans.[284] Consequently, by November, 2010, the Obama administration decided to wait until after mid-term elections to further consultations over the BIT with a new, incoming Congress.[285]

The 2010 conflicts over the content of the Model BIT were readily imported into domestic TPP discussions. When the Obama administration committed to the TPP, House Democrats warned that the White House would need to make reforms to trade and investment policy to ultimately win their support for the TPP. House Democrats explained in a letter to the President,

> "For these negotiations to yield an agreement that could enjoy broad support, it will be critical that you work in cooperation with congressional trade reform advocates to transform the Bush TPP initiative into an opportunity to develop a new forward-looking American trade agreement model."[286]

Among specific reforms, the House Trade Working group in Congress demanded the exclusion of ISDS from the TPP,[287] and House Democrats were bolstered by support from labor unions and public interest groups. In January, 2010, the AFL-CIO submitted written

---

[284] "House Trade Group Urges USTR To Go Beyond May 10 Deal In TPP Talks," *Inside U.S. Trade*, Vol. 28, No. 2, January 15, 2010.
[285] "Hormats: Administration Consult With Congress on Model BIT," *Inside U.S. Trade*, Vol. 28, No. 45, November 19, 2010.
[286] Ibid.
[287] "House Trade Group Urges USTR To Go Beyond May 10 Deal In TPP Talks," *Inside U.S. Trade*, Vol. 28, No. 2, January 15, 2010.

comments[288] on the TPP to the Obama administration, calling for reforms to investment and financial services policy, while environmental groups urged for a significant reduction to the scope of ISDS or to replace it with a state-to-state dispute mechanism.[289] In response, the U.S. Business Coalition for the TPP urged that the USTR and the other TPP negotiating partners agree to a "standstill" in which negotiators would not adopt new trade or investment restrictions that would limit, weaken, or provide exceptions to an investor rights and investment market access.[290] They argued that any such provisions would "undermine the ability of the TPP to serve as a new model for trade expansion to support global economic recovery and will constrain any final agreement's ability to benefit our nation's farmers, industries, workers and consumers."[291]

*Investor-state dispute settlement*

U.S. business interests in the TPP quickly found resistance not just from domestic coalitions but from groups abroad and other negotiating teams. As TPP negotiating progressed in 2010, Australia and New Zealand negotiators demanded their exclusion from ISDS.[292] ISDS was excluded from the Australia-U.S. FTA due to adamant objections from Australia while the U.S. business community had a certain comfort level with the strength of Australia's judicial system.[293] Publicly, the Australian government announced "severe reservations" about ISDS in

[288] "AFL Urges USTR to Use TPP Agreement to Establish New Trade Template", *Inside U.S. Trade*, Vol. 28, No. 4, January 29, 2010.
[289] "U.S. Environmental Groups Urge Inclusion of Lacey Act Language in TPP", *Inside U.S. Trade*, Vol. 28, No. 22, June 4, 2010.
[290] "Letter to USTR Kirk from the U.S. Business Coalition for TPP," June 14, 2010
[291] Ibid.
[292] "Australian, New Zealand Groups Demand Exclusion of Investor-State From TPP," *Inside U.S. Trade*, Vol. 28, No. 48, December 10, 2010.
[293] Testimony of Robert Stumberg, Hearing before the Committee of Ways and Means, US House of Representatives on "Investment Protection in US Trade and Investment Agreements," One Hundred Eleventh Congress, First Session, May 14, 2009.

the TPP and that it would seek exclusion from ISDS in the TPP.[294] In New Zealand, Prime Minister John Key stated the inclusion of ISDS in the TPP was "far-fetched" and that his government would support Australia's position.[295] Australia, New Zealand, and Singapore presented their position papers on investment during the fourth round of negotiations in October, 2010.[296] Their negotiating positions were bolstered and motivated by Australian and New Zealand labor unions and advocacy groups that had launched a campaign calling on their governments to reject certain investment provisions and ISDS. A U.S. business representative responded that ISDS would be important for all countries in the TPP due to the existing, overlapping FTAs between members that already include ISDS, which would leave some investors at a disadvantage. For example, if the U.S. were to exclude Australia from ISDS, U.S. investors would be at a disadvantage to Singaporean investors who would be able to access ISDS under the Singapore-Australia FTA.[297] Moreover, the business representative argued that ISDS would be "beneficial" for TPP members because it supports FDI and therefore higher paying jobs.

*Investment regulations for state-owned enterprises*

While the major U.S. business forums united and focused on their opposition to proposals from the critics of trade and investment policy, there was a small dispute over the extent to which the U.S. Model BIT should include disciplines on state-owned enterprises, which would also affect the content of the TPP investment chapter. A prominent business group, the U.S. Chamber

---

[294] "Australian, New Zealand Groups Demand Exclusion of Investor-State From TPP," *Inside U.S. Trade*, Vol. 28, No. 48, December 10, 2010.
[295] Ibid.
[296] Ibid.
[297] Ibid.

of Commerce, was lobbying the Obama administration to insert more substantive regulations on state-owned enterprises into the U.S. Model BIT for negotiations with China. However, The U.S-China Business Council, which represents many of the same U.S. MNCs, argued against the Chamber's proposal.[298] The Chamber advocated for new competition and intellectual property regulations that would support the "offensive" interests of U.S. MNCs operating in Asian markets dominated by state-owned enterprises, notably China. The Chamber argued that the U.S. should assume a tough negotiating stance on the issue as a trade strategy. The U.S.-China Business Council contested that new provisions on state-owned enterprises would potentially undermine negotiations and the far-reaching effects of the Model BIT far exceed any "incremental" benefits of new regulations on state-owned enterprises. On the other hand, as China was rapidly becoming a capital-exporter, labor groups were advocating for new language regulating foreign state-owned enterprises investing in the U.S. In January, 2010, the AFL-CIO submitted to the Administration, "…investment rights can no longer be viewed in the main as a package of rights to protect outward bound investment. Any agreement must ensure that State-owned enterprises are not permitted to gain an unfair advantage when acquiring U.S. assets."[299]

*Investment-related labor and environmental concerns*

A big obstacle to the conclusion of the review of the U.S. Model BIT was the content of the language on labor and environmental protections.[300] AFL-CIO Policy Director Thea Lee

[298] "Business Sends Obama Mixed Messages On Disciplining State-owned enterprises In BITs," *Inside U.S. Trade*, Vol. 28, No. 3, January 29, 2010.
[299] "U.S. Business Groups Push For New SOE Disciplines in TPP Negotiations," *Inside U.S. Trade*, Vol. 29, No. 12, March 25, 2011.
[300] "Hormats: Administration Consult With Congress on Model BIT," *Inside U.S. Trade*, Vol. 28, No. 45, November 19, 2010.

proposed to Congress that FTAs combine tariff reductions and investment protections which removes the costs and risks of FDI thereby facilitating and accelerating the offshoring of jobs, "precisely because, for the most part, there has been no commensurate set of [labor and environmental] obligations."[301] Lee and her colleagues on the Subcommittee proposed two revisions to the Model BIT, (1) establish an enforceable legal obligations for labor and environmental protections, and (2) establish broad exceptions to investor rights and ISDS for labor and environmental measures.[302] These proposals were vehemently denounced by business representatives in the Subcommittee who described the proposals as neither feasible nor appropriate. Business lobbyist Linda Menghetti pointed to the fact that the "vast majority" of outward U.S. FDI is to high-wage countries for the purpose of market access. Menghetti supported a statement from Ranking Congressman Brady who emphasized that "about 95 percent" of the output of U.S. subsidiaries abroad stays outside the U.S. while only "about 5 to 7 percent" comes back to the U.S., which undermines the claims of labor unions that FDI is mainly offshoring.[303] Moreover, the U.S. business community fiercely opposed labor and environmental exceptions to investor rights, arguing that they "…would allow a government to justify discriminatory or otherwise unfair conduct on such grounds will harm U.S. investors, costing U.S. jobs and undermining U.S. innovation."[304] They appealed that strengthening investment-

[301] Testimony of Thea Lee, AFL-CIO Policy Director, Hearing before the Committee of Ways and Means, US House of Representatives on "Investment Protection in US Trade and Investment Agreements," One Hundred Eleventh Congress, First Session, May 14, 2009.
[302] Ibid.
[303] Testimony of Linda Menghetti, Vice President of the Emergency Committee for American Trade, Hearing before the Committee of Ways and Means, US House of Representatives on "Investment Protection in US Trade and Investment Agreements," One Hundred Eleventh Congress, First Session, May 14, 2009.
[304] "Text: Letter on BIT", *Inside U.S. Trade*, Vol. 28, No. 3, January 22, 2010.

related labor and environmental protections would grant global competitors new economic opportunities and advantages that would not be available to U.S. investors.[305]

The debate entered TPP negotiations as the House Trade Working Group urged the USTR to go beyond the May 10 agreement in TPP negotiations, including, by establishing strong and enforceable provisions linking investment to labor and environmental standards.[306] The USTR responded to Congress that they were still considering the issue as they developed U.S. objectives in the TPP.[307] Some USTR officials were concerned that it would be "very difficult" to negotiate "far-reaching" labor and environmental standards with low-income developing countries participating in the TPP, such as Vietnam or Brunei.[308] Indeed, in 2010 bilateral consultations with the U.S., Vietnam had sought "greater flexibility" for poor countries in the TPP, particularly for labor and environmental standards.[309] The U.S. responded that it would not favor a "two-tier agreement" with different standards for different countries.[310] Throughout 2010, the USTR refused to make any commitments on the issue in their consultations with Congress.

III.A.3. Capital controls and financial regulations

The 2009 review of the Model BIT was occurring as policymakers were grappling with aftermath of the global financial crisis in 2008 and its possible long-term effects. The transfers

---

[305] Ibid.
[306] "House Trade Group Urges USTR To Go Beyond May 10 Deal In TPP Talks," *Inside U.S. Trade*, Vol. 28, No. 2, January 15, 2010.
[307] Ibid.
[308] Ibid.
[309] "Vietnamese Official: Full TPP Participation Depends On How Talks Unfold," *Inside U.S. Trade*, Vol. 28, No. 18, May 7, 2010.
[310] Ibid.

provision of the Model BIT obligates states to allow capital to cross borders "free and without delay." [311] The Subcommittee "conducted extensive discussions" on the free transfers policy and debated the merits of including language that would grant governments policy space for "capital controls," an emergency regulation on cross-border flows of capital. Some Subcommittee members were concerned that the free transfers policy does not provide developing countries with the policy space necessary to confront massive and destabilizing capital inflows and outflows before or after a financial crisis.[312] Opposing this recommendation, other Subcommittee members advocated that the transfer provision not be weakened and that the existing exceptions provision[313] "already provides extensive flexibility" for governments to address financial instability and crisis. The Subcommittee was unable to come to consensus on policy recommendations for free transfers and capital controls.

In TPP negotiations, throughout 2010 all sides of the debate reiterated their positions in stakeholder events, public comments, positions papers, letters, and Congressional testimonies.[314] While the Democratic majority in Congress demanded[315] that the USTR provide governments with broad regulatory power over multinational banks and the cross-border provision of financial services, key USTR representatives attended private events in New York City hosted by financial

---

[311] 2004 U.S. Model BIT, Article 7.
[312] "Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty," September 30, 2009, U.S. Department of State.
[313] 2004 U.S. Model BIT, Article 20.
[314] "TPP San Francisco," Office of the United States Trade Representative, Press Release, June, 2010, San Francisco, California.
[315] "House Trade Group Urges USTR To Go Beyond May 10 Deal In TPP Talks," *Inside U.S. Trade*, Vol. 28, No. 2, January 15, 2010.

services lobbies concerned about the Obama administration's trade agenda and the TPP.[316] There is no evidence that in 2010 the USTR's policy diverged from the 2004 Model BIT with respect to the free movement of capital.

### III.A.4. Market access for FDI and financial services FDI

The market access negotiations, including sectoral exceptions to investment obligations called "non-conforming measures," are less central to the focus of this research project and summaries of these talks are in Annex Six.

## III.B. 2011: USTR officially supports key business proposals

Negotiating rounds five through ten took place in 2011. At the 2011 APEC meeting, Canada, Japan, Mexico publically expressed interest in joining. Administration officials issued three Federal Register notices requesting public comments on the possible inclusion of Japan, Canada and Mexico in the TPP talks. TPP investment negotiations were progressing relatively slowly compared to the rest of the agreement as the USTR still had not tabled proposals for key issues until the fifth round in late February in Chile.[317] While the original TPP investment draft was based on the 2004 U.S. Model BIT, the Obama administration had been drafting new provisions during their on-going review of the Model BIT.

| Table 11: TPP 2011 negotiations, USTR officially supports key business proposals | | |
|---|---|---|
| | | |

[316] "TPP Blog," Office of the United States Trade Representative, Free Trade Agreements, TPP, (available: https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-blog)
[317] "U.S. TPP Investment Proposal Retains Investor-State, Breaks New Ground," *Inside U.S. Trade*, Vol. 29, No. 10, March 11, 2011.

| Negotiating issues in investment and financial services | Domestic interactions with the USTR | | | TPP negotiators | | |
|---|---|---|---|---|---|---|
| | Labor unions, NGOs, civil society organizations | Business lobbies, private sector trade policy advisors | Congress | P-4 (Chile, Brunei, New Zealand, Singapore) | Australia, Peru, Vietnam, Malaysia | Mexico, Canada, Japan |
| Investor rights and investor-state dispute settlement (ISDS) | Unsuccessfully lobbied for disciplines on State-owned enterprises; continues calls for investor reforms | Successfully lobbied for disciplines on State-owned enterprises and no broad exceptions to provisions | Deep divisions over the issues as Obama administration narrowly passes FTAs with South Korea, Panama, Colombia | U.S.-dominated negotiating process confines States to merely reacting to U.S. proposals; Australia links refusal of ISDS to tobacco company targeting public health laws, NZ support wanes | | Preparing to join negotiations |
| Financial regulations and capital controls | Unsuccessfully lobbied for capital controls/financial regulations | Successfully lobbied for past BIT/FTA provisions | | Not available | | |
| Market access for FDI | Wary of offshoring | Seeking highest commercial value | Reciprocal market access is necessary | USTR rejects offers from Singapore and Vietnam | | |

III.B.1. Investor rights and investor-state dispute settlement (ISDS)

*Investment regulations for state-owned enterprises*

From the onset of TPP negotiations, the U.S. had determined that addressing state-owned enterprises was a "twenty-first century trade issue" and set aside a separate chapter in the agreement for competition policy with state-owned enterprises. Simultaneously, in the investment chapter negotiations, the USTR tabled the new disciplines on state-owned enterprises that were being drafted for the new Model BIT (which were also prepared for negotiations with China). At the February round, the USTR introduced the two new provisions, which was the first

time that TPP countries had the opportunity to discuss the new disciplines with the USTR.[318] The first of the two provisions was a clarification that the TPP investment provisions would apply to state-owned enterprises.[319] However, the proposal did not completely meet the standards of the U.S. business lobbies which had advocated for an expansion of the "fair and equitable treatment" provision to address policies that favor domestic companies.[320] The USTR chose not to expand the "fair and equitable treatment" provision due to its problematic history in opening the U.S. to ISDS cases.

The second new provision concerning state-owned enterprises was a ban on regulations requiring the use of particular intellectual property. During the October round in Lima, Peru, the USTR press release shared that the investment chapter would include new language to address "…the increasingly common problem of 'indigenous innovation' measures that disadvantage U.S. technology by forcing U.S. investors to favor another country's domestic technology."[321] The new provision would ban regulations mandating that investors use domestic technology and/or intellectual property, and it would ban regulations that would oblige a company to carry out research and development in a host country as a condition for investment in that country.[322] It would address the growing amount of indigenous innovation policies in the Asia-Pacific that function to favor domestic state-owned enterprises by controlling foreign investors' use of intellectual property, thereby disadvantaging U.S. companies.

---

[318] Ibid.
[319] "U.S. Business Groups Push for New SOE Disciplines in TPP Negotiations," *Inside U.S. Trade*, Vol. 29, No. 12, March 25, 2011.
[320] Ibid.
[321] "Deputy USTR Updates on TPP," Office of the United States Trade Representative, Press Release, October, 2011, (https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/october/deputy-ustr-updates-tpp)
[322] "U.S. TPP Investment Proposal Retains Investor-State, Breaks New Ground," *Inside U.S. Trade*, Vol. 29, No. 10, March 11, 2011.

As negotiations progressed in 2011 and the Obama administration further considered TPP disciplines on state-owned enterprises they would reject Democrats' and labor union's investment proposals on state-owned enterprises, including, "affirmative obligations" that foreign state-owned enterprises operate "solely of a commercial nature," a prohibition on state-owned enterprises that receive loans or financing not available in the marketplace, and an FDI screening mechanism.[323] The U.S. Treasury Department was concerned that "overly broad" SOE language would open up the U.S. to challenges, such as the Treasury's 2008 bail-out of U.S. financial institutions and auto makers.[324] Reaction within the business community was mixed but many concurred with the Treasury that inserting new disciplines against state-owned enterprises could lead to unanticipated and detrimental effects on U.S. companies.[325]

*Investment-related labor and environmental concerns*

The USTR's focus on drafting separate labor and environmental chapter signifies that by 2011 the USTR had relegated all labor and environmental concerns to their respective chapters. USTR Ambassador Marantis explained to Congress that proposed broad exceptions to investor rights for labor and environmental regulations "…would undermine support among the TPP's strongest advocates. And, in the end, I am afraid it could seriously jeopardize congressional approval of a final deal."[326] The USTR openly admitted it would have to concede to the business

[323] "USTR Under the Gun to Generate Draft TPP Language Dealing with State-owned enterprises," *Inside U.S. Trade*, Vol. 29, No. 28, July 15, 2011.
[324] "Stakeholders Urge USTR to Make Changes to SOE proposal in TPP Talks," *Inside U.S. Trade*, Vol. 29, No. 28, July 15, 2011.
[325] Ibid.
[326] Testimony of USTR Ambassador Marantis in "Hearing on Trans-Pacific Partnership", Hearing Before the Subcommittee on Trade of the Committee on Ways and Means, *U.S. House of Representatives*, One Hundred Twelfth Congress, First Session, December 14, 2011.

community's positions in order to get the TPP through Congress. Conversely, a USTR's 2011 press release offered, "The investment text will protect the rights of the TPP countries to regulate in the public interest."[327]

*Investor-state dispute settlement (ISDS)*

Throughout 2011, Australia continued to hold the line in its rejection of ISDS while New Zealand supported the Australian delegation but not to the same extent.[328] Australian Prime Minister Julia Gillard released a policy document in April, 2011 stating the government would discontinue negotiating ISDS and that it opposes measures that would give greater rights to foreign firms, or would limit the government's ability to regulate.[329]Australia explicitly linked its opposition to ISDS to tobacco companies using ISDS to target public health regulations. In early 2010, U.S. tobacco company Philip Morris had lobbied the USTR to use the TPP to limit regulations on tobacco marketing, arguing that Australia's plain packaging regulations would be "tantamount to expropriation" and therefore urged the USTR to pursue ISDS.[330] Then in June, 2011, relying on the Australia-Hong Kong BIT, Philip Morris served the government of Australia with a notice of an ISDS claim for "damages [amounting] to billions of dollars."[331] The Australian government immediately announced that it would no longer support the inclusion of

---

[327] "Outlines of TPP," November 12, 2011, Office of United States Trade Representative
[328] "U.S. TPP Investment Proposal Retains Investor-State, Breaks New Ground," *Inside U.S. Trade*, Vol. 29, No. 10, March 11, 2011.
[329] "Australian Minister Says Gillard Government Won't Back Down on ISDS," *Inside U.S. Trade*, Vol. 30, No. 11, March 16, 2012.
[330] "Submission of Philip Morris International in Response to the Request for Comments Concerning the Proposed Trans-Pacific Partnership Trade Agreement," January 22, 2010, (available at http://www.regulations.gov/#!documentDetail;D=USTR-2009-0041-0016.1)
[331] "Philip Morris v. Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?" Investment Treaty News, July 12, 2011, by Mathew C. Porterfield & Christopher R. Byrnes.

ISDS in any agreement, citing Philip Morris' attempts to "limit [Australia's] capacity to put health warnings or plain packaging requirements on tobacco products."[332]

The USTR faced a dilemma – due to a federal law called the Doggett amendment the USTR and other federal agencies cannot seek any weakening of tobacco regulations in another country.[333] U.S. legal experts argued that if the USTR opposed Australia's cigarette law then it would violate the Doggett amendment. As a solution, some members of Congress wrote to USTR Kirk to exclude tobacco altogether from the TPP, a proposal that business fiercely opposed as undesirable precedent.[334] Other members of Congress supported Australia and New Zealand's position, as there is no ISDS in the U.S.-Australia FTA.[335] USTR Ambassador Marantis favored business interests by contesting to Congressional critics that the U.S. will not negotiate any exclusions from ISDS, which would ultimately not be true.[336]

III.B.2. Capital controls and financial regulation

As the Obama administration still had not concluded its review of the Model BIT, Treasury Secretary Geithner responded to the economist's concerns about U.S. policy on the free movement of capital.[337] He acknowledged, "…the experience of the last decades shows that large swings in capital flows can create significant policy challenges." However, Secretary

---

332 Ibid.
333 "Sanchez Circulates Letter Urging USTR to Exclude Tobacco from TPP," *Inside U.S. Trade*, Vol. 29, No. 26, July 1, 2011.
334 Ibid.
335 Testimony of USTR Ambassador Marantis in "Hearing on Trans-Pacific Partnership", Hearing Before the Subcommittee on Trade of the Committee on Ways and Means, *U.S. House of Representatives*, One Hundred Twelfth Congress, First Session, December 14, 2011.
336 Ibid.
337 "Open Letter to Mr. Ricardo Hausmann," Secretary of the Treasury Timothy Geithner, April 12, 2011, (available: http://www.ase.tufts.edu/gdae/policy_research/Geithner_response_to_capital_controls_letter.pdf)

Geithner explained that the Treasury believed that developing countries have "a range of policy measures" available to address these challenges and that U.S. FTAs and BITs provide policymakers with the policy space to do so. Moreover, he offered that the purpose of the "transfers" provision is "…to establish predictable rules to govern trade and investment."[338] By the TPP February round in Chile, sources reported that the U.S. proposals had maintained past language on transfers and financial services regulations, underscoring that in the Obama administration's support for the business community's positions.[339] Simultaneously, the USTR reported that the TPP would "…protect the right of financial regulators to take action to ensure the integrity and stability of financial markets, including in the event of a financial crisis."[340]

III.C. 2012: TPP membership expands while investment chapter leaked

Negotiating rounds 11 to 15 were held in 2012 while Mexico and Canada officially joined the agreement. By mid2012, the USTR set a dateline for the conclusion of TPP negotiations to be October, 2013. In April, 2012, the Obama administration finally concluded is overdue review of the Model BIT and released the text. The new 2012 Model BIT contained minor revisions to the 2004 Model BIT that generally expanded investor rights, and this reignited the conflicts from the 2009 Subcommittee review. In June, a U.S. civil society organization published[341] a leaked draft of the TPP investment chapter that was scrubbed such that brackets revealed areas of disagreement but not the positions of each negotiating team. The June leak

---

[338] Ibid.
[339] "U.S. TPP Investment Proposal Retains Investor-State, Breaks New Ground," *Inside U.S. Trade*, Vol. 29, No. 10, March 11, 2011.
[340] "Outlines of TPP," November 12, 2011, Office of United States Trade Representative.
[341] "TPP Investment Chapter, June, 2012 Leak," Published by *Citizen's Trade Campaign*, (available: http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf). The USTR did not offer comment on the authenticity of the document.

exactly reflected the Obama administration's policy positions in the new 2012 Model BIT. However, the leaked draft was heavily bracketed in its core provisions, signifying that the most significant sections were still under dispute in negotiations, including the most controversial provisions – "indirect expropriation," ISDS, and "transfers."

Table 12: TPP 2012 negotiations, membership expands while investment chapter leaked

| Negotiating issues in investment and financial services | Domestic exchanges with the USTR | | | TPP negotiators | | |
|---|---|---|---|---|---|---|
| | Labor unions, NGOs, civil society organizations | Business lobbies, private sector trade policy advisors | Congress | P-4 (Chile, Brunei, New Zealand, Singapore) | Australia, Peru, Vietnam, Malaysia | Mexico, Canada, Japan |
| Investor rights and investor-state dispute settlement (ISDS) | Investment chapter will undermine labor and environmental chapters | No ISDS then no TPP; import new Model BIT provisions into TPP | Congress remains sharply divided while State Legislatures side with House Democrats in demanding reforms to investor rights and ISDS | NZ and Peru table China's definition of "indirect expropriation"; Australia continues resistance to ISDS | | Canada and Mexico separately intensify efforts to join, then join in December; Japan continues domestic deliberations and bilateral consultations with U.S. |
| Financial regulations and capital controls | Global consensus has shifted to support capital controls, TPP not | Changes to existing language are unnecessary | | Language permitting capital controls supported by all countries and only opposed by the U.S. | | |
| Market access for FDI | Expanding ISDS to financial sector is deregulatory | Deep market access and ISDS, no exceptions | | Vietnam, Malaysia, Singapore, Brunei, strongly resist U.S. market access demands | | |

III.C.1. Investor rights and investor-state dispute settlement (ISDS)

*"Indirect expropriation" debate*

The leaked investment chapter revealed a significant divide over the definition of "indirect expropriation," in which Peru, New Zealand, and at least one other country had countered the USTR with China's language on indirect expropriation, as stipulated in each of their agreements with China.[342] The "indirect expropriation" provision was controversial because it would apply to government takings of an "investment" broadly defined to include the value of an investment, intellectual property, financial instruments, government permits, money and debt, among others. The dissenting countries opposed the U.S. proposal that included broad investor rights and advocated China's language of the investor protection which allows more flexibility for regulation. The U.S. approach to "indirect expropriation" puts the burden of proof on the host State which must show that regulations were "designed and applied" non-discriminatorily and for the public purpose.[343] Conversely, the competing proposal[344] states that "indirect expropriation" only occurs when there is discriminatory *and* "severe" deprivation, which is more difficult for investors to prove. Moreover, this proposal required that "indirect expropriation" must be "disproportionate to the public purpose," which puts far less burden of proof on the host state as a government would merely need to show that a regulation is furthering a larger public purpose. In dialogue over the leaked chapter, a spokesman for the U.S. business lobby denounced China's definition of "indirect expropriation" and he issued strong support for the U.S. proposal.[345]

---

[342] "Leaked TPP Text Shows Disagreement on Indirect Expropriation Definition," *Inside U.S. Trade*, Vol. 30, No. 24, July 15, 2012.
[343] TPP Investment Chapter, 2012 Leak, Annex 12-C
[344] TPP Investment Chapter, 2012 Leak, Annex 12-D
[345] "Leaked TPP Text Shows Disagreement on Indirect Expropriation Definition," *Inside U.S. Trade*, Vol. 30, No. 24, July 15, 2012.

Domestically, Public interest lawyer Robert Stumberg proposed to Congress that the U.S. should "[n]arrow indirect expropriation so that it does not apply to nondiscriminatory regulations as explained in the *Methanex* award."[346] In 2005, Methanex lost its case against the U.S. because the ISDS tribunal ruled that "non-discriminatory" public purpose legislation does not constitute expropriation.[347] Stumberg's proposal would have the effect of limiting "indirect expropriation" to measures that are discriminatory or serve "illegitimate" public purposes. In contrast, business lobby leader Linda Menghetti testified to Congress that proposals to insert clarifying language on indirect expropriation would significantly narrow investor rights and "…put in jeopardy important U.S. national economic and other policy goals."[348]

*Investment-related labor and environmental concerns*

While the USTR relegated labor and environmental concerns to separate chapters, labor and environmental groups argued that these chapters would be undermined by the investment chapter and ISDS. An AFL-CIO senior aide explained that while the USTR drafted the labor chapter with "intense" consultations with labor unions, the AFL-CIO was unsure that labor would support the final agreement.[349] The AFL representative questioned the value of the TPP

---

[346] Ibid.

[347] *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005, at Part IV—Chapter D, para. 7. In pertinent part:

> ''a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable. . . ."

[348] Testimony of Linda Menghetti, Vice President of the Emergency Committee for American Trade, Hearing before the Committee of Ways and Means, US House of Representatives on "Investment Protection in US Trade and Investment Agreements," One Hundred Eleventh Congress, First Session, May 14, 2009.

[349] "AFL-CIO Official Sees Labor Progress in TPP, But Questions Value of Deal," *Inside U.S. Trade*, Vol. 30, No. 5, February 3, 2012.

investment chapter to U.S. workers because policymakers and analysts were still unsure of the TPP's effects on offshoring and trade flows.[350] Similarly, the environmental group Sierra Club publically supported the USTR's efforts in the environmental chapter, however, they argued that ISDS would undermine the environmental chapter by allowing companies to sue governments over environmental regulations and therefore environmental organizations would likely not support the final TPP.[351] Labor and environmental groups derided the "investment and environment" provision because it was unenforceable and and "little more than paper commitments."[352]

*Investor-state dispute settlement (ISDS)*

The June leak revealed that the U.S. had sought to expand investment and investor rights to include not only goods as in past agreements but also intellectual property and services. This was achieved by expanding the scope of "performance requirements"[353] to include services and intellectual property rights (including the language drafted in 2011 for state-owned enterprises). Early in 2012, thirty U.S. business lobbies and trade associations confronted Australia's opposition to ISDS in a letter to President Obama.[354] The business community had two demands of the USTR, first, to not grant countries such large exceptions to the agreement as it would be antithetical to a "high-standard" agreement and bad precedent, and second, to ensure that all TPP

---

[350] Ibid.
[351] "USTR Acknowledges Objections on Enforceability in TPP Environment Talks," *Inside U.S. Trade*, Vol. 30, No. 26, June 29, 2012.
[352] "Labor, Environmental Provisions in Model BIT Spark Divergent Reactions," *Inside U.S. Trade*, April 25, 2012.
[353] Article 12.7
[354] "Business Pushes Back on Australia's Objection to Investor-State in TPP," *Inside U.S. Trade*, Vol. 30, No. 9, March 2, 2012.

members and potential members commit to strong enforcement mechanisms, notably, ISDS. A business source commented that the letter was intended to demonstrate that the inclusion of ISDS was essential to securing Congressional support for a final TPP deal, and therefore, Australia's exclusion from ISDS would kill the TPP.[355] After the letter was published, in an Australian Senate meeting, representative of the Australian Prime Minister affirmed that it would not back down from its opposition to ISDS.[356] In July, The U.S. National Conference of State Legislators addressed an open letter to all TPP negotiators calling upon them to abolish ISDS from the TPP and they encouraged the Australian delegation to continue to resist ISDS.[357]

*Tobacco and ISDS*

The USTR was working on drafting a tobacco proposal, in large measure a response to Australia's opposition to ISDS to protect public health tobacco regulations. Throughout 2012, the USTR repeatedly held back from tabling the proposal due to domestic resistance from business lobbies and Congress members from tobacco-producing states. In a May press release,[358] the USTR announced that the proposal would create a "safe harbor" provision that would protect tobacco measures from legal challenges, but would not shield governments from ISDS if a tobacco regulation would be tantamount to expropriation.[359] The public health

---

[355] Ibid.
[356] "Australian Minister Says Gillard Government Won't Back Down on ISDS," *Inside U.S. Trade*, Vol. 30, No. 11, March 16, 2012.
[357] "An Open Letter From U.S. State Legislators To Negotiators Of The Trans - Pacific Partnership Urging The Rejection Of Investor State Dispute Settlement," The U.S. National Conference of State Legislators, July 5, 2012.
[358] "Factsheet: TPP Tobacco Proposal," Office of the United States Trade Representative, Press Release, May, 2012
[359] "TPP Tobacco Proposal May Not Affect Investor-State Disputes, Expert Says," *Inside U.S. Trade*, Vol. 30, No. 41, October 19, 2012.

community applauded it as a "good first step" while the U.S. business community united in opposition, demanding that no products receive special treatment.[360] A coalition of the most politically influential business lobbies ranging from agriculture to manufacturing and services warned the USTR against the exclusion in the TPP of any products as bad precedent. Conversely, in July, ASEAN health ministers met to discuss completely removing tobacco from the ASEAN FTA and future FTAs, and this proposal was supported by TPP member Malaysia.[361]

III.C.2. Capital controls and financial regulations

In May, Ranking Congressmen Barney Frank and Sander Levin issued a public letter to Timothy Geithner, Secretary of Treasury, referencing a private meeting in which both the Under Secretary of Treasury and USTR Kirk gave Rep. Frank "oral assurances" that U.S. trade and investment agreements do not limit a country's use of capital controls vis-à-vis the "prudential carve-out" for emergency measures.[362] However, Reps. Frank and Levin noted that legal language of the provisions simply do not offer a clear assurance that a country may deploy capital controls without being in violation of the treaty. Moreover, as international regulatory norms had shifted to support the (limited) use of capital controls, the U.S. was now a policy outlier. Indeed, after exhaustive research into the 2008 global financial crisis, in November,

---

[360] "Obama goes to bat for big tobacco in TPP," Action on Smoking and Health, August 19, 2013.
[361] "ASEAN Health Ministers' Tobacco Move Could Have Implications for TPP," *Inside U.S. Trade*, Vol. 30, No. 29, July 20, 2012.
[362] "Letter Concerning Capital Controls to Secretary Geithner from Rep. Frank and Rep. Levin," May 23, 2012, (available: http://democrats.financialservices.house.gov/uploadedfiles/media/file/press/112/frank_%20levin%20letter%20to%20geithner%20re%20capital%20controls_%20may%2023_%2020120003.pdf)

2012, the IMF announced a "new institutional view" that the free movement of capital rests on weak economic theory and it has "heightened macroeconomic volatility and vulnerability to crises" (2012: 12). The IMF's new institutional stance called for situational capital controls (i.e. capital controls on a case-by-case basis).

The letter from Reps. Frank and Levin pressured the Treasury to formulate an official interpretation of the legal language related to capital controls in the TPP.[363] Instead, Under Secretary Brainard responded that any new changes to the provisions would "cast doubt" that existing treaties do allow for capital controls, therefore, the Treasury would make no official interpretation of the provisions.[364] Reps. Frank and Levin rebutted that the official interpretation could apply to past agreements as well. Secretary Geithner then responded to Reps. Frank and Levin that U.S. trade and investment policy categorically provides space for capital controls in the "exceptions" provisions, which allow governments to temporary break from their obligations for emergency financial measures.[365]

The June leak of the TPP investment chapter confirmed that the Obama administration had not amended U.S. policy stance on capital controls and that the USTR was pushing to institutionalize the free movement of capital in the TPP against the objections of other countries. In the leak, the "transfers" provision and its annexes were bracketed and it included two other provisions that were introduced by other countries that would have clearly and explicitly permitted the use of capital controls.[366] The first proposal, "Measures to Safeguard the Balance

---

[363] Ibid.
[364] Ibid.
[365] Quoted in "New IMF View on Capital Controls Raises Questions for U.S. Approach in TPP," *Inside U.S. Trade*, Vol. 30, No. 1, January 4, 2013.
[366] "Leaked TPP Draft Text on Investment Reveals Debate on Capital Controls," *Inside U.S. Trade*, Vol. 30, No. 2, June 15, 2012.

of Payments,"[367] included language that would unambiguously permit the temporary and non-discriminatory use of capital controls to safeguard a country's balance of payments. This proposal closely followed the legal language on capital controls in the WTO agreement,[368] and the U.S. was the only country to oppose the provision.[369] Malaysia had taken a particularly hard stance on the issue as the Malaysian Trade Minister had mandated to negotiators to ensure that no financial services provision impinge upon Malaysia's policy space to institute capital controls. The 1998 Asian financial crisis was devastating to Malaysia and policymakers rejected the IMF's emergency funds in favor of a mix of capital controls. Among Asian regulators and academics Malaysia's emergency capital controls are widely regarded as successful although foreign businesses and investors had since "shunned" Malaysia for their policy (Gallagher et. al. 2013).

The second proposal that would have permitted capital controls appeared in brackets and it applied only to Chile.[370] The provision stated that Chile has the right to enforce its capital controls law[371] in order to ensure currency stability and the functioning of its payments system. Similar to Malaysia, for Chile this policy stance was informed by their past experience in implementing capital controls from 1990-5 in response to large and destabilizing capital inflows. Chilean policymakers concluded that capital controls were the "crucial" tool to building an environment conducive to development during a time in which GDP growth was falling in other Latin American countries (Gallagher et. al. 2013). During the U.S.-Chile FTA negotiations,

[367] TPP Investment Chapter, 2012 Leak, Article XX.3
[368] Article XII of the General Agreement on Trade in Services
[369] "New IMF View on Capital Controls Raises Questions for U.S. Approach in TPP," *Inside U.S. Trade*, Vol. 30, No. 1, January 4, 2013.
[370] TPP Investment Chapter, 2012 Leak, Annex 12-I
[371] Ley 18.84, Ley Organica Constitucional del Banco Central de Chile.

although Chile attempted to revise the U.S. provisions to provide for capital controls, they were only able to obtain special ISDS procedures that included an additional six-month "cooling off" period before investors can file a case over capital controls (Gallagher et. al. 2013).

III.D. 2013: USTR "plays hardball" while ramping up pressure to conclude negotiations

The USTR had set a self-imposed deadline to conclude negotiations by the end of 2013, however, as the year pressed on it became evident that a December conclusion would not be possible. In November, an anonymous Chief negotiator had his notes from the Salt Lake City round leaked to WikiLeaks. Writing in short-hand form he observed,

> "U.S. exerting great pressure to close as many issues as possible this week. However the Chapters that were reviewed by the CNs [Chief Negotiators] did not record much progress…One country remarked that up until now there had not been any perceivable movement on the part of the U.S. and that is the reason for the situation."[372]

Earlier in the year, the U.S. chief negotiator, Barbara Weisel, explained that the USTR was working with the U.S. business community in formulating their negotiating priorities.[373] Weisel reasoned, "If we're going to close the deal this year, we have to prioritize what it is we really care about in this agreement."[374] Simultaneously, the stakeholder process was reduced and eventually discontinued at the end of the year (Elms 2015: 14).

---

[372] "Excerpts from internal government commentary on the TPP negotiations, minor editing to protect the author country," *Wikileaks*, November, 2013, (available: https://wikileaks.org/IMG/pdf/tpp-salt-lake-extracts-.pdf)
[373] "Official Says U.S. Narrowing Its TPP Priorities, Asks For Business Help," *Inside U.S. Trade*, May 23, 2013.
[374] Ibid.

<table>
<tr><th colspan="7">Table 13: TPP 2013 negotiations, USTR applies pressure to conclude negotiations</th></tr>
<tr><th rowspan="2">Negotiating issues in investment and financial services</th><th colspan="3">Domestic interactions with the USTR</th><th colspan="3">TPP negotiators</th></tr>
<tr><th>Labor unions, NGOs, civil society organizations</th><th>Business lobbies, private sector trade policy advisors</th><th>Congress</th><th>P-4 (Chile, Brunei, New Zealand, Singapore)</th><th>Australia, Peru, Vietnam, Malaysia</th><th>Mexico, Canada, Japan</th></tr>
<tr><td>Investor rights and investor-state dispute settlement (ISDS)</td><td>Unions announce opposition to TPP b/c it will lead to offshoring and greater inequality</td><td>Offshoring in high-tech manufacturing is “over with”; last U.S. footwear plants threatened</td><td rowspan="3">Bipartisan pressure on the Obama administration for TPA bill</td><td colspan="2">Australia loosens ISDS opposition in exchange for more market access; U.S. and Japan insist on broad scope of ISDS, all other countries opposed; ASEAN countries want exclusion from “pre-establishment” provisions</td><td>Japan supports U.S. position on ISDS</td></tr>
<tr><td>Financial regulations and capital controls</td><td>Expanding ISDS in financial services is deregulatory</td><td>Expand investor rights and ISDS in financial services</td><td colspan="2">U.S. position “inflexible,” Chile Chief Negotiator resigns citing U.S. anti-capital controls policy among his top public concerns in the TPP</td><td>Mexico and Canada against expanding ISDS in fin. ser.</td></tr>
<tr><td>Market access for FDI</td><td>Wary of offshoring</td><td>Deep market access necessary</td><td colspan="3">U.S., Australia, New Zealand favor narrow exceptions market access, all others opposed</td></tr>
</table>

III.D.1. Investor rights and investor-state dispute settlement (ISDS)

*Application of ISDS to “investment agreements” and “investment authorizations”*

The Chief negotiators’ notes observed, “…The most important issue for the majority of members…is the proposal by the U.S. to apply ISDS to Investment Agreements and Investment

Authorizations."[375] In U.S. investment law, an "investment agreement" and an "investment authorization" cover all major contracts between an investor and a host state, including, natural resource exploration and extraction (such as mining, oil, gas, and other hydrocarbon exploration/extraction), public utility services (such as electricity and water treatment), and public works concessions (such as roads, highways, infrastructure). The same provisions are in the investment chapter in U.S.-Korea FTA but they were bracketed in the June, 2012 TPP leak. During the Obama administrations' review of the Model BIT, oil, gas, and mining companies and members of Congress underscored the fundamental importance of ISDS to their industries.[376] Domestically, environmental organizations actively campaigned against ISDS as a threat to environmental regulations and especially because the fossil fuel industry was using it as a deregulatory tool in the context of global warming and climate change. The Chief negotiator indicated that, "The U.S., as in previous rounds, has shown no flexibility on its proposal."[377] Japan supported the U.S. while other countries objected and made proposals to narrow its scope.

*Investor-state dispute settlement (ISDS)*

In Australia's 2013 elections, the incumbent liberal party was replaced by a more conservative party which announced that it would negotiate ISDS on a case-by-case basis.[378] Japan joined the talks mid-year after vowing to the U.S. that Japan would be a "constructive"

[375] "Excerpts from internal government commentary on the TPP negotiations, minor editing to protect the author country," *Wikileaks*, November, 2013, (available: https://wikileaks.org/IMG/pdf/tpp-salt-lake-extracts-.pdf)
[376] "Investment Protection in US Trade and Investment Agreements," One Hundred Eleventh Congress, First Session, May 14, 2009.
[377] Ibid.
[378] "Australia May Be More Open to ISDS in TPP With Government Change," *Inside U.S. Trade*, March 15, 2013.

member of negotiations, such as, supporting the U.S.' position that ISDS unequivocally apply to all TPP members, even in the face of Australia's opposition.[379] By the year's end, the new Australian government indicated that it was open to including ISDS in exchange for additional market access for Australian agricultural exports.[380] Similarly, Malaysia announced that it supported ISDS but was seeking longer transition periods and greater carve-outs for its domestic industries.[381] Vietnam, Malaysia, and Brunei sought to narrow the scope of ISDS by maintaining that ISDS only apply to the "post-establishment" phase and not "pre-establishment," meaning that an investor would only be covered by ISDS after they have established an investment in the host state. In U.S. investment law, ISDS also applies to the "pre-establishment" phase in which ISDS applies to an investor seeking to establish an investment in a host State.[382]

*Tobacco and ISDS*

In September, the USTR and Malaysia simultaneously tabled competing proposals on policy space regarding tobacco control measures.[383] The USTR was forced to revise its earlier proposal after federal agencies criticized it as too weak and business groups described it as unnecessary. The USTR cited that tobacco is "unique product" that is "always harmful to human health" and the new proposal would preserve the policy space of countries to regulate tobacco

---

[379] "Japanese Officials Stress That Tokyo Will Play Constructive Role In TPP," *Inside U.S. Trade*, May 10, 2012.
[380] "Australia Open To ISDS In TPP If Other Countries Give On Tariffs," *Inside U.S. Trade*, December 13, 2013.
[381] "Malaysia Says 14 TPP Chapters 'Substantially Closed,' Lists Objections," *Inside U.S. Trade*, June 28, 2013.
[382] "Excerpts from internal government commentary on the TPP negotiations, minor editing to protect the author country," *Wikileaks*, November, 2013, (available: https://wikileaks.org/IMG/pdf/tpp-salt-lake-extracts-.pdf)
[383] "TPP Countries Will Consult Internally On Tobacco Proposals, Official Says," *Inside U.S. Trade*, September 6, 2013.

without a complete carve-out of tobacco that would create precedent for excluding agricultural products.[384] The new U.S. proposal reaffirmed the WTO's commitments to tobacco control measures and required that public health officials consult each other before any dispute settlement procedures begin, however, tobacco tariffs would be eliminated and tobacco companies would maintain investor rights and access to ISDS. Conversely, the Malaysian proposal completely carved-out tobacco from the agreement and therefore precluded tobacco from any dispute challenges, including ISDS.[385] According to Malaysian officials, there was "broad" support for their proposal, including from Japan, but negotiators had to return to their governments before taking positions.[386] However, Malaysia quickly began to soften its stance and in December they tabled a revised proposal that removed tobacco tariffs, therefore, trade in tobacco would be liberalized.[387]

*Investment-related labor and environmental concerns*

As the AFL-CIO announced[388] that it would coordinate an international campaign to stop the TPP, a spokesman for General Electric Company denied that the TPP would promote more offshoring and to the contrary it would create more jobs in the U.S. General Electric's spokesman made two arguments to the Senate, first, that many capital-intensive U.S.

---

[384] "New U.S. Proposal on Tobacco Regulation in the Trans-Pacific Partnership," Office of the United States Trade Representative, Press Release, August, 2013.
[385] "TPP Countries Will Consult Internally On Tobacco Proposals, Official Says," *Inside U.S. Trade*, September 6, 2013.
[386] Ibid.
[387] "M'sia said to have backed down on TPP stance," *The Malaysian Reserve*, December 16, 2013.
[388] "Resolution 12: America and the World Need a New Approach to Trade and Globalization," Submitted by the Committee on Shared Prosperity in the Global Economy and the Executive Council, *AFL-CIO*, 2013 Convention.

manufacturing industries are heavily dependent upon exports and the TPP was being designed to promote such exports, which would support and grow jobs.[389] Second, he declared that offshoring was "over with" in high-technology manufacturing industries. He reasoned that in capital-intensive manufacturing the labor cost is trivial to determining production location, "So the international global supply chain that we have constructed allows us to be competitive around the world and I think sustain far more jobs in the U.S."[390]

Also in 2013, the U.S. and Vietnam bilaterally negotiated textile production rules and market share. The USTR offered to cut textile and apparel tariffs by 50 percent in exchange for a rule that would ban the use of textile materials from non-TPP members, although the USTR did not consult domestic manufacturers on the proposal.[391] The proposal was supported by 15 Senators representing U.S. footwear importers and it was opposed by The National Council of Textile Organizations who argued that roughly 522,000 jobs would be offshored to Vietnam if tariffs were cut by just 25 percent.[392] By August, New Balance, which maintained footwear plants in the U.S., was engaged in a spat with six other name-brand domestic footwear companies that had no production facilities in the U.S. New Balance argued that the TPP's elimination of tariffs on footwear would shift investment and market share to plants in lower-cost Vietnam thereby threatening New Balance's U.S. production facilities.[393]

---

[389] "The Trans-Pacific Partnership: Opportunities and Challenges", Hearing before the Committee on Finance, *U.S. Senate*, One Hundred Thirteenth Congress, First Session, April 24, 2013.
[390] Ibid.
[391] "U.S., Vietnam to Meet on Textile Rules Ahead of Malaysia TPP Round," *Inside U.S. Trade*, July 20, 2013.
[392] Ibid.
[393] "New England shoe companies push for elimination of shoe tariffs," by Kevin Miller, *Kennebee Journal*, August 23, 2013.

III.E.2. Capital controls and financial regulations

*Investor rights in financial services*

On November 27, Faryar Shirzad, Managing Director at Goldman Sachs, sent an email to USTR Froman affirming the importance of broad investor rights for the financial services sector.[394] In past U.S. FTAs, due to the Treasury's regulatory concerns, only the "transfers" and "expropriation" articles from the investment chapter along with ISDS enforcement applied to financial services. In the TPP, the USTR was attempting to expand investor rights and ISDS in the financial services sector by also including the controversial "minimum standard of treatment" provision with ISDS enforcement.[395] In addition to Goldman Sachs, a prominent U.S. financial services lobby group wrote an open letter to the USTR advocating for the full inclusion of investor rights from the investment chapter and access to ISDS in the TPP financial services chapter.[396] However, the USTR faced strong opposition to this unprecedented proposal, including from Mexico and Canada, which led U.S. financial services institutions to become "worried" that the USTR would forgo the initiative in an effort to conclude the deal by the end of the year. Mr. Shirzad informally addressed USTR Froman as "Mike" and warned that denying the financial services industry the same investor rights enjoyed by other industries would be "unfortunate" given the importance of the U.S. financial services industry in generating service exports and growing U.S. commercial presence around the world. Shirzad urged,

---

[394] "Note from Faryar on TPP," November 27, 2013, obtained by *Rootstrikers* via the Freedom of Information Act.
[395] "U.S. Faces Opposition in TPP on Demands For Broad Investor-State Clause," *Inside U.S. Trade*, October 4, 2013.
[396] "Re: Financial Services Protections in the Trans-Pacific Partnership Agreement," Letter to USTR Kirk from The Securities Industry and Financial Markets Association (SIFMA) and The Financial Services Forum, June 29, 2012.

> "I wanted to underscore how important it is for the financial services industry to get robust commitments on ISDS in the agreement – including on pre-establishment and the full range of fair treatment ([‘minimum standard of treatment,’ ‘national treatment,’ ‘most favored nation’]) provisions. These measures are critical to making the TPP a meaningful agreement for our industry and, as importantly, they set powerful precedent for the U.S.-China BIT."[397]

Opponents of the proposal to expand investor rights and ISDS in financial services argue that the provisions are deregulatory as financial services companies can challenge financial regulations, even during financial and economic crises, which could even discourage a government from adopting financial regulations in the first place. Historically, U.S. regulators, including the Treasury, Federal Reserve and the Securities and Exchange Commission, sought to shield themselves from such challenges and opposed expanding the scope of ISDS mechanism to include additional types of financial services claims.[398]

*Capital Controls*

The leaked notes of the anonymous Chief Negotiator during the Salt Lake City round observed of the financial services negotiations, "The positions are still paralyzed. U.S. shows zero flexibility…"[399] In February, Rodrigo Contreras, Chile's Chief Negotiator, suddenly resigned from his post. Then in May, before the Lima, Peru round, Contreras published an

---

[397] "Note from Faryar on TPP," November 27, 2013, obtained by *Rootstrikers* via the Freedom of Information Act.
[398] "U.S. Faces Opposition in TPP on Demands For Broad Investor-State Clause," *Inside U.S. Trade*, October 4, 2013.
[399] "Excerpts from internal government commentary on the TPP negotiations, minor editing to protect the author country," *Wikileaks*, November, 2013, (available: https://wikileaks.org/IMG/pdf/tpp-salt-lake-extracts-.pdf)

editorial in Peru's top newspaper explaining his concerns about the direction of the TPP, namely, the U.S.' demands in intellectual property and their unequivocal rejection of capital controls. He argued that the TPP was still a work in progress and a potential opportunity for all members, however, institutionalizing the free movement of capital in the TPP would "deprive" developing countries of "legitimate tools to safeguard financial stability." Contreras outlined capital controls as fundamental to development policy,

> "It is critical to reject the imposition of a model designed according to realities of high-income countries, which are very different from the other participating countries. Otherwise, this agreement will become a threat for our countries: it will restrict our development options in health and education, in biological and cultural diversity, and in the design of public policies and the transformation of our economies."[400]

Lastly, Contreras warned that growing social movements would not forgive governments that use to trade negotiations to limit the prosperity and well-being of their countries. Earlier that year, Treasury Secretary Lew had visited the ASEAN TPP members and among their discussions was the Asian countries' continued to opposition to the U.S. provisions that would limit capital controls. To that end, in Singapore, officials stressed to Secretary Lew that the "eventual TPP package will have to provide an overall balance of benefits for all participants," and a lot of "tough work" remained before TPP countries could conclude the deal.[401]

---

[400] Translation from "Nuevo Tablero Mundial," by Rodrigo Contreras A, *Caretas*: Edicion 2283, published May 16, 2013.
[401] "Treasury Secretary Lew Visits Four TPP Countries, China On Asia Trip," *Inside U.S. Trade*, November 15, 2013.

III.F. 2014: The Obama administration prepares for TPA while pushing for TPP conclusion

By 2014, the negotiations had hit two major stumbling blocks, first, that the USTR lacked TPA from Congress, and second, the U.S. and Japan had hit an impasse in bilateral market access for agriculture and autos. The TPA gave other countries the assurance that any agreements with the USTR would not be changed by Congress, and since the USTR lacked TPA other negotiators held back their offers. Therefore, beginning in 2014, the Obama administration began to actively work with Congress to develop a TPA legislation. However, progress had further waned as the U.S. and Japan could not resolve their bilateral market access issues in agriculture and autos. This dilemma nearly arrested the entire negotiations as other countries conditioned their offers on the outcome of the U.S.-Japan deal.[402]

| Table 14: TPP 2014 negotiations, the Obama administration prepares for TPA | | | | | | |
|---|---|---|---|---|---|---|
| Negotiating issues in investment and financial services | Domestic interactions with the USTR | | | TPP negotiators | | |
| | Labor unions, NGOs, civil society organizations | Business lobbies, private sector trade policy advisors | Congress | P-4 (Chile, Brunei, New Zealand, Singapore) | Australia, Peru, Vietnam, Malaysia | Mexico, Canada, Japan |
| Investor rights and investor-state dispute settlement (ISDS) | Application of ISDS to "investment agreements and authorizations" in tandem with other TPP chapters threatens | Demands limited sectoral exceptions | Begins to draft TPA bill while working with USTR; House Democrats draft alternative | ASEAN countries reject application of ISDS to "investment agreements and authorizations"; Australia concedes to ISDS conditional upon greater market access; USTR defends ISDS as foreign policy goal to promote the rule of law abroad; USTR informally proposes tobacco carve-out from ISDS | | |

[402] "Australia Could be Repeat of Past Meetings Absent U.S.-Japan Progress," *Inside U.S. Trade*, October 17, 2014.

| Financial regulations and capital controls | public sector services jobs | | bill with alternative negotiating objectives | Chile leads opposition to U.S. “transfers” policy |
|---|---|---|---|---|
| Market access for FDI | Restricts regulations on financial products | | | Vietnam, Malaysia, and Japan make proposal for broad sector exceptions to market access, especially in financial services, rejected by USTR |

III.F.1. Investor rights and investor-state dispute settlement (ISDS)

*Application of ISDS to “investment agreements” and “investment authorizations”*

The ASEAN countries continued to reject the broad scope of applying ISDS to “investment agreements” and “investment authorizations” for three reasons.[403] First, countries did not want to expose themselves to ISDS in public-private partnerships, in the case of Malaysia, the country was undertaking a series of public-private partnerships infrastructure and forestry projects that could potentially be challenged using ISDS under such a provision. Second, the ASEAN countries did not want ISDS to apply to government procurement, which was politically sensitive in each country and Malaysia had taken a particularly hard stance on the issue.[404] In fact, in the June, 2012 leak there was a proposed provision that the ISDS “…does not apply where there is a dispute between a Party and an investor of a Party related to government procurement or the provision of a subsidy or grant.”[405] The third reason was the dispute over tobacco, discussed below. The ASEAN countries were seeking exceptions or outright carve outs in all three areas. Domestically, labor union representatives from affiliates of Public Services

[403] “Malaysia Flags Major TPP Outstanding Issues, Says U.S. Needs TPA To Close,” *Inside U.S. Trade*, February 28, 2014.
[404] Ibid.
[405] “TPP Investment Chapter, June, 2012 Leak,” Published by *Citizen’s Trade Campaign*, (available: http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf). The USTR did not offer comment on the authenticity of the document.

International made their case to Senate Finance Committee Democrats in September. Among the union's TPP concerns were that the provisions applying ISDS to public services and in tandem with the services and government procurement chapters it would threaten jobs in the public services sectors such as public health, education, and law enforcement. They argued that privatization of public service sectors opens the door to MNCs guided by the profit motive that will devalue wages, labor standards, and jobs.[406]

*Investor-state dispute settlement (ISDS)*

The new Australian government had dropped their absolute opposition to ISDS but they were seeking greater U.S. market access in exchange.[407] In March, the USTR published a "fact sheet" on ISDS intended to defend U.S. investment policy from the domestic and foreign opposition. The USTR did not directly address criticisms of ISDS but merely sought to rhetorically separate "fact from fiction" by claiming that ISDS offers the same protections to investors abroad that they enjoy in the U.S. while safeguarding the right of governments to implement public purpose regulations, such as "…in the interest of financial stability, environmental protection, or public health."[408] The press release asserted that a "core value" guiding trade policy is "promoting the rule of law," and ISDS is one of the cornerstones of this

---

[406] "Public Services Unions Make Case Against Trade Deals To Senate Democrats," *Inside U.S. Trade*, September 19, 2014.
[407] "USTR TPP Briefing To Cleared Advisers Reveals Major Outstanding Issues," *Inside U.S. Trade*, February 14, 2014.
[408] "The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors," Office of the United States Trade Representative, Press Release, March, 2014.

objective.[409] Therefore, the USTR was not espousing ISDS for economic merits, but rather, as a foreign policy goal to promote the rule of law abroad.

*Tobacco and ISDS*

Early in the year, Malaysia's revised tobacco proposal still had support from other members but many members were "reluctant" to give their full support because they did not want to make concessions in other areas of the talks.[410] Towards the end of the year, the USTR had informally discussed with other countries a compromise that would exclude tobacco-related disputes from ISDS but would not affect the rest of the TPP, such as state-to-state disputes and removing tariffs on tobacco.[411] According to Sen. Hatch, the Department of Health and Human Services had refused to give away it's ''policy space'' in regulating tobacco which helped to motivate the USTR to carve out tobacco products from ISDS.[412] The USTR's proposal was blasted by a tobacco industry spokesman, "This proposal would unfairly discriminate against a single sector by denying access to due process and other basic and fundamental legal principles…Worse, it sets a terrible precedent opening the door for other trade partners to begin targeting other business sectors for exclusion."[413]

*Investment-related labor and environmental concerns*

---

[409] Ibid.
[410] "Malaysia Flags Major TPP Outstanding Issues, Says U.S. Needs TPA To Close," *Inside U.S. Trade*, February 28, 2014.
[411] "USTR Informally Floats ISDS Tobacco Carve-out with Some TPP Countries," *Inside U.S. Trade*, October 10, 2014.
[412] Cited in "President Obama's 2014 trade policy agenda : hearing before the Committee on Finance," United States Senate, One Hundred Thirteenth Congress, second session, May 1, 2014. United States.
[413] Ibid.

In December, President Obama addressed the Business Roundtable and outlined his administration's plan to obtain fast track. He mulled that passing fast track would be challenging because many Americans "mistakenly" attribute wage stagnation and job loss to trade agreements.[414] Obama said that the link between trade and wage stagnation is a "half-truth," and he claimed that more jobs have been lost to automation than to offshoring. Therefore, he urged Democrats and unions to not "fight a war" on past trade agreements, "Those who oppose these trade deals, ironically, are accepting a status quo that is more damaging to American workers."[415] Obama asserted that there had been offshoring of U.S. manufacturing as a direct result of the NAFTA and China entering the WTO, however, the TPP will not promote offshoring since companies "can do that now without any real restraints."[416] Moreover, he argued that the TPP would boost labor, environmental, and intellectual property standards which would help support U.S. jobs. Thea Lee, Policy Director of the AFL-CIO, contorted that unions are not "anti-trade," rather, they made a range of substantive recommendations for the TPP that were "virtually ignored" by the Obama administration.[417] Union representatives presented studies contesting that trade has had a more important effect on jobs and wages than claimed by Obama.[418]

III.F.2. Capital controls and financial regulations

In February, after Chile's elections, representatives of the new Chilean government met with USTR Froman and conveyed that they would not give up their right to capital controls,

[414] "In Two Speeches, Obama Says He Will Make Case For TPA to Congress," *Inside U.S. Trade*, December 5, 2014.
[415] Ibid.
[416] Ibid.
[417] Ibid.
[418] Ibid.

which would go beyond their commitments in the U.S.-Chile FTA.[419] Several high ranking officials of the new Chilean government had concluded that the costs of the TPP would outweigh the benefits because Chile already had FTAs with all of the TPP countries but they were being asked to make sensitive concessions in intellectual property rights and capital controls.[420] Similarly, a handful of U.S. Senators led by Sen. Elizabeth Warren addressed USTR Froman about their concerns that the TPP would restrict financial regulations in the U.S., "With millions of families still struggling to recover from the last financial crisis and the Great Recession that followed, we cannot afford a trade deal that undermines the government's ability to protect the American economy."[421] They identified three provisions as problematic for financial regulations - ISDS, market access, and capital controls. They noted that ISDS had successfully been used in another country to target their emergency financial measures and that the USTR's proposed expansion of the "minimum standard of treatment" provision to the financial sector would have a powerful deregulatory effect on the financial services sector. They outlined concerns that market access commitments in the financial services sector would undermine the ability of regulators to restrict "predatory or toxic financial products - such as particularly risky forms of derivatives" because such regulations could be interpreted as a denial of access to the U.S. financial markets.[422] They opposed the ban on capital controls because it could "…limit Congress' prerogative to enact not only capital controls, but basic reform measures like a financial

[419] "Incoming Chilean Officials Convey TPP Red Lines In Meeting With Froman," *Inside U.S. Trade*, February 14, 2014.
[420] Ibid.
[421] "Letter to USTR Froman on the TPP," December 17, 2014, Office of Senator Elizabeth Warren, (available: http://www.warren.senate.gov/files/documents/TPP.pdf)
[422] Ibid.

transactions tax."[423] In conclusion, they pressed the USTR to explain how U.S. trade policy would help Congress and regulatory agencies to prevent future financial crises.

III.F. 2015: Obama administration secures TPA then concludes TPP negotiations

While the USTR pressured Congress for TPA, other TPP negotiators contributed by warning Congress that without TPA the TPP would end up "like the Doha stalemate."[424] As TPP proponents did not yet have the necessary votes in Congress to secure passage of TPA, major U.S. industry groups stepped up lobbying efforts, especially the financial services lobbies. Emails between USTR Froman and executives of the big U.S. banks revealed close coordination on lobbying efforts to win votes for TPA while scheduling meetings to discuss the content of the TPP and T-TIP - "See u thurs, bob" one bank executive signed in his email to USTR Froman.[425] Simultaneously, in January, *wikileaks* obtained and published a new leaked draft of the investment chapter revealing that the USTR had secured unprecedented investor rights, further fueling an increasingly diverse domestic opposition to TPA.[426] The TPP negotiations were concluded on October 5, 2015 and the final text was made public on November 5, 2015.

| Table 15: TPP 2015 negotiations, Obama administration secures TPA and TPP concluded | | |
|---|---|---|
| Negotiating issues in | Domestic interactions with the USTR | TPP negotiators |

[423] Ibid.
[424] "Groser Warns that TPP Could End Up Like Doha if Congress Does Not Pass TPA", *Inside U.S. Trade*, March 20, 2015.
[425] "RE: TPA letter," February 9 – May 1, 2015, e-mails between USTR Froman and U.S. bank executives, obtained by *Rootstrikers* via Freedom of Information Act.
[426] "Trans-Pacific Partnership treaty: Advanced Investment Chapter working document for all 12 nations (January 20, 2015 draft)," *WikiLeaks* release: March 25, 2015, (available: https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf).

| investment and financial services | Labor unions, NGOs, civil society organizations | Business lobbies, private sector trade policy advisors | Congress | P-4 (Chile, Brunei, New Zealand, Singapore) | Australia, Peru, Vietnam, Malaysia | Mexico, Canada, Japan |
|---|---|---|---|---|---|---|
| Investor rights and investor-state dispute settlement (ISDS) | Organize to defeat TPA in Congress (unsuccessfully), in so doing new international alliances formed | Major lobbying effort to secure TPA in Congress | Passed TPA although there is no evidence that TPA effected USTR negotiating objectives or the content of the investment and financial services chapters | ASEAN countries unsuccessful in "pre-establishment"; USTR secures language on "indirect expropriation" and application of ISDS to "investment agreements and authorizations" but makes compromises for specific exceptions; Australia exchanges market access for ISDS; USTR compromises on tobacco | | |
| Financial regulations and capital controls | | | | USTR concedes on capital controls but secures highly limited conditions for their implementation, Chile wins most policy space; USTR successfully incorporates "minimum standard of treatment" and ISDS enforcement | | |
| Market access for FDI | | Industries upset over data provision | | Industries upset over Malaysia' FDI screen in financial services; USTR promises industries that TPP exceptions are "minimum baseline" for future negotiations | | |

III.F.1. Investor rights and investor-state dispute settlement (ISDS)

*Investor rights*

The leaked January draft of the investment chapter revealed which conflicts had been settled, which remained, and other developments since the 2012 leak. All brackets around the definition of "investment" had been removed, signifying that the ASEAN countries did not secure their exceptions to the "pre-establishment" obligations while other countries had dropped their proposals to narrow the scope the chapter. The conflict over the indirect expropriation

provisions had been resolved, with a removal of the brackets around the U.S. proposal and a deletion of the competing proposal, which was language from China's BITs.[427] It is unclear if any political trade-offs settled the conflict. In addition, there was a deletion of a footnote establishing broad interpretation of "public welfare objectives," an edit that weakened the public purpose carve-out from the investor protection.[428] These developments protected the "expropriation" provision from the attempts from other countries to block any legal avenues that would allow companies to bring "indirect expropriation" claims under ISDS.

In March, in a NAFTA case involving a U.S. investment in a Canadian quarry, an ISDS tribunal ruled that Canada breached its "minimum standard of treatment" obligations awarded the U.S. company $101 million USD.[429] The governments of the U.S., Canada, and Mexico disagreed with the tribunal's decision, which motivated the USTR to make slight revisions to the TPP "minimum standard of treatment" provision. Notably, the USTR introduced new language that provided that a government measure that is merely inconsistent with an investor's expectations does not constitute a breach of the "minimum standard of treatment" provision.[430] A second new provision carved-out government subsidies and grants from the "minimum standard of treatment" obligation.[431] However, with the release of the final TPP text, legal experts doubted the effect of the new provisions because no past findings of a violation of the provision had

[427] TPP Investment Chapter, January, 2015 leak released by *wikileaks*, Annex II-B.
[428] TPP Investment Chapter, June, 2012 leak, Annex 12-C (4(B)), footnote number 23.
[429] "Cases Filed Against the Government of Canada: Clayton/Bilcon v. Government of Canada," Office of Global Affairs Canada, (available: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng)
[430] TPP Investment Chapter, Article 9.6 (4).
[431] TPP Investment Chapter, Article 9.6 (5).

rested exclusively on the fact that an investor's expectations were not met, but rather that the state acted in an unfair or arbitrary way.[432]

*Application of ISDS to "investment agreements" and "investment authorizations"*

Throughout most of the year the conflict continued over the application of ISDS to "investment agreements" and "investment authorizations." In the June, 2012 leaked draft of the TPP investment chapter both terms appeared 12 times and all bracketed, then in the January, 2015 leak both terms appeared 18 times and all bracketed, and in the final text the terms appeared 41 times, signifying that conflict was not resolved until near the end of negotiations and most likely at the political level of Chief Negotiators. As the NAFTA did not have such provisions, Mexico had emerged as leading the opposition to the U.S. proposal, and especially they sought to guard against ISDS claims in the event of breaches to public concessions contracts.[433] Based on the final text, the USTR had made two major compromises from their negotiating position delineated in the 2012 Model BIT. The first compromise was to scale-back the definition and scope of "investment agreements" and "investment authorizations." With respect to natural resources, an "investment agreement" would not include public land, water, or radio spectrum; with respect to the supply of public services, an "investment agreement" would not include correctional, healthcare, education, childcare, or welfare services; the definition of "investment authorizations" would not apply to non-discriminatory regulations that address competition, the environment, public health, licensing regimes, or investment incentives. The

---

432 "TPP Investment Language Aims to Tighten Standard for MST Breach," *Inside U.S. Trade*, November 13, 2015.
433 "TPP Investment Leaks Reveals Remaining Issues are ISDS Scope, Capital Flows," *Inside U.S. Trade*, March 27, 2015.

second compromise led to the creation of a new Annex which provides that a state may condition a contract for an investment agreement such that disputes could be arbitrated under an alternative legal forum to the ISDS procedures. The Annex also contained some country-specific provisions, notably, Mexico did not consent to the application of ISDS to oil, gas, petroleum, and a range of public infrastructure. In sum, while the USTR began negotiations insisting on the application of ISDS to diverse public domain contracts called "investment agreements" and "investment authorizations," to conclude the TPP, the USTR had to narrow the definition of both terms and the scope of ISDS as applied to the terms.

*Investor-state dispute settlement (ISDS)*

While trying to win TPA from many skeptical or critical Congress members, the USTR was forced to defend its positions. Throughout 2015, the USTR published fact sheets, question and answer sessions, and responses to high-profile critics in Congress, such as Sen. Elizabeth Warren. In fact, Ranking Rep. Levin had drafted an alternative TPA bill with substantive proposals for reforms to investor rights and ISDS. In March, House Democrats had a private meeting with USTR officials concerning the TPP investment chapter in which the USTR indicated that it would not change its negotiating positions on the issues.[434] Some Congress members in attendance responded that the USTR's unwillingness to compromise on its negotiating positions was contrary to the purpose of TPA, in which Congress mandates negotiating objectives to the USTR. House Democrat Alan Grayson elaborated, "Now they're telling us that major parts ... of these agreements are no longer subject to negotiations, much less

[434] "Democrats Divided on Value of Closed-Door Investment Briefing," *Inside U.S. Trade*, March 27, 2015.

guidance through legislation."[435] The USTR stuck to its talking points that stakeholder consultation substituted Congressional mandate. Similarly, USTR Froman responded to criticisms in the Senate, "The TPP investment rules have been carefully crafted though many years of close stakeholder consultation and a public comment process."[436]

In addition to attempting to limit the scope of "investment agreements" and "investment authorizations," TPP countries were seeking carve-outs from ISDS for specific sectors. Australia was conditioning its acceptance of ISDS to improved market access for its sugar and dairy exports, and by August the U.S. had offered additional market access to Australian sugar.[437] In addition, as revealed by the January leak, Australia asserted that if it accepted ISDS then it would not apply not to tobacco measures and a list of other public health measures.[438] Canada sought a complete carve-out of its "culture industries" from ISDS.[439] By the end of negotiations, Australia conceded to ISDS while both Australia and Canada succeeded in securing these carve-outs. The January leak also disclosed that Malaysia had been seeking a permanent and complete carve-out of government procurement from ISDS.[440] Malaysian officials were seeking a high monetary threshold above which the government procurement of construction would be open to foreign bidders.[441] However, by the end of the year, they had only secured a three year transition period of isolating government procurement from ISDS.

---

[435] Ibid.
[436] Cited in "President Obama's 2015 trade policy agenda: hearing before the Committee on Finance," United States Senate, One Hundred Fourteenth Congress, first session, January 27, 2015
[437] "TPP Ministerial Ends Without Deal, But Officials Cite Major Progress," *Inside U.S. Trade*, August 7, 2015.
[438] TPP Investment Chapter, January, 2015 leak released by *wikileaks*, Annex II-M.
[439] TPP Investment Chapter, January, 2015 leak released by *wikileaks*, Annex II-I.
[440] TPP Investment Chapter, January, 2015 leak released by *wikileaks*, Annex II-L.
[441] "TPP Chiefs Expected to Discuss Outstanding Issues, Including IPR," *Inside U.S. Trade*, April 24, 2015.

*Tobacco and ISDS*

The USTR's informal tobacco proposal provided a broad exemption from ISDS for tobacco-related regulations, and this provoked outrage not just from tobacco companies and affected Congress members but also from the business community more generally.[442] President Obama justified his administration's position, "The big bugaboo that's lifted up there is tobacco companies suing poorer countries to make sure that anti-smoking legislation is banned, or at least tying them up with so much litigation that ultimately smaller countries cave."[443] However, the USTR waited until after Congress passed TPA to officially table its tobacco proposal that would deny the benefits of ISDS to tobacco companies and products.[444] Throughout the year, Democratic and Republican Congress members from tobacco producing states, including Senate Majority Leader Mitch McConnell, went to bat for the tobacco industries.[445] McConnell did not withdraw his support for the TPP, but he warned USTR Froman, "…[do] not set a new precedent for future U.S. trade negotiations by negatively carving out a specific American agricultural commodity — in this case tobacco."[446] However, in TPP negotiations, the USTR "was clear" that tobacco had to be treated differently, especially because it was a "salient" issue with a "sizeable" bloc of TPP members, including Australia, New Zealand, and Malaysia.[447] The

---

[442] "Mcauliffe Links Offer of TPP Outreach to Dropping Tobacco Carveout," *Inside U.S. Trade*, March 15, 2015.
[443] "Remarks by the President at Meeting of the Export Council," *The White House,* Office of the Press Secretary, December 11, 2014.
[444] "U.S. Tobacco Proposal Makes ISDS Carveout Optional; Builds on Model BIT," *Inside U.S. Trade*, October 2, 2015.
[445] "Will Trans-Pacific deal go up in tobacco smoke?" by Adam Behsudi, Politico, August 12, 2015).
[446] Ibid.
[447] Ibid.

USTR's lead negotiator Barbara Wiesel explained that if the USTR did not compromise on tobacco then they would have had to compromise in other areas, such as ISDS.[448] The USTR's proposal was accepted by the other TPP negotiators and subsequently some Congress members who had supported TPA vowed to not support the final vote for the TPP.[449]

*Investment-related labor and environmental concerns*

The auto rules of origin were among the last conflicts of negotiations and they were decided in a political tradeoff with the other remaining issues. In an FTA, product-specific rules of origin interact with the investment chapter inasmuch as the investment chapter facilitates and/or incentives offshoring. The final rules of origin for autos was set at 45 percent for the TPP bloc, meaning that 45 percent of the total content of an automobile must come from TPP members in order for the automobile to qualify for the benefits of the agreement, such as tariff reductions. While U.S. and Mexican automakers supported the TPP auto rules of origin, U.S. labor unions alongside a handful of Congress members lamented the compromise, as in their view it was a downgrade from the 62.5 percent auto rules of origin in the NAFTA.[450] They argued that the new TPP auto rules of origin would result in increased offshoring and/or import competition from the Asian TPP members.[451]

Simultaneously, U.S. footwear producer New Balance had cut a deal with the Obama administration to forgo their opposition to the TPP in exchange for a contract to supply the

[448] "Tillis Warns USTR That Tobacco Carveout Could Endanger Fast Track for TPP," *Inside U.S. Trade*, August 14, 2015.
[449] "TPP Deal Includes Tobacco Carveout, Teeing up Fight with Congress," *Inside U.S. Trade*, August 14, 2015.
[450] "TPP Opponents Pin Hopes to Defeat Deal on Broad Information Campaign," *Inside U.S. Trade*, April 24, 2015.
[451] "Text: Confidential LAC Interim Report," *Inside U.S. Trade*, June 5, 2015.

military with Made-in-the-USA shoes.[452] However, according to New Balance, the Obama administration reneged on the arrangement which led New Balance to join the textile workers union in opposing the TPP. By the end of negotiations, labor unions and sympathetic Congress members were warning that the TPP meant further offshoring in both the automobile and textile sectors. Alongside long-standing ISDS-related environmental concerns, the TPP's potential effect on the quantity and quality of jobs became a central sticking-point in the 2015 TPA debates in Congress. The debates were largely a continuation of the on-going conflicts, however, the point of issue was no longer the content of the TPP but rather whether or not Congress should pass TPA which would open the door to ratifying the TPP.

III.F.2. Financial regulations and capital controls

*Capital controls*

Whereas the 2012 leak illustrated that TPP countries proposed various forms of capital controls to the opposition of the USTR, the January 2015 leak showed that there had been some incremental movement on the stalemate. Most notably, in the January 2015 leak there were two competing provisions that would govern capital controls.[453] The first proposal was based on the WTO balance of payments provisions which provide relatively greater policy space for implementing capital controls and it replicated the language found in the 2012 leak, which was contested by the U.S.; the second was a set of more narrow provisions that was similar to the language found in the U.S.-Korea FTA. There were two main differences between the proposals, in the first instance the U.S. proposal had a far more limited scope in that it only applied to

[452] "Shoemaker New Balance Challenges Obama On Trans-Pacific Partnership," *National Public Radio*: All Things Considered, April 22, 2016.
[453] TPP Investment Chapter, January, 2015 leak released by *wikileaks*, Article CCC.3.

"movements of capital," whereas the competing proposal applied to all "transfers or payments," even for goods and services. The second difference was that the U.S. proposal imposed far more stringent conditions that a capital control would have to meet in order to qualify as an exception to TPP obligations, including, that the measure would not exceed one year and that it would be applied as a non-discriminatory tax, among other conditions. Both proposals were bracketed and the issue would not be resolved until towards the end of negotiations. However, the leak demonstrated that the U.S. had moved from its original negotiating stance to be more accepting of capital controls. Ranking Rep. Levin observed that the conflict was now over the extent of capital controls, "Other TPP countries have insisted on [capital controls]…The focus is now on ensuring that the language in the exception is neither too narrow nor too broad."[454]

The final agreement, "Temporary Safeguard Measures,"[455] was a combination of the two proposals although with some significant political compromises. The provisions apply broadly to all transfers, however, they are subject to a range of specific conditions and if those conditions are met then any capital controls measure must not exceed 18 months. Among those conditions are that they must be consistent with the expropriations provision, including: they must not interfere with investors' ability to earn a market rate of return; they must not be used "to avoid necessary macroeconomic adjustment"; they are not permitted for payments or transfers relating to FDI; states must follow specific procedures for consultations with other TPP members and publish a schedule for their removal.[456] In sum, while TPP countries secured the right to

[454] "TPP Investment Leaks Reveals Remaining Issues are ISDS Scope, Capital Flows," *Inside U.S. Trade*, March 27, 2015.
[455] TPP Exceptions Chapter, Article 29.3.
[456] TPP Exceptions Chapter, Article 29.3 (4).

temporary capital controls, the U.S. attached a curious combination of specificity and ambiguity to the necessary conditions that would permit the implementation of capital controls.

The 2012 leak revealed that Chile was seeking to codify their unrestrained ability to implement any capital controls in a separate annex to the investment chapter, including its right to implement reserve requirements to capital inflows, which they had successfully implemented for five years in the early 1990s. The January, 2015 leak contained some additional provisions, notably that the reserve requirement does not exceed 30 percent of the amount transferred and must not be imposed for longer than two years. In the final agreement, any references to the broad regulatory power of Chile's monetary authorities was removed, and the phrase "Notwithstanding Article 9.9 (Transfers)" was inserted prior to the provision.[457] The end result was that Chile secured the right to implement a specific form of capital controls (reserve requirements on capital inflows) for no more than two years.

*Investor rights in financial services*

By the conclusion of negotiations, the USTR had secured an unprecedented expansion of ISDS to investors and investments in financial services by incorporating the "minimum standard of treatment" provision from the investment chapter into the financial services chapter and then making it subject ISDS enforcement. In past FTAs, the U.S. had only incorporated the "expropriation" and "transfers" provisions and subjected them to ISDS enforcement in the financial services chapters.[458] Domestically, the measure was controversial as the "minimum standard of treatment" provision has been cited in nearly 90 percent of all ISDS claims and

[457] TPP Investment Chapter, Annex 9-E (1).
[458] See U.S.-Korea FTA, Financial Services Chapter, Article 2(b).

critics argued that expanding this right to financial services firms could “open a Pandora’s box” of claims against financial regulations.[459] A spokesman from the financial services industry contested that the addition of “minimum standard of treatment” would only “slightly” enhance investor rights in financial services because the lack of access to the right in the past had not stopped many ISDS claims in financial services.[460]

In negotiations, the measure was resisted by other countries who eventually proposed a range of counter-offers in the form of carve-outs and exceptions. By the end of negotiations, Brunei, Chile, Mexico, and Peru had secured a limited carve-out from the new obligation. The provision[461] granted that “minimum standard of treatment” in financial services would not apply to any fact or situation prior to the fifth anniversary of ratification of the TPP in Brunei, Chile, and Peru, and the seventh anniversary in Mexico. In so doing, those countries not only secured a transition period but also an exception to the obligation for existing conditions that would currently constitute a breach of “minimum standard of treatment” in financial services. Following the conclusion of negotiations, the USTR’s trade advisory committee on services issued their report to the USTR measuring the final text against the industry’s negotiating objectives. While the services and finance industries supported the TPP, among their reservations on the financial services chapter was the fact that it did not include the “national treatment” and “most favored nation” provision from the investment chapter.[462] In sum, the USTR expanded

---

[459] “TPP Financial Services Chapter Opens Door to Broader ISDS Claims,” *Inside U.S. Trade*, November 13, 2015.
[460] Ibid.
[461] TPP Financial Services Chapter, Annex 11-E.
[462] “Services & Finance ITAC Flags Reservations on ISDS, Localization, NCMs,” *Inside U.S. Trade*, December 11, 2015.

investor rights in financial services over domestic regulatory concerns and international opposition but not to extent that industry groups had hoped.

## G. New President Trump Withdraws the U.S. from the TPP

*President Obama signs the TPP*

At the end of 2014, USTR Michael Froman announced that trade promotion authority (TPA) was necessary to conclude the TPP negotiations. Congress grants TPA to the President to allow for an "up or down" vote for an FTA, in return, in the TPA legislation Congress sets the negotiation objectives for the President. In past practice, Presidents sought TPA from Congress before negotiating an FTA because the TPA contains Congressionally mandated negotiating objectives. However, the Obama administration had not sought TPA from Congress until the end of TPP negotiations because Congress was hostile to the TPP from the start of negotiations. House Democrats had repeatedly introduced TPA legislation containing negotiating objectives proposed by labor unions and environmental organizations, which were contrary to the USTR's priorities in the TPP. In May and June of 2014, the TPA failed its original votes in the House and Senate as many Congressional Democrats were demanding a renewal of Trade Adjustment Assistance and measures against currency manipulation as the price for their support for TPA. Trade Adjustment Assistance coordinates federal programs aimed at reducing the impact of import competition as a result of trade and investment agreements.

Beginning in 2015, the AFL-CIO in tandem with other unions froze all campaign contributions to pressure Congress members to oppose TPA while growing conservative opposition to U.S. trade policy led to new political alliances across party lines. Political trade-offs were made in favor of a stronger Trade Adjustment Assistance while major

corporate lobbies stepped up efforts to win the necessary Congressional votes. Research by Maplight, an organization that specializes in measuring campaign contributions, found that industry groups gave 8.6 times more money ($197.9 million) to House Representatives who voted in favor of TPA than to those who opposed the legislation ($23.1 million) (Stevens 2015). By the end of June, 2015, the TPA had been reintroduced to both the House and Senate where it narrowly passed and President Obama signed it into law in July. TPA passage enabled the conclusion of TPP negotiations in October because it gave TPP members the necessary confidence to put forward their final offers because TPA ensured that Congress could not change the final deal (Froman 2014).

In February 2016, the TPP members signed the agreement. For the TPP to become implemented as international law, TPP members would have to pass the TPP through their respective political ratification processes. In the U.S., this meant Congress would vote on the TPP's implementation. Due to the 2016 Presidential election cycle, this was becoming increasingly complicated as the top candidates were campaigning against the TPP. The Obama administration did not send the TPP up for vote as Congress was awaiting the results of the 2016 elections.

*The 2016 Presidential Elections*

The first social protest in the U.S. against the TPP was in June 2010, in which advocates from the labor, environmental, family farm, consumer, indigenous rights, and among others held a gathering outside the TPP's first U.S. negotiating round. Their banner read, "A New Deal or No Deal," and their message was a call for a new trade agreement model that would prioritize the interests of labor, the environment, and the consumer, rather than corporate profits. As

negotiations continued, so did the social protests against the TPP. From that moment and until Obama signed the TPP in 2016, popular opposition to the TPP gained more and more momentum. First thousands, then tens of thousands, then hundreds of thousands, and then millions of U.S. citizens signed letters and petitions in opposition to the TPP and its corporate-sponsored content. During the fast-track debate in 2015, more than 2,000 local political organizations signed statements opposing fast-track for the TPP.

Trade became a hot-button issue on the 2016 Presidential campaign trail. Democratic frontrunner Hillary Clinton was challenged by Senator Bernie Sanders, a self-described "Democratic Socialist," who had soared in popularity in only months. Sanders' long track record of opposition to U.S. FTAs and his persistent resistance to the TPP throughout negotiations boosted his message and popularity. Sanders actively campaigned against the TPP, he argued, "The TPP is a disastrous trade agreement designed to protect the interests of the largest [MNCs] at the expense of workers, consumers, the environment and the foundations of American democracy" (Sanders 2016). Sanders promised that as President he would integrate public interests and public institutions into trade policy formation, on the principle of democracy.

Conversely, as Secretary of State, Clinton oversaw the State Department's formation of key trade and investment negotiating objectives for the agreement (Department of State 2012) and then she declared the TPP as the "gold standard" of trade agreements. Sander's growing popularity and popular opposition to the TPP seemed to have forced Clinton to rethink her trade policy stance. In October 2015, just before the first Democratic primary debate, Clinton announced that she had a change of heart on the TPP and that the TPP was in need of fundamental changes to earn her support. When

Clinton reversed course on the TPP and announced her opposition, it meant that both of the Democrat's frontrunners did not support the TPP. As the TPP needed the Democrats support in Congress, this was the key moment in sealing the TPP's fate.

Republican frontrunner, reality television star Donald Trump, grew in popularity with the majority white working class by pledging to "Make America Great Again." On trade, he promised to withdraw from the TPP and label China a currency manipulator, threatened to withdraw from the WTO and NAFTA, and to impose high tariffs on imported Chinese goods and goods produced by U.S. MNCs that had offshored production. Trump's "America first" trade policy was one part of a larger package of social protections for the white working class, which also entailed empowering them with putative immigration and criminal justice policies. He promised xenophobic border walls and controls to protect working class jobs from "illegal immigrants" and aggressive security policies to protect working class communities from the "bad hombres" to the South and the "radical Islamic terrorists" in the East. Trump's nationalistic rhetoric worked. Trump won the election because he won white working class voters in key swing states and counties (Freund & Sidhu 2017; Sasson 2016; Cohn 2016; Tankersley 2016).

*The TPP gets Trumped*

After Trump won the election, true to his campaign promise, he withdrew the U.S. from the TPP on his first week in office. Congressional Democrats and their constituents refused to give Trump credit for the TPP's 2016 defeat, Senate Minority Leader Charles Schumer proclaimed, "TPP was dead long before President Trump took office." Similarly, Richard Trumka, head of the AFL-CIO, attributed the lack of Congressional support for the TPP to "a powerful coalition of labor, environmental, consumer, public health and allied groups." Obama's

USTR Froman responded that the TPP was merely in a state of hibernation because the U.S.' core interests do not change with an administration change. At the April 2017 APEC meeting in Vietnam, trade ministers from the TPP countries marginalized Trump's new USTR Robert Lighthizer and they pledged to ratify the TPP without the U.S.

## V. Conclusion

### *Polanyi's "double movement" and TPP negotiations*

In the TPP investment chapter negotiations, U.S. political actors represented all three of the ideal types of trade policy positions. U.S. MNCs, the Obama administration, and bipartisan groups in Congress supported "free trade" policies (market-based governance). Labor unions, environmental organizations, consumer groups, and many Congressional Democrats supported "socialist" trade policies (subjecting markets to democratic control). Libertarian, small government, and "Tea Party" Republicans and political organizations, along with the Trump administration, supported the "nationalist" trade policies (prioritizing national interests over multinational interests). The "free trade" actors vigorously promoted the TPP while "socialist" and "nationalist" groups denounced the TPP in favor of social protections, and the alliances had crossed conventional party lines on both sides of the debate. As negotiations progressed, U.S. political actors sharpened their positions as they conflicted and cooperated with groups in other countries. With the election of Donald Trump, "socialist" and "nationalist" political currents had defeated the "free traders" in the TPP battle.

### *"Free trade" actors in TPP investment negotiations*

The "free trade" actors sought strong investor protections and far-reaching applications of ISDS with limited exceptions. They promoted their position as "de-politicized," neutral, market-based governance for the region. However, the "free trade" groups were in conflict with the "socialist" and "nationalist" actors. Therefore, their promotion of market-based governance was a political decision rather than a "neutral" economic law. For example, during domestic negotiations, U.S. business groups united in their position, "U.S. investors are at a competitive disadvantage compared to many of their key competitors from countries that already have strong [investment agreements] with countries in key growth markets such as China, India and Russia" (Inside U.S. Trade 2010a). Prominent business lobbyist Linda Menghetti explained to Congress, "…strong investment protections are vital and squarely within America's economic and national interest" (cited in House 2009). The domestic negotiations over specific provisions revealed the USTR's decision-making process in developing negotiating objectives – they would support most of business' proposals and reject any competing proposals, including those of labor, environmental, and consumer groups. Since the Obama administration did not pursue TPA and lacked Congressional directives, the USTR was free to reject other policy proposals.

However, the Obama administration did not entirely represent "free trade" policies. The USTR had a more nuanced approach than simply pursuing the expansion of investor protections and ISDS in indefinite directions. As the U.S. had been a defendant in numerous ISDS cases, the USTR did not support all of business' proposals. For, example, the "minimum standard of treatment" and "expropriation" provisions were less investor-friendly than the proposals advanced by U.S. MNCs. However, compared to the investment policies of other countries, U.S. investment policy is the among the most pro-investor rights (Alschner & Skougarevskiy 2016).

*"Socialist" trade actors in TPP investment negotiations*

In negotiations, the U.S.' proposed multinational investor protections immediately conflicted with the priorities of labor unions, environmental organizations, and consumer advocacy groups. For this reason, diverse groups in the U.S. called on the Obama administration to democratize trade and investment policy. Labor unions had two primary concerns in investment negotiations, first, that strong investor protections facilitated offshoring of jobs, and second, they attempted to tie investor rights to investor obligations to raise labor standards abroad. However, it was sometimes unclear whether these demands were "socialist" or "nationalist." Labor unions who sought to insert language into the investment chapter to raise global labor standards were "socialist," while labor leaders who prioritized the interests of U.S. workers over workers in other countries were "nationalist." Environmental organizations also sought to weaken investor protections. Their purpose was to prevent multinational investors from using ISDS to weaken environmental regulations, notably, the fossil fuel industry's deliberate use of ISDS to dismantle climate change regulations. Similarly, the USTR conceded to a broad tobacco exception from ISDS. While the U.S. business community united in opposition against product-specific exemptions to ISDS as an unacceptable precedent, the conflict represented a growing domestic and international sentiment that MNCs use ISDS to undermine public interest legislation, particularly in small or developing countries. The heated debate over capital controls starkly contrasted the public and private interest in monetary and exchange rate policy. Developing countries, led by Chile, outlined the right to capital controls as fundamental to development policy; whereas the USTR was opposed to capital controls in order to facilitate flows of private capital and support the

commercial interests of U.S. financial services MNCs. U.S. consumer advocacy groups, hundreds of leading U.S. economists, and Congressional Democrats supported developing countries' right to capital controls. These groups represented "socialist" trade politics as they sought to democratize trade policy formation.

*"Nationalist" trade actors in TPP investment negotiations*

Similar to the "socialists," in all countries "nationalists" tended to be opposed to strong investor protections. The developing countries pushed back on the USTR for a combination of weaker investor rights and broad exceptions to ISDS, and many of their motivations were to benefit domestic industries. For example, Mexico sought broad exceptions to ISDS in the energy sector to safeguard national energy firms while Malaysia sought exceptions for government procurement to give contracts to national firms. Even the U.S. took such precautions - the USTR did not include the proposals from labor unions on state-owned enterprises because the Treasury did not want to expose itself to ISDS claims against emergency financial measures, such as nationalizing the banks and automakers after the 2008 financial crisis. Libertarian political organizations, like the Cato Institute, announced that they opposed ISDS because it undermined U.S. sovereignty and democracy. Politicians, notably Donald Trump, opposed the TPP along nationalist lines inasmuch as the TPP resembled past U.S. FTAs that allowed MNCs to abandon production in the U.S. while allowing other countries to import without reciprocal market access.

## Chapter Six: The Direction of U.S. International Investment Agreements

I. Introduction

II. Comparing the NAFTA and TPP investment and financial services chapters

III. The TPP's impact on state sovereignty

IV. Conclusion: international investment law theory revisited

### I. Introduction

In this chapter, I compare the legal content of the NAFTA and TPP investment agreements. Although there are key differences, in the main, the NAFTA and TPP investment agreements are highly consistent. I argue that based on this analyses, the TPP investment chapter heavily favors "private" interests in the "public-private" divide and it categorically limits development policy options for the low-income TPP countries. I conclude that although President Trump withdrew the U.S. from the TPP, it is not in the Trump administration's interest to revise the U.S. Model BIT. In the next chapter I will discuss the intersection of the U.S. Model BIT with Trump's "America First" campaign promises.

### II. Comparing the NAFTA and TPP investment and financial services chapters

#### II.A. Differences between the NAFTA and TPP investment and financial services chapters

*"The TPP is not NAFTA" – President Obama*

In broad terms, the NAFTA and TPP investment and financial services chapters contain very similar investor protections and investor-state dispute settlement (ISDS) procedures, however, there are some important and specific differences. International

investment law experts Wolfgang Alschner and Dmitriy Skougarevskiy compared the TPP investment chapter to over 3000 international investment agreements in force using a method that turns text into data to compare similarities and differences between texts (2016). They found that the TPP investment chapter was most similar to the investment chapters of the U.S.-Colombia FTA (81 percent similarity) and the U.S.-Peru FTA (81 percent similarity) (2016). Notably, Alschner and Skougarevskiy found that the TPP investment chapter was 70 percent similar to the 2012 U.S. Model BIT and 58 percent similar to the NAFTA investment chapter (2012).

Alschner and Skougarevskiy's methodology is limited in two significant ways. First, their methodology omits footnotes and annexes, which contain some of the USTR's most important negotiating concessions. Notably, the exceptions to the application of ISDS to "investment agreements," which cover public-private contracts over natural resources, infrastructure, and public services (Annex 9-L), and the annexes covering capital controls (Annex 9-E, 9-F, and Exceptions and General Provisions). Second, Alschner and Skougarevskiy's study does not discuss the legal context of the provisions, in which slight changes to the language can have strong modifications to the legal interpretation. For example, the central difference between the "minimum standard of treatment" articles in the NAFTA and the TPP is that the NAFTA article contains the broad language that investments be treated "in accordance with international law," while the TPP article specifies that that investments be treated "in accordance with *applicable customary* international law" (emphasis added). The insertion of only two words, "applicable customary," before "international law" significantly alters the interpretation of the article because it limits the scope of *which* international law is being referenced. The TPP article provides for "applicable customary international law," which is an established body of legal

precedents that are centuries old, whereas the NAFTA article merely cites "international law" which was interpreted by investors to be *any* international law.

President Obama repeatedly addressed the TPP's critics, "The TPP is not NAFTA." Based on my own analysis, there are three mains sources of differences between the NAFTA and TPP investment and financial services chapters: (1) the experiences of the U.S. as a defendant under the NAFTA ISDS; (2) evolving commercial interests of U.S. MNCs abroad; (3) the USTR's concessions during TPP negotiations. The investment provisions that are contained the NAFTA were originally designed for capital-importing states and so the original U.S. drafters did not anticipate the U.S. to be an ISDS defendant. However, the early NAFTA cases, especially those brought against the U.S., motivated the Department of State to modify core provisions. The most significant of these revisions came during the drafting of the 2004 U.S. Model BIT in which the Department of State carefully scaled back the strength of two core investor protections, the "minimum standard of treatment" and "expropriation" articles. This was achieved by the creation of annexes that tied the interpretations of the two provisions to "customary international law" that has been established in centuries of international arbitrations on the two provisions. The adjustments to these two provisions were the most significant changes to the U.S. Model BIT (2004).[463]

The commercial interests of the U.S. MNCs have evolved with technology and the growing commercial and political importance of Asian markets. To support the interests of U.S. MNCs, both the 2012 U.S. Model BIT and the TPP contain expanded

[463] The other NAFTA-inspired small revisions to the U.S. Model BIT are well documented elsewhere (Vandevelde 2009 and 2010; Alvarez 2004).

investor protections that were not conceivable in the 1990s. Comparing the NAFTA and TPP investment and financial services chapters, the TPP's most significant expansion of investor rights include: expanded "performance requirements" aimed at state-owned enterprises banning transfers of technology and intellectual property; application of ISDS to "investment agreements" and "investment authorizations"; application of ISDS to the WTO intellectual property rules (TRIPS); the application of the "minimum standard of treatment" article to the financial services sector. The strengthening of these U.S. investor protections were in large measure developed for future negotiations with China, particularly regulations on intellectual property and state-owned enterprises (which are further developed in the TPP intellectual property and state-owned enterprises chapters).

Lastly, other key differences between the NAFTA and TPP investment and financial services chapters emerged from the concessions that the USTR made during TPP negotiations. The USTR's most important negotiating concessions to the TPP's regulations include: exceptions to the application of ISDS to "investment agreements"; more liberal policy space for use of capital controls; the complete carve-out of tobacco from ISDS. The TPP's impact on state sovereignty is discussed below (Section III).

II.B. Similarities between the NAFTA and TPP investment and financial services chapters

*The ghost of Calvo*

Far more significant than the specific differences between the NAFTA and TPP investment and financial services chapters are their fundamental similarities. Considering the diverse and wide-ranging proposals to alter the 2004 U.S. Model BIT, the Obama administration made only very minor revisions (outlined above) to the 2004 U.S. Model BIT in their drafting of

the 2012 Model BIT. The Obama administration's wholesale endorsement of the 2004 Model BIT signaled the structural consistency of U.S. investment policy since the Cold War. The 1983 U.S. Model BIT was developed by the Reagan administration which was then imported into the NAFTA investment chapter. The NAFTA investment chapter motivated some slight revisions to core investor protections in the 2004 Model BIT. In turn, the 2004 Model BIT was slightly expanded upon by the Obama administration in the 2012 Model BIT, both of which were used to negotiate the TPP investment chapter. From the Cold War through the "rise of China," the main elements of U.S. investment policy have remained stubbornly unchanged – a broad definition of investment and the six core investor rights enforceable by ISDS (the six are: national treatment; most favored nation; minimum standard of treatment; expropriations; transfers; and performance requirements). Since the TPP investment chapter is an expanded version of the NAFTA investment chapter, then it was mostly written by the Reagan administration and not the Obama administration.

In 2007, Congress adopted the "May 10th Agreement" which promised to rebalance the priorities of U.S. trade and investment agreements with greater emphasis on the public interest. The May 10th Agreement included stronger labor and environmental protections, intellectual property flexibilities that would facilitate greater access to life-saving medicines, and investment language that clearly limited the rights of multinational investors to those afforded to domestic investors, referred to as "no greater rights." In 2009, during the Obama administrations' review of the 2004 U.S. Model BIT, various proposals were made to insert a "no greater rights" provision into the new (2012) U.S.

Model BIT. These proposals were fiercely opposed by the U.S. business community, lobbyist Linda Menghetti warned Congress,

> "An approach to incorporate further the 'no greater rights' language would reverse decades of U.S. support for strong and binding international rules that largely benefit the U.S. and its investors. This return to Calvo is not necessary and would be very harmful" (cited in House 2009).

Prior to Menghetti's statement, Harvard law professor Robert Stumberg had demonstrated to Congress that the U.S. BIT program provides greater investor rights than the rights afforded by the U.S. Constitution, which business lobbyist Menghetti had implicitly acknowledged. However, Menghetti warned that seeking a reversion to U.S. domestic law would amount to a return to the Calvo doctrine. Speaking on behalf of a group of major U.S. MNCs, Menghetti asserted that any proposed "no greater rights" provision would "…provide few if any benefits to the U.S. while creating huge risks for U.S. investors overseas" (cited in House 2009). Menghetti explained to Congress that strong investor protections are necessary to raise investor confidence in foreign markets to make foreign investments, therefore, any rollback of investor rights to domestic law would "dramatically shift" the risk profile of foreign investments and put U.S. firms at disadvantage.

In the same Congressional Hearing, Congressman John Larson was just as forthcoming, "…for U.S. foreign investors in other jurisdictions, we want to obtain greater substantive rights for our investors than domestic investors may have in those countries. That is sort of the value of the BIT" (cited in House 2009). The early twenty-first century debates over "no greater rights" were eerily reminiscent of the early twentieth century conflicts between the Calvo Doctrine and the Hull Doctrine. After Mexico's mass expropriations in 1917, U.S. Secretary of State Polk

asserted that “on occasion” international law may afford foreigners with “broader and more liberal treatment” than nationals,

> “The Government of the United States is firmly of the opinion that the great weight of international law and practice supports the view that every nation has certain minimum duties to perform with regard to the treatment of foreigners, irrespective of its duties to its own citizens” (cited in Borchard 1940: 453).

Simply put, U.S. investment policy has remained highly consistent over time because the international commercial interests of U.S. MNCs depend upon strong investor rights and protections. After President-elect Trump pledged to withdraw from the TPP, USTR Michael Froman, who oversaw TPP negotiations, retorted, “American core interests don’t change from administration to administration” (cited in AFP 2016). Indeed, even if the Trump administration does withdraw the U.S. from the TPP, U.S. investment policy will not fundamentally change with an administration change. Rather, the same or similar conflicts in TPP negotiations between multinational investors and state regulators will emerge in the next negotiations whether it be in a TPP renegotiation or a different FTA or BIT.

*Strong investor rights as comparative advantage*

Congressional Democrats, labor unions, environmental organizations, consumer advocacy groups, academics, and think tanks advanced complex and substantive policy proposals for both the 2012 U.S. Model BIT and the TPP. Most of the proposals would have significantly weakened investor rights and ISDS while strengthening the ability of

governments to regulate. Even during the NAFTA negotiations, labor unions and environmental organizations had presented Congress with sophisticated evidence supporting their proposals and debunking the arguments of U.S. MNCs. U.S. trade and investment policy became increasingly unpopular in the country as growing sections of the population linked globalization to job loss, growing inequality, environmental damage, and other problems. For this reason, during the TPP negotiations the Obama administration did not seek trade promotion authority from Congress as they sought to insulate the USTR's negotiating positions from democratic processes. This also explains the unprecedented secrecy surrounding the TPP negotiations. In this context, the Obama administration categorically rejected any policy proposals that were unfavorable to the U.S. commercial interests abroad. In 1959, in sociologist C. Wright Mills' analysis of the domestic power structure, he concluded that labor unions were "dependent variables…in the national context" (1959: 265). This analysis still holds, labor unions and all other domestic political actors found themselves marginalized from trade and investment policy negotiations which eliminated them as independent variables effecting the agreements.

In both the NAFTA and TPP negotiations, there were consistently three independent variables that acted upon the texts, (1) the USTR and other relevant government agencies (notably the Treasury, Commerce, and State Departments), (2) U.S. MNCs, and (3) other country negotiators and regulators. Congress was an independent variable during the NAFTA negotiations because the USTR received negotiating objectives from Congress via fast track legislation, however, during the TPP negotiations there was no such legislation and Congress' influence over the content of the negotiations was diminished. For example, even when the Democrats controlled Congress in 2009-10 and the majority of House Democrats supported

legislation for progressive trade policy reform, in response the USTR simply waited for a new Congress.

The negotiating history of the NAFTA and the TPP shows that the USTR consulted closely with the U.S. MNCs in drafting and negotiating the agreements. In large measure, this is because a U.S. trade agreement must pass Congress for its implementation as law and Congress is highly sensitive to the needs and concerns of the U.S. MNCs and large exporters. As explained by former Secretary of State James Baker during the NAFTA negotiations, "[a trade] agreement not acceptable to the broad spectrum of American business is doomed to failure" (cited in Senate 1991). During TPP negotiations, House Republicans warned that if the Obama administration conceded to labor and environmental groups' policy proposals then "…they risk eroding traditional support for trade…" because the business community would not support such trade and investment law (cited in Inside U.S. Trade 2010). To that end, the agreements advance the individual commercial interests of U.S. MNCs and large exporters. In TPP negotiations, Congress was a "mediating variable" because Congress had an ambiguous effect on the content of the investment negotiations, however, the Congressional legislative process enhanced the influence of the other independent variables, including by giving a powerful voice to labor unions and environmental groups. However, since all of the policy proposals for the investment and financial services chapters from labor unions and environmental organizations were rejected by the USTR, Congress' main impact was to secure the power and influence that U.S. MNCs had over the agreements.

The USTR argues that that U.S. investor protections and ISDS reflects "U.S. values and interests" (2015). The U.S. BIT program represents U.S. values because it

support an international rule of law and ISDS is a conflict resolution process that smooths international tensions. Indeed, without ISDS there would be a basis for developing countries to reject international law as they did during the Cold War, which would foreshadow a return to gunboat diplomacy. Simultaneously, the USTR argues that U.S. investment law is in the U.S. interest because the U.S. wrote the laws and China did not. The USTR and U.S. MNCs argue that U.S. investor protections and ISDS are in the U.S. national interest because U.S. MNCs employ U.S. workers and their global comparative advantage relies on U.S. investment agreements. For example, the fossil fuel industry promotes ISDS as in the national interest because it sustains the global competitiveness of U.S. energy companies and their workers. A spokesman from Chevron, a U.S. oil and gas company, lobbied to Congress during the Obama's administration's investment policy review in 2009,

> "Sustained progress toward a comprehensive global investment protection regime is necessary to both reduce the risk associated with overseas investments and to ensure that U.S. companies are not disadvantaged against foreign competitors whose investments are protected by such agreements" (cited in House 2009).

At the time of that testimony, Chevron was engaged in a (successful) multibillion dollar ISDS dispute with Ecuador under the U.S.-Ecuador BIT. Just as U.S. MNCs depend upon the regulatory obligations of U.S. investment agreements for their comparative advantages, the same regulations curtail state sovereignty.

## III. The TPP's impact on state sovereignty

### *The TPP and investor-state dispute settlement*

In early 2015, as the Obama administration expended tremendous political capital to win the necessary Congressional votes for trade promotion authority (formerly called "fast-track legislation"), Senator Elizabeth Warren issued a scathing critique, "Agreeing to ISDS in this enormous new treaty [TPP] would tilt the playing field in the U.S. further in favor of big multinational corporations. Worse, it would undermine U.S. sovereignty" (Warren 2015). Jeff Zients, Assistant to the President for Economic Policy, publically responded to Warren, "ISDS does not undermine U.S. sovereignty, change U.S. law, nor grant any new substantive rights to multinational companies. The reality is that ISDS does not and cannot require countries to change any law or regulation" (Zients 2015). Factually, Zients was correct in that ISDS tribunals do not have the authority to change a country's law. However, ISDS tribunals order governments to pay multinational investors and corporations monetary damages (awards have ranged up to billions of dollars) for breaches of investor rights. Therefore, in practice and implementation, ISDS undermines the authority of regulators as governments modify, amend, or withdraw legislation due to the threat of ISDS, called "regulatory chill." While it is difficult to empirically demonstrate the existence of "regulatory chill," there have been documented instances of it in North America.[464]

---

[464] Sinclair detailed that the threat of a NAFTA ISDS suit changed cigarette regulations in Canada: "In the mid-1990s, as part of intensive lobbying against proposed federal regulations to require plain packaging of cigarettes, the tobacco industry procured a legal opinion by former NAFTA chief negotiator Carla Hills that asserted such regulations infringed NAFTA's intellectual property rules and constituted expropriation in violation of NAFTA's investment chapter. The multinational tobacco industry repeatedly threatened the Canadian government with trade treaty action, including an investor-state challenge. The federal government's proposals for plain packaging were abandoned and replaced with watered-down requirements to increase the size of health warning labels on packages" (2015: 37).

If Zients is correct that ISDS does not undermine state sovereignty, then this does not explain the reason that TPP negotiators insisted on the complete carve-out of tobacco from ISDS. Tobacco has become a local public health issue all over the world as smoking has increased cancer rates which has strained state budgets, motivating governments to regulate tobacco companies, marketing, and products. In turn, tobacco companies have explicitly and successfully used ISDS as a deregulatory tool, such as in Australia, Canada, and Uruguay. Although the USTR was strongly against any product-specific exceptions to ISDS as “dangerous” precedent, the U.S. eventually conceded to the tobacco carve-out as a compromise. President Obama justified his administration’s decision, “The big bugaboo that’s lifted up there is tobacco companies suing poorer countries to make sure that anti-smoking legislation is banned, or at least tying them up with so much litigation that ultimately smaller countries cave” (The White House 2014). As ISDS tribunals mandate that countries pay MNCs monetary compensation ranging from millions to billions of dollars, legislators in those countries find that their capacity to regulate is limited by ISDS, directly undermining state sovereignty. The problem becomes particularly acute for capital-importing developing countries, some of which have national GDPs that are smaller than the market capitalizations of leading MNCs.

*The TPP and expansive investor rights*

Investor-state dispute settlement does not undermine state sovereignty *per se*, rather, it enforces multinational investor rights that conflict with the ability of states to regulate. The TPP contains some of the most expansive multinational investor rights of any international investment agreement in force (Alschner and Skougarevskiy 2016). Compared to other investment treaties, multinational investor rights are particularly strong in the TPP investment and financial services

chapters in at least five regulatory areas: (1) a broad definition of investment that includes far-reaching intellectual property rights; (2) the historically problematic “minimum standard of treatment” and “indirect expropriation” articles; (3) an expansive list of prohibitions on “performance requirements” including unprecedented regulations targeting state-owned enterprises; (4) limited policy space for capital controls; (5) limited exceptions to the application of ISDS. The TPP’s multinational investor rights in these five areas go well beyond WTO obligations and in some important instances they conflict with international regulatory norms.

Similar to the investment agreements of other developed countries, the U.S. uses a broad, asset-based definition of “investment” (in contrast to an enterprise-based definition) that covers tangible and intangible property controlled by investors of another Party. The TPP’s definition of investment is not new as it includes a non-exhaustive list of assets that are considered to be “investments,” including intellectual property rights. Intellectual property law in U.S. FTAs have always gone beyond WTO obligations in length, strength, and scope of patentable items. The TPP intellectual property chapter expands into new regulatory areas, such as, data exclusivity and market exclusivity to prevent the development of low-cost generic drugs. Since the TPP intellectual property rights chapter contains unprecedented expansions of intellectual property rights, the definition of investment also grows to encompass these new rights.

Over the objections and counter proposals of domestic groups and other country negotiators, the U.S. retained the same strong investor rights from the 2004 Model BIT in the TPP investment chapter, and even expanded some. The main innovation of the 2004 U.S. Model BIT was to tie the legal interpretations of “minimum standard of treatment”

and “indirect expropriation” to “customary international law,” thereby weakening the strength of these two key investor protections. However, arbitral tribunals have not based their interpretations of these provisions on “customary international law” but rather have merely cited the standards of other tribunals, creating “evolving” standards of what constitutes “minimum standard of treatment” and “indirect expropriation.” Therefore, since TPP’s “minimum standard of treatment” and “indirect expropriation” articles can be interpreted as both narrow and broad investor rights, they afford strong investor protections. Moreover, the TPP significantly strengthened investor rights in the financial services sector by applying the “minimum standard of treatment” article to the financial services chapter for the first time. The TPP further strengthened investor rights with new provisions in the “performance requirements” article that are directed at state-owned enterprises, specifically, they ban host states from requiring the use of domestic technology, require host states to allow multinational investors to participate in the development of industry standards, and clarify that all of the TPP’s investment obligations apply to state-owned enterprises.

Lastly, the TPP incorporates strong investor rights because exceptions to investor protections are highly limited and specified. The two key areas were capital controls and the application of ISDS to “investment agreements.” The USTR was forced to concede to a more liberal approach to capital controls than it originally intended, nonetheless, the policy space for capital controls is simultaneously vague yet highly conditional and temporary. The other most contentious area of investment negotiations was the U.S.’ proposal to apply ISDS to “investment agreements” and an “investment authorizations,” which cover all major contracts between an investor and a host state, including, natural resource exploration and extraction (such as mining, oil, gas, etc.), public utility services (such as electricity and water treatment), and public works

concessions (such as roads, highways, infrastructure). Except for Japan, other countries either rejected this proposal or sought broad exceptions. At the insistence of U.S. oil, gas, and extractive industries, the U.S. attempted to limit any exceptions to the application of ISDS to "investment authorizations." The final agreement contained two major compromises, first, a reduced scope of "investment agreements" and that carved-out specific areas of the public domain, and second, conditions under which disputes could be arbitrated under an alternative legal forum to the ISDS procedures. Cumulatively, the TPP investment chapter provides some of the strongest investor protections of all existing international investment agreements (Alschner and Skougarevskiy 2016).

*The TPP and conflicts with public interest legislation*

Multinational investors and corporations invoke the "minimum standard of treatment" and "indirect expropriation" clauses when governments change or introduce regulations that negatively impact their investment. However, because the U.S. definition of the "minimum standard of treatment" and "indirect expropriation" articles offer investors particularly strong rights, multinational investors and corporations have assumed liberal interpretations of these rights. In so doing, multinational investors and corporations have increasingly used them to bring ISDS challenges against public interest legislation (Choudhury 2008). For example, the NAFTA ISDS cases overwhelming targeted environmental regulations.

Strong investor rights and the offensive use of ISDS have the effect of "locking-in" a government's regulatory environment, thereby limiting state sovereignty to design and implement future market regulations. However, regulatory norms evolve. Consider

the TPP's tobacco carve-out. The regulatory norms on tobacco evolved from treating tobacco as a "safe" product to a "dangerous" product, and states introduced public interest legislation accordingly. The fact that TPP negotiators had to carve-out tobacco from ISDS demonstrates that ISDS is used as an offensive tool by MNCs to lock-in a favorable regulatory environment in a particular country.

However, tobacco is not the only commodity that is patently against the public interest and in which regulatory norms have evolved. Nor is tobacco the only public issue that has motivated public interest legislation which has been a target of ISDS claims. The U.S. fossil fuel industry understands that they are contributing to global warming, which is against the public interest as global warming has been linked to the increasing frequency of natural disasters, among other public issues. Yet the oil and gas industry has won billions of dollars in successful ISDS cases, thus weakening climate change and fossil fuel regulations in those countries. Two NAFTA examples include a successful ISDS case against a ban on fracking in Canada, and the pending $15 billion claim against the U.S. for the Obama administration's denial of the Keystone XL oil pipeline. In the lead up to the 2008 global financial crisis, the "toxic assets" that were fraudulently sold to investors all over the world by U.S. multinational banks were malicious to the public welfare as they destabilized the global financial system. Yet, the TPP extends the "minimum standard of treatment" protection to the financial sector and one multinational bank has already successfully used ISDS against emergency financial measures.[465] Similarly, the international regulatory norms on capital controls have been shifting and evolving for at least the last hundred years (Abdelal 2009), yet the TPP cements a stringent and limiting approach to

[465] *Saluka Investments B.V.* vs. *The Czech Republic*, Partial Award, Ad hoc-UNCITRAL Arbitration Rules (2006).

capital controls that domestic lawmakers cannot change. Since at least the industrial revolution, the relationship between capital and labor has been mediated by government and labor standards have consistently changed, yet MNCs have used ISDS to challenge labor protections including a minimum wage bill.[466] Pharmaceutical MNCs have used ISDS to extend patent monopolies on medicines even though many countries have laws recognizing that patent laws evolve over time.[467] In sum, TPP negotiators have not adequately explained why tobacco is the *only* public issue that deserves to be carved-out from ISDS as ISDS undermines state sovereignty to address a range of public issues.

The TPP's limits to state sovereignty have disproportionately strong effects on developing countries because they are capital-importers and investor rights apply to host states. However, as the number of ISDS cases have steadily increased each year, high-income and developed countries have also been increasingly defendants in ISDS cases. The TPP exposes the U.S. to greater risk of ISDS challenges because it extends the jurisdiction of ISDS to territories with which the U.S. did not have a BIT or FTA (notably Japan which is a capital-exporting state) and there are more than 9000 MNCs in the TPP countries (Weisman 2015).

Lastly, the TPP investment chapter (and any other international investment agreements) lacks a corresponding arbitral mechanism to bring justice to multinational investors and corporations that have violated their obligations under international labor, environmental, and human rights laws. Specifically, there is investor-state dispute settlement but there is no state-investor dispute settlement not to mention a public-

[466] Veolia Propreté v. Arab Republic of Egypt (ICSID Case No. ARB/12/15)
[467] Eli Lilly and Company v. Government of Canada.

investor dispute settlement. A key innovation of the TPP investment chapter was an unprecedented "corporate social responsibility" clause,[468] however, it is a "voluntary" commitment and entirely unenforceable. Similarly, the "environment and public health" article[469] is phrased as a moral obligation of multinational investors and is unenforceable. Therefore, ISDS creates a tremendous legal disparity between multinational investors and local publics, in which multinational investors have access to binding and enforceable ISDS arbitrations but local publics are limited to municipal legal remedies.

For example, in Peru, a TPP member, U.S. based mining company Renco Group Inc. had metal smelter operations that contaminated air, soil, and water to the extent that it caused an epidemic of lead poisoning in nearby towns. The Peruvian government ordered Renco to clean up the site and Renco launched an ISDS case[470] against Peru citing a breach to the "minimum standard of treatment" article under the U.S.-Peru FTA. Meanwhile, in 2007, U.S.-based lawyers brought claims against Renco on behalf of 162 sickened Peruvian children in the state of Missouri because Missouri allows foreign plaintiffs to bring claims against companies located in that state (Wallach 2012). As Renco could bring its claims to ISDS tribunals but the citizens of Peru had to rely on U.S. domestic courts, ISDS created uneven legal rights between Renco and the citizens of Peru. In another example, in Mexico, another TPP member, multinational banks (Wachovia and HSBC) were found laundering billions of dollars for Mexican drug cartels. While the Obama administration refused to bring criminal charges against the banks because they believed it would have been "destabilizing to the global economy," victims of the drug war in Mexico were left to sue the multinational banks in U.S. courts (cited in Roth 2012). The TPP

[468] Article 9.7
[469] Article 9.6
[470] The Renco Group, Inc. v. The Republic of Peru.

expands the financial sectors' access to ISDS but it does not offer a concurrent mechanism to check the financial sectors' flagrant abuse of those rights. This imposed legal disparity between social groups further undermines state sovereignty as multinational investors enjoy the privileges afforded by ISDS but local publics lack access to international tribunals to bring justice to the crimes and transgressions of multinational investors. In some instances, such as the ones outlined above, this legal disparity between multinational investors and local publics can contribute to a situation in which multinational investors and corporations are "above-the-law" in nation-states.

## IV. Conclusion: international investment law theory revisited

### IV.A. Comparing the NAFTA and TPP investment and financial services chapters to free trade theory

Are the TPP investment and financial services chapters a "golden straightjacket" (Freidman 2012) that constrains "arbitrary" government regulations and enhances market efficiency and productivity? Do these agreements remove the state from the market such that private investment flows respond to market forces? The short answer is no. With the exception of certain elements of the market access negotiations, neither the content nor the negotiations of the NAFTA and TPP investment and financial services chapters had anything to do with free trade theory. This was well argued by Ranking Rep. Sander Levin during Congress' debates over trade promotion authority in 2015,

> "What do David Ricardo and Adam Smith have to say about the inclusion of investor-state dispute settlement in our trade agreements? Nothing, to my knowledge. What do they have to say about providing a 12

year monopoly for the sale of biologic medicines?...What does the theory of comparative advantage have to say about those issues? Absolutely nothing – and yet those are the issues at the crux of the TPP negotiations today" (Levin 2015).

The content of U.S. investment policy represents the offensive commercial interests of U.S. MNCs balanced against the defensive goals of domestic regulators. The interests of U.S. MNCs have evolved well beyond comparative advantage and market efficiency or any other traditional topic in open macroeconomics. To the contrary, the NAFTA and TPP investment and financial services chapters are full of what can be considered protectionist measures, notably, long and strong patent monopolies and other related intellectual property protections (Baker 2016). For this, one can argue that U.S. investment agreements "socially constructed" comparative advantages as U.S. MNCs depend upon these unique protections for gaining market share and mitigating risk (Streeten 1996). The other side of the coin is that the same investment regulations produced social and political conflicts which became the main source of contention in negotiations. These conflicts were not questions of free trade but public issues concerning the appropriate limits to state sovereignty to implement market and industry regulations.

Free trade theory does not account for the most important content in the NAFTA and TPP investment and financial services chapters. Notably, free trade theory does not explain two key characteristics of the NAFTA and TPP investment and financial services chapters: (1) trade is not free but managed, and (2) the negotiations are not "country x vs. country y" but rather "multinational interests vs. state regulators."

*(1) Trade is not free but managed*

The NAFTA and TPP investment and financial services chapters contain provisions that can be characterized as market access, regulatory, or a combination of both. The sectoral market access negotiations were driven by U.S. MNCs seeking to access foreign markets, and they were countered by negotiators in those countries who had a competing set of motivations. The outcomes of the market access negotiations have commercial "winners" and "losers." For example, during NAFTA negotiations the U.S. financial services industry threatened to sink the NAFTA in Congress if Mexican negotiators did not concede complete market access in financial services and subsequently Mexico's banking system quickly became majority foreign-owned. In another NAFTA example, the U.S. flagships in information technology entered Mexico and shortly after most of the competing domestic firms in Mexico went out of business (Gallagher & Zarsky 2007). These examples do not reflect the theory of comparative advantage in which countries lower tariffs (or even non-tariff barriers) and market forces maximize the efficiency of scarce resources. Rather, this example shows that commercial "winners" and "losers" are the result of political trade-offs by trade negotiators who are balancing different domestic and international political pressures. In so doing, market access provisions (in tandem with the regulatory provisions) lead to managed trade as commercial outcomes were determined by trade negotiators.

The regulatory provisions also function to manage trade. The clearest example is intellectual property rights, in which the U.S.' long and strong patent monopolies are by definition "managed trade" because a monopoly is a guaranteed market outcome. Similarly, the TPP's disciplines on state-owned enterprises, including the relevant provisions in the investment chapter, function to create market outcomes favorable to

U.S. MNCs operating in TPP territories. The NAFTA and TPP's strong investor protections are not free trade but managed trade because these multinational investor rights create a regulatory environment that is favorable to U.S. MNCs.

Many commentators on U.S. trade and investment policy, particularly the critics, describe U.S.-style multinational investor protections as deregulatory because they weaken regulations in host states. However, deregulation implies less or no regulation, whereas U.S. BITs and FTAs are packed with regulations. Therefore, it is more accurate to characterize U.S. BITs and FTAs as "re-regulatory" rather than deregulatory because in practice U.S. BITs and FTAs *replace* existing legislation in host countries. For example, in negotiating the NAFTA, Mexico was pressured to *replace* the Calvo doctrine with ISDS. Therefore, the political management of regulations leads to managed trade as regulations condition patterns of trade and investment.

*(2) Not "country x vs. country y" but "multinational interests vs. state regulators"*

In free trade theory, "country x" trades the goods and services that it has relative cost-efficiencies with "country y" and vice-versa. Therefore, free trade theory assumes that trade and trade negotiations are between "country x" and "country y." However, in actuality, the main actors in trade and trade negotiations are multinational commercial interests and state regulators. In the development of the NAFTA and TPP investment and financial services chapters, the content of the agreements was originally motivated by U.S. MNCs and then it was negotiated with domestic regulators in an interagency process that determined U.S. trade and investment negotiating objectives. The USTR then took these negotiating objectives to their counter-party negotiators who represented the goals of their domestic regulators. In an overly simple model of the process, U.S. MNCs first negotiated the agreement with U.S. domestic regulators who then

negotiated the agreement with regulators in other states. This is illustrated by the contentious debate over capital controls in the TPP. U.S. policy on capital controls was motivated by U.S. MNCs and then approved by domestic regulators and then in TPP negotiations it was disapproved by regulators in other countries who demanded greater policy space for capital controls. That negotiating process cannot be explained by free trade theory. Essentially, the NAFTA and TPP investment and financial services chapters can be explained as the outcome of conflicts between U.S. MNCs and state regulators, both in the U.S. and other countries.

### IV.B. Comparing free trade theory to NAFTA outcomes (investment and financial services chapters)

*Does trade balance?*

A central tenet of comparative advantage and free trade theory is that trade will balance, meaning the value of imports and exports will tend to equalize and there cannot be chronic trade imbalances. My findings on the U.S.-Mexico trade imbalance refute the notion of equilibrium due to monetary dynamics. The Mexican central bank, Banco de Mexico, has been accumulating dollar reserves to protect against exchange rate appreciation due to capital inflows ("The Dutch Disease"). Banco de Mexico's predicament was that as U.S. capital flowed into Mexico, which the NAFTA was designed to promote, the Peso would appreciate against the dollar and Mexico's exports would lose competitiveness vis-a-vis exporters in East Asia. Moreover, Banco de Mexico had to accumulate dollar reserves due to exchange rate volatility due to capital flow volatility, and as insurance against the risks posed by financial integration with the U.S., including global financial crises (Ibarra 2012; Sidaoui et. al. 2010). Mexico's growing stock of dollar reserves has

financed the U.S. trade deficit with Mexico. For the aforementioned reasons, as long as Banco de Mexico desires to accumulate *dollar* reserves and *not other currencies*, then there is no reason to expect U.S.-Mexico trade to tend towards balance.

*Are industries national?*

Both comparative advantage and Gomory and Baumol's theory (2001) rest on the assumption that industries are national. In comparative advantage, the commercial actors are countries. In Gomory and Baumol's multiple equilibrium trade theory, the commercial actors are national industries that are retained by countries. However, to what extent are industries still national? In 1996, political economist Susan Strange dismissed the relevance of free trade theory, "[products cross borders] not because of any comparative advantages in market terms of one country over another but because the management of a [MNC] has decided on a production strategy that involves such movements" (1996: 48). The main commercial actors in trade are no longer nations or national industries but MNCs and their value chains. However, this does not mean that MNCs have lost their national roots. Economist Ian Fletcher argued that most MNCs are "strongly tied" to a particular nation. According to Fletcher, "Despite the myth of the stateless corporation, only a few dozen firms worldwide maintain over half their production facilities abroad" (2010: 25). Fletcher cited a 1996 study that found, "[MNCs] typically have about two-thirds of their assets in their home region/country, and sell about the same proportion in their home region/country" (cited in Fletcher 2010: 25). In a survey of the assets and sales of Fortune 500 companies during the early 2000s, economists Rugman and Hoon Oh found that most MNCs operate regionally rather than globally (2008). They concluded, "…globalization as popularly understood does not exist. For example, there is no evidence that U.S. firms operate

globally. Instead, they both produce and sell on a home region basis, as do [MNCs] from Europe and Asia" (2008: 13). Only the top dozen or so MNCs operate on a truly global scale, and the vast majority of MNCs have regional operations and strategies.

Economists Rugman and Hoon Oh also found that MNCs tend to dominate in their home region but also invest and operate in other regions. For example, there are many foreign-owned MNCs investing in North America, but the "home" U.S. MNCs have most of the market share in North America, and there are similar patterns in Europe and Asia (Rugman & Hoon Oh 2008: 13). The NAFTA facilitated regional economies of scale for U.S. MNCs such that they could retain competitive advantages in North America while MNCs from Europe and Japan contested the market. To that end, economists Moran and Oldenski found that U.S. manufacturing MNCs that invested in Mexico also expanded domestic investment and operations in the U.S. (2014: 41). Similarly, the NAFTA facilitated economies of scale in the regional financial services industry (dos Santos & Lapavitsas 2008). That most MNCs operate regionally rather than globally meets Gomory and Baumol's assumption that industries are national. Gomory and Baumol's theory can be extended from national industries to apply to regional industries. However, that does not mean that the current market structure is static, nor does it address increasing trends towards the "deregionalization" of MNCs.

*MNCs vs. Ricardo*

While the assets and sales of most MNCs remain regionalized, there are also strong trends towards their globalization. Economists Rugman and Hoon Oh found that services MNCs were more regionalized than MNCs that manufacture and/or sell goods. There are likely many contributing factors to the high degree of regionalization of services MNCs. However, "non-

tariff barriers" to trade in services guard against competition in services markets. For this reason, U.S. services MNCs motivate a range of regulatory chapters in U.S. FTAs, including, state-owned enterprises, competition policy, procurement, services, e-commerce, investment, telecommunications, and financial services, among others. U.S. MNCs seek to use these regulatory chapters in U.S. FTAs to reregulate signatory countries so that U.S. MNCs can gain market share in those countries, which would lead to more globalization of services MNCs.

Economists Rugman and Hoon Oh's study on the assets and sales of MNCs do not take into account trade flows. The assets and FDI of MNCs are not complete measures of the globalization of MNCs, as many MNCs contract production rather than invest in productive enterprises, particularly in East Asia. For example, Apple does not own Foxconn but contracts its production to Foxconn. According to the United Nations Conference on Trade and Development, approximately 80 percent of world trade takes place in "value chains" linked to MNCs (UNCTD 2013). Therefore, due to trade flows, MNCs have much further global reach than is suggested by their regionalized assets and sales.

The increasing globalization of MNCs lends to two conclusions related to free trade theory, first, national competition is increasingly obsolete, and second, the trade balance is no longer a measure of national competitiveness. Stephen Roach, former chief economist of Morgan Stanley's China operations, declared, "Country-specific economic competition has been rendered obsolete by the emergence of multicounty, vertically integrated supply chains" (2014: 117). As developing countries, particularly in East Asia, participate in production and value chains linked to MNCs, these countries are not competing for production but rather sharing in production. The organizing logic of global value chains is not national comparative advantage but a "trade-investment-services-intellectual property nexus" (Elms & Low 2013). This is because an

industry or firm's comparative advantage becomes unbundled and dispersed across nations, as nations join supply chains rather than build supply chains. Therefore, a country's trade balance is less a measure of national competitiveness. On the U.S. side, the trade deficit does not signify that U.S. firms have lost industrial competitiveness. Quite the contrary, U.S. MNCs are the most dynamic and competitive in the world. U.S. MNCs rely on regional and global supply chains that are not determined by the theory of comparative advantage with a basis in one nation or even region (Elms & Low 2013). As MNCs become increasingly global, they undermine the credibility of Gomory and Baumol's theory, which rests on the assumption that industries are national.

IV.C. Comparing investment law literature to NAFTA outcomes (investment and financial services chapters)

International investment law is studied from three disciplines - economics, legal studies, and international political economy. Scholars rarely make empirical and theoretical connections between these three different approaches. In what follows, I will attempt to fill this gap using my findings from the NAFTA investment chapter. I argued that free trade theory's assumptions about investment law do not match the actual content and implementation of investment law. Therefore, free trade theory is not a useful framework for understanding investment law. Rather, I propose a combination of legal studies and international political economy.

International investment law has regulatory effects and income effects, and scholars typically consider them separately. I argue that the legal implementation and income effects are two sides of the same coin, that is, they have dynamic feedbacks to each other. As international investment law balances multinational investor rights against the state's ability to regulate, a

growing number of legal scholars characterize this dichotomy as a "public-private" debate over the purpose, content, and implementation of investment law (Shan 2007; Choudhury 2008; Spears 2010; Mills 2011). On the income side, investment law has been a crucial tool for MNCs to access foreign markets and mitigate certain political risks of investing and operating in those markets (although that is not to say that investment law motivates FDI) (Menghetti 2011). However, in the existing literature there is little explicit recognition that MNCs rely upon investment law for their economic interests, and in turn, their market power translates into political power to motivate the content of investment law.

The contentious history of investment disputes, ranging from gunboat diplomacy to controversial ISDS cases, demonstrates that investing in developing countries can carry great social and political risks for MNCs. U.S. MNCs depend upon investment law to establish basic conditions for investment in developing countries. International investment law combines technical rules on market access and regulations, with U.S. investment law as among the most far-reaching and demanding in the investment treaty universe. Beginning with the NAFTA investment chapter, U.S. MNCs began to use investment law for regulatory advantages in foreign markets, as opposed to using investor protections only to mitigate risk. The USTR and U.S. MNCs describe regulations in the host states that disadvantage U.S. MNCs as "non-tariff barriers" to investment and operations in foreign markets. Therefore, the USTR and U.S. MNCs carefully design U.S. investment law to reduce and/or eliminate these domestic regulations in host states. For this reason, corporate lobbies effectively barred Congress from inserting a "no greater rights" provision into the 2012 U.S. Model BIT, which would have limited multinational investor rights to the same rights as domestic investors in a host state. In U.S. FTAs, including the NAFTA and TPP, the investment chapters have substantive interconnections with other key

chapters, notably, intellectual property rights and services and financial services. This "nexus" of international regulations provides the indispensable legal underpinning to MNCs' FDI into developing countries. In turn, MNCs' FDI and market access in developing countries facilitates their economies of scale and therefore increased global market share.

MNCs rely on FDI for global competitiveness, and in turn, their enhanced market position allows them to expand domestic investment and employment. As MNCs realize larger economies of scale, they become vital sources of jobs, growth, and exports for states. In addition, MNCs are the main actors in the import and export of goods, services, and capital. For these reasons, among others, Congress is highly sensitive to the trade policy needs and concerns of U.S. MNCs. In so doing, U.S. MNCs have the structural political power to motivate the content of U.S. trade law and policy. As U.S. investment law and policy embodies the private interests of U.S. MNCs, investment law increasingly comes into conflict with public interests in a range of regulatory areas.

The "public-private" debate is not unique to U.S. investment law. Many of the most basic standards for investment protection in the NAFTA and TPP investment chapters are in the more than 3000 international investment agreements in force worldwide. Since the early 1990s, thousands of international investment agreements have proliferated to cover the planet and most of the agreements contain the same basic investor rights with some form of arbitration. In fact, as China has emerged as a major capital-exporter, China's own investment policy has evolved to resemble the U.S. Model BIT (Berger 2013). The difference is that U.S. investment agreements contain some of the strongest and far-reaching investor protections than other investment agreements, including those of China and other capital-exporters.

States are now coming to terms with the fact that international trade and investment law has been driving a wedge between national public interests and multinational private interests, both in terms of governance (regulations) and income (distribution). For this reason, Donald Trump ran for the Presidency on the campaign promises of economic nationalism and sovereignty. The Trump administration's "2017 Trade Policy Agenda" announced that they would ignore WTO rulings against the U.S. that impinged upon U.S. sovereignty, threatening to undermine the multilateral trade regime. States will condition global commerce in the twenty-first century by making political tradeoffs between multinational private interests and national public interests.

## Chapter Seven: Conclusion: Trump's "America First" Trade Policy and Polanyi's "Double Movement"

I. Introduction
II. Trump's "America First" Trade Policy
III. Motivations of Trump's "America First" Trade Policy
IV. Politics of Trump's "America First" Trade Policy
V. Limitations to research and future research

"Fascism, like socialism, was rooted in a market society that refused to function."
-Karl Polanyi, 1944, *The Great Transformation*

### I. Introduction

Karl Polanyi argued that the breakdown of the international market system in the 1930s led to the rise of fascism and socialism in Europe (1944: 25). Polanyi observed that European nations responded to capital flight, rising unemployment, and social and racial tensions by supporting fascist and socialist leaders. The fascists promised large sections of the population social protections from unfettered international markets in exchange for a loss of "human freedoms," while the socialists promised to subject the market to democratic control, even if this would threaten private property rights.

In a curious parallel, in the twenty-first century U.S., globalization and automation have created polarized and precarious employment systems and the breakdown of the international market system in 2008 deeply exacerbated those trends (Kalleberg 2013). The white working class had the most to lose as employment shifted

from manufacturing to services and the "new economy" left many of them behind (Standing 2011). Hard work no longer translated into success, inequality grew, and social and racial tensions mounted. During the 2016 Presidential race, political outsiders Donald Trump and Bernie Sanders, representing opposite sides of the political spectrum, won the sympathies of the white working class. Donald Trump's "nationalist" rhetoric and Bernie Sander's "socialist" messages offered new directions and greater social protections. In electing Trump, the white working class sought to swing the "double movement" pendulum from "free market" policies to "nationalist" policies.

## II. Trump's "America First" Trade Policy

### *Consequences of TPP Withdrawal*

The Trump administration has set out to abandon multilateral FTAs, including the TPP, in favor of bilateral FTAs (USTR 2017: 1). The new USTR explained, "These bilateral discussions will present unique opportunities to engage our Asia-Pacific partners in areas in which the TPP failed to provide adequate market access of American-made goods and agriculture products" (2017: 143). Trump's Commerce Secretary Wilbur Ross justified the new administration's cold feet in multilateral FTAs, "The concessions made with each nation by the U.S. add up, and what happens is the other countries get the benefit of things they didn't even ask for because you had to give them to someone else" (cited in Needham 2017). On those grounds, President Trump withdrew the U.S. from the TPP.

Since the Reagan administration began to negotiate the WTO (the GATT Uruguay Round, 1986-1994) and through the Obama administration, U.S. trade policy has started and ended with WTO politics and negotiations. That is, for the last 30 years, U.S. trade policy has

been motivated by WTO negotiations or has been intended to motivate WTO negotiations. After the Bush administration walked away from the WTO Doha Round, they joined the TPP in 2008 as an alternative path to trade liberalization.

It took the Obama administration nearly a year to commit publicly to the TPP. Within the context of the stalemated WTO Doha Round, there were three immediate catalysts for the Obama administration's decision to press forward with the TPP. The first was that Japan was cooperating in joining the agreement, which was necessary to make the TPP politically viable for the U.S. The second reason was that East Asian economic integration was proceeding without the U.S., and the USTR and the U.S. business community feared marginalization in this highly valuable region. Singapore's trade minister made it explicitly clear to the Obama administration that East Asian trade and investment integration would proceed with or without the U.S., as the ASEAN was the fulcrum of the China-led RCEP multilateral trade agreement. The third reason, closely linked with the second, was APEC politics.

By 2007, all APEC members had committed to the long-term goal of an APEC-wide FTA (called the FTAAP). From the U.S. perspective, an APEC-wide FTA would have stimulated favorable outcomes at the WTO Doha Round. However, one of the central obstacles to realizing an APEC-wide FTA (U.S.-China trade conflicts notwithstanding) was the difficult question of who would write the rules for this FTA, as U.S. FTAs demand far more regulatory commitments than China's FTAs. The China-led RCEP and the U.S.-led TPP quickly emerged as competing visions for the trade and investment rules for a potential future APEC-wide FTA. Moreover, U.S. MNCs and exporters would have a lot at stake in an APEC-wide FTA. For this reason, President

Obama repeatedly stressed that the TPP would enable the U.S. to "write the rules" for the Asia-Pacific and not China.

By withdrawing from the TPP, the Trump administration is back to square one. They must now figure out how to address all three of these imperatives that launched the Obama administration into the TPP. The TPP set legal precedent for the Trump administration to negotiate bilateral FTAs with Japan and eventually Vietnam and Malaysia (the U.S. already has FTAs with the other TPP countries). However, without U.S. involvement in multilateral deals, there is no chance of revitalizing the WTO Doha Round. The purpose of the TPP was to position the U.S. to have a multilateral negotiating strength for a future APEC-wide FTA, which in turn would have catalyzed outcomes in the deadlocked WTO Doha Round. Therefore, the Trump administration's trade policy marks a substantial break from the Obama and Bush administrations.

*Moving forward*

In March 2017, the USTR published its "2017 Trade Policy Agenda" with some exposition on an "America First" trade policy, although it lacked details on how to achieve those aims. The report detailed four trade policy priorities, the first two were novel, and the latter two were carry-overs from the Obama administration. The Trump administration's top two trade policy priorities are, "(1) defend U.S. national sovereignty over trade policy; (2) strictly enforce U.S. trade laws" (USTR 2017: 2). Each represents potentially significant policy breaks from past practice.

States arbitrate trade disputes in WTO dispute settlement procedures. The losing state often must make domestic regulatory changes to satisfy the winner, which entails negative

impacts to domestic constituencies in the losing state. The U.S. has lost numerous WTO cases, and past administrations and Congresses have complied with the rulings. In 2003, President Bush's United States Trade Representative (USTR) Robert Zoellick explained,

> "The U.S. should live up to its obligations under WTO rules….We recognize that each matter [in which compliance is required] involves sensitive interests. Yet America should keep its word, just as we insist others must do" (cited in Chorev 2005: 342).

The Bush administration, just like their predecessors and successors, made the political calculation that the WTO was largely established in the U.S.' image and mostly serves U.S. interests. Therefore, the benefits of the multilateral trade regime outweigh the costs. For this reason, after the WTO Doha Round of negotiations collapsed in 2008, the Obama administration established their number one trade policy objective as "revitalizing the WTO Doha Round" (Froman 2014b). In sharp contrast, the Trump administration has put an unprecedented emphasis on stressing national sovereignty in relation to the WTO's dispute settlement system, setting precedent for the U.S. to ignore WTO rulings that the Trump administration would consider violations of U.S. sovereignty. The USTR's report asserted that, "…the Trump Administration will aggressively defend American sovereignty over matters of trade policy" (USTR 2017: 3). Moreover, Trump's National Trade Council Director Peter Navarro reportedly asked the USTR to catalogue the U.S.'s options for avoiding the WTO dispute settlement system, moving more in the direction of protectionism.

From a domestic perspective, to prioritize national sovereignty over trade policy is congruent with a nationalistic trade agenda. Given the U.S.' contentious disputes with its largest trading partners at the WTO, including China, Canada, Mexico, and large economies in Asia,

this priority sets precedent for protectionism against unfavorable rulings at the WTO that would harm domestic constituents. From an international perspective, all of these actions would drain the effectiveness and creditability of the entire multilateral trading system, which would be highly consequential to the U.S. economy. This is well expressed by the mixed reactions of U.S. labor unions. Thea Lee, the deputy chief of staff at the AFL-CIO, commented on the USTR's "2017 Trade Policy Agenda",

> "On the one hand, we would agree with certain parts, that our trade policy has not been aggressive or consistent enough in looking out for the interest of American workers…We don't necessarily agree that we need to go completely outside the international trade system" (cited in Paletta & Swanson 2017).

U.S. trade policy was instrumental in determining the scope and framework of the WTO and in turn, the WTO has been highly necessary and beneficial for U.S. MNCs and agricultural exporters. This is why the Obama administration wanted to use the TPP to revitalize the WTO Doha Round. Moreover, undermining the WTO could lead the U.S. to become more isolated from East Asia, which in turn does not offer hope for the WTO Doha Round.

The second of the Trump administration's trade policy priorities is to "strictly enforce U.S. trade laws." In the 1988 Omnibus Act, Congress laid out a primary trade negotiating objective to reduce the U.S. trade deficit. However, Congress was careful to instruct that the main channel to reduce the trade deficit was via an aggressive export strategy and not by trade protectionism on imports. Aggressive export promotion in tandem with an openness to imports remained trade strategy through the Obama administration. The Trump administration's priority to "strictly enforce U.S. trade laws" is setting precedent to use trade remedy laws to restrict

imports from non-market economies that use "unfair trade practices" (read: China). Protectionist restrictions on imports would be a nationalistic break from past U.S. trade practice.

III. Motivations of Trump's "America First" trade policy

In the NAFTA negotiations there were a range of "nationalist" actors who had denounced the agreement, such as Ross Perot and his famous quip that the NAFTA would produce "a giant sucking sound" of investment and jobs to Mexico. However, in the 1992 Presidential election, Perot only won about one percent of the vote. Republican incumbent President Bush was in favor of the NAFTA, as his administration had negotiated the NAFTA alongside the WTO. And the Democrat challenger, Bill Clinton, had also come out in support of the NAFTA, although he took a more careful approach by promising labor and environmental standards in side agreements. Over twenty years later, during the 2016 Presidential elections, Donald Trump repeated Ross Perot's same nationalist talking points criticizing the NAFTA while promising to reverse the Obama's "free trade" agenda. Why did Trump's nationalism have far more currency with voters than Ross Perot's? Why were candidate Trump's trade promises so politically successful? Why were the leading Presidential candidates in the 1992 election in favor of the NAFTA but the leading candidates in the 2016 election against the TPP?

Based on my analysis of the NAFTA and TPP negotiations, I propose three motivations to the emergence and institutionalization of Trump's "America First" trade policy. First, that Trump's trade promises were part of a larger "America First" foreign policy, such that trade issues intersected with other foreign policy priorities. Second, that Trump's trade rhetoric had widespread receptiveness from the white working class,

especially in key swing states and counties. Third, that Democrat nominee Hillary Clinton lacked an alternative to the "free trade" model that was so deeply ingrained in both political establishments.

*"Make America Great Again"*

Despite the many sound arguments that President Obama had improved welfare in the country, there is equal evidence to the contrary. The "Great Recession," which occurred during Obama's tenure, had permanently damaging effects on the labor market, foreclosing opportunities of social mobility for millions of working class people and especially young people (Jaimovich & Siu 2012: Kalleberg 2013). The Obama administration's Wall Street bailouts did not improve that condition. Despite Obama being the first non-white President, activists opposed to mass incarceration encountered the politics of a society that claimed to be "colorblind." Despite Obama's record numbers of deportations, Obama offered no long-term solutions to contentious debates about immigration, terrorism, border security, and the growing undocumented population. Despite Obama's political rhetoric of the U.S. as a diverse and inclusive nation, drastic demographic changes had upended everyday life in many white communities and produced a politics of resentment. Internationally, as China's rise was highly correlated with the decline in U.S. manufacturing employment and wages, commentators easily painted Obama's multilateral initiatives as being unresponsive, if not complacent, to the China challenge. In contrast, Donald Trump's campaign slogan, "Make America Great Again," had something the Democrats lacked – a message of redemption.

Despite Trump's outlandish and completely unfeasible campaign promises, his message was congruent at the domestic and international level. At the heart of it, he promised to empower

the white working class and prioritize their interests. He promised domestic and international policies to restore the old industrial economy. Domestically, he claimed that widespread deregulations and tax reform would stimulate investment and jobs, particularly in the energy sector that the Obama administration had targeted with "job-killing" environmental legislations. He promised a border wall to permanently stem the tide of immigration and put bans on Muslim immigration to protect the country from terrorist threats. He promised to strengthen the war on drugs to restore "law and order" and support law enforcement. Trump's trade objectives were part of his larger pledges to put "America First" in all international affairs. He announced a plan to defeat ISIS and rebuild the military, and he assured that he would confront China's "mercantilism" and get tough on MNCs that offshored manufacturing. In so doing, Trump easily distinguished himself as a nationalist, in contrast to Clinton's multinational loyalties.

*Receptiveness of the white working-class*

In a review of news articles from major media outlets, most articles attribute Trump's victory to support from the white working class and nearly half of the articles cite manufacturing troubles (Freund & Sidhu 2017: 2). To be sure, there is evidence that most of Trump's supporters are wealthy, suburban whites (Sasson 2016). However, Trump's support in key swing states came from working class whites, and these votes delivered Trump the sufficient Electoral College votes for the Presidency. In the rust belt/swing states of Ohio, Pennsylvania, Michigan, and Wisconsin, Clinton underperformed Barack Obama among white working class voters, and Clinton lost those state to Trump (Sasson 2016). According to exit polls, whites without a college degree

made up a third of the voting population and Trump won them by 39 percentage points, far surpassing 2012 Republican nominee Mitt Romney's 25 percent margin in 2012 (Tankersley 2016). Uneducated whites, particularly in swing states and key counties, were the foundation of Trump's victory (Freund & Sidhu 2017).

While exit polls suggested that "the economy" was the primary motivation working class whites in voting for Trump, exit polls are notoriously unreliable. However, there is evidence that trade pattern woes can swing U.S. elections. Autor et. al. (2017) found that import competition from China led to more votes for Trump in 2016 than Bush in 2000, especially in key counties and states. Similarly, Autor et. al. (2016) found that import competition from China is significantly correlated with increased political polarization in congressional elections, as measured by the number of moderate incumbents who lost their seats. Jensen et al. (2016) included trade in services in their analyses and they found that while good imports are associated with more political polarization, services exports are associated with more support for the incumbent. While campaigning in these regions, Trump said that as President he would exit the TPP, threaten to withdraw from the WTO and NAFTA, and impose strong tariffs on imported Chinese goods and goods produced by U.S. MNCs that had offshored production. His message clearly had currency with the white working class in these key swing states because he won their vote.

*Clinton's lack of alternatives to "free trade"*

"NAFTA is the worst trade deal maybe ever signed anywhere, but certainly ever signed in this country,"[471] Trump taunted Clinton during a prime time television debate in the 2016

[471] Cited in Patrick Gillespie, *CNNMoney*, 27 September 2016.

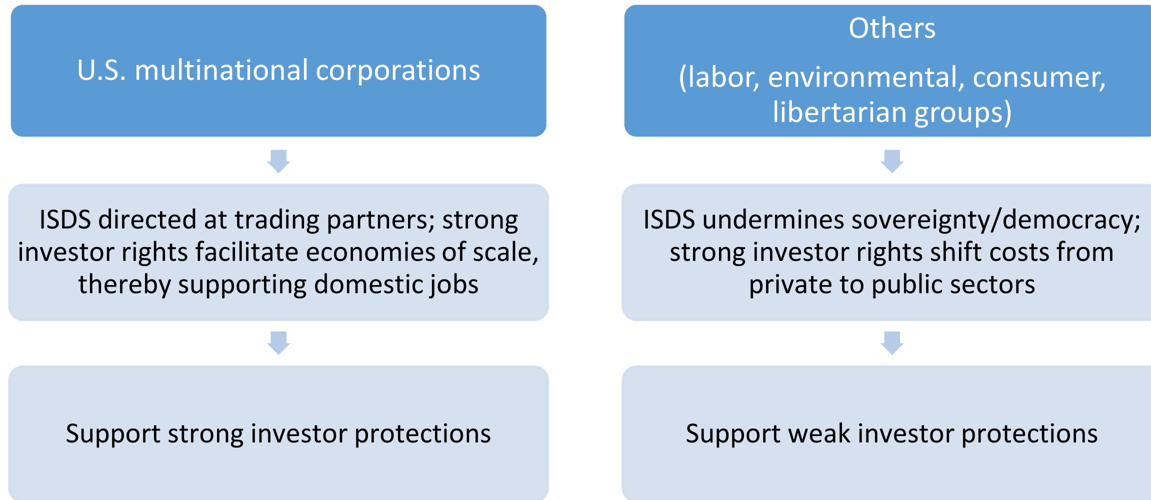
Presidential race. Clinton's husband, President Bill Clinton, had implemented the NAFTA as law in 1994. According to Trump, the NAFTA was a "disaster" because of the subsequent multiplication of the U.S. trade deficit with Mexico, and he promised to renegotiate the deal, or 'tear it up,' to reduce the trade deficit. By Trump's calculation, the trade deficit was in large measure due to the offshoring of U.S. manufacturing to Mexico.

Trump observed his lone agreement with Bernie Sanders, "We have one issue that's very similar, and that's trade." Sanders had repeatedly derided the NAFTA for favoring the interests of MNCs over U.S. workers. In contrast, Clinton offered little alternative to the "free trade" initiatives of past administrations, including her husbands'. As I documented in Chapter Five, as Secretary of State, Clinton had oversaw the forming of the 2012 U.S. Model BIT, which set key negotiating objectives for the TPP and the TPP investment agreements are highly consistent with the same agreements in the NAFTA. Clinton then proclaimed the TPP to be the "gold standard" of FTAs. During the Democratic primaries in the 2016 Presidential race, after Clinton suffered a string of surprising upset losses to Bernie Sanders in the rust belt/swing states, Clinton reverse her support for the TPP. However, her loss of the rust belt white working class to Sanders and then Trump demonstrated that voters did not trust her new trade/economic policies.

## IV. Politics of Trump's "America First" trade policy

Using the framework that I presented in the introduction (reproduced below), I will compare Trump's trade rhetoric to his actual policy implementation.

Figure Six: Two Policy Positions in U.S. International Investment Law (reproduced)




On the Presidential campaign trial, candidate Trump clearly took the policy position to weaken investor protections and prioritize national sovereignty. After withdrawing the U.S. from the TPP, the new Trump administration requested Mexico and Canada to renegotiate the NAFTA in March 2017. To deliver an “America First” trade policy in the NAFTA renegotiations, the Trump administration would have to prevent offshoring by reducing U.S. manufacturing FDI to Mexico. To achieve this in the NAFTA renegotiations, they can pursue two policies, (1) to impose regulations that restrict manufacturing FDI to Mexico, and/or (2) to make fundamental reforms to the NAFTA investment chapter, which regulates regional FDI and capital flows.

However, President Trump’s actual trade policy is moving in the direction of strong investor rights in the NAFTA, thereby supporting U.S. MNCs rather than the nationalist interest groups that voted for him. Trump’s top trade advisors understand that the global competitiveness of key U.S industries are dependent upon trade and investment with Mexico. Peter Navarro, head of Trump’s newly created White House National Trade Council, proposed to use the NAFTA

renegotiations to create a 'mutually beneficial regional powerhouse where workers and manufacturers on both sides of the border will benefit enormously.'[472] In the Trump administration's draft notice to Congress, they proposed only cursory revisions of the NAFTA investment chapter.[473]

Commentators may call this trade strategy "North America First" or "U.S. MNCs First," but they cannot call it "America First." The NAFTA is a regional, multilateral initiative, it is not a nationalistic one. Similarly, if the Trump administration negotiates the U.S.-China BIT to contain strong investor protections, then they will support multinational interests over national interests, contrary to his trade promises to his voting base. Therefore, while withdrawing from the TPP in order to prevent a deepening of the U.S. trade deficit was a "nationalist" trade policy, it is doubtful that Trump will remain true to his other core trade promises. President Trump had already decided against labelling China a currency manipulator, which he had promised to do as a candidate.

## V. Limitations to research and future research

### V.A. Limitations to research

The main limitation to my process tracing of the NAFTA and TPP investment and financial services chapters was a lack of access to negotiating materials and documents. The NAFTA process tracing is far more complete because all of the negotiating draft texts for the investment chapter are publically available (publicly released 2004), while the TPP negotiations were highly secretive. The most useful information on the TPP

[472] Cited in Andrew Mayeda, Eric Martin, and Nacha Cattan, *Bloomberg*, 15 March 15 2017.
[473] See Stephen P. Vaughn, above n 3.

negotiations came from leaked draft texts, documents, and emails, and the second most useful were leaked information to the press especially *Inside Trade*. Therefore, the lack of public transparency limited my data collection such that some important details were missing, notably, country-specific negotiating positions in the TPP.

V.B. Areas for future research

While the Trump administration has made certain revisions to U.S. trade policy, it is unclear if trade policymaking institutions have also been changed. Future empirical research should address whether or not the Trump administration actually changed the alliances between U.S. MNCs, domestic trade agencies, and multilateral trade institutions. Moreover, does the newly created White House National Trade Council change any of these institutional dynamics?

Similarly, as the TPP was negotiated nearly twenty years after the NAFTA yet the content of the investment and financial services chapters are very similar, future research should address why U.S. investment policy has remained so consistent over the years. Specifically, as the core investor protections from the 1982 U.S. Model BIT remain the core protections in the 2012 U.S. Model BIT, why has U.S. investment policy remained so consistent from the Cold War through the "rise of China"?

Lastly, for the purposes of producing knowledge that goes beyond the academy, future research on trade negotiations should analyze the strategies of the different U.S. domestic political groups to influence U.S. trade and investment policy. Labor unions, environmental organizations, and consumer advocacy groups were largely unsuccessful in influencing domestic policy in the 2012 U.S. Model BIT. However, during TPP negotiations these domestic political actors formed relationships and networks with anti-TPP constituencies in other countries. For

example, if during the TPP negotiations U.S. domestic political actors found the USTR to be unresponsive to their proposals, then how did trade negotiators in other countries respond? Future research should analyze the "pros and cons" and the effectiveness of these strategies.

# Appendices

## Appendix One:

### Overview of foreign bank operations in Mexico

While local Mexican banks retained their advantage in relational, "soft" information, foreign banks rely on "hard" information for mass retail lending and new financial products such as derivatives (Detragiache et. al. 2006; dos Santos 2013; de Hass 2012). Foreign banks in Mexico enhanced and expanded consumer credit and credit card networks, introducing automated credit scoring, electronic lending platforms, and products such as credito a la nomina, or wage-linked loans (dos Santos & Lapavitsas 2008: 49). Household and consumption loans as a share of total loans jumped from less than 15 percent to 42 percent between 1999 and 2006. Further statistical analysis demonstrates that the rapid expansion of household and consumer loans has been led by foreign banks while domestic banks have significantly lower exposures to consumer credit (Schulz 2004; Haber & Musacchio 2005; dos Santos & Lapavitsas 2008: 49; dos Santos 2013). In 2007, the UK bank HSBC and the U.S. bank Citigroup attributed 52.4 and 75.8 of all profits in their Mexican operations to their consumer lending segments (dos Santos 2013: 322). The result has been a reorientation of Mexican banking credit away from productive enterprises while targeting household income streams.

As foreign banks have come to dominate the Mexican banking sector, they led the transformation of Mexican banking operations towards a reorientation of credit towards household lending and fee-based income. While U.S. banks have profited from these activities, a number of analysts have raised policy concerns. As banks in Mexico increasingly target personal income as a source of profit, they simultaneously have reduced loans to productive enterprises. A number of studies have found that foreign banks in Mexico have led a falling availability of bank

credit to productive enterprises, particularly small and medium businesses (Schulz 2004; Haber & Musacchio 2005; Doyran & Erdogan 2015; dos Santos 2011 & 2013)[474]. Further, Beck and colleagues (2008) present evidence that while credit to productive enterprises has a statistical association with higher rates of per capita growth, credit to households has none. While it is difficult to draw conclusions based on a lack of statistical evidence, there have been a number of studies that point to adverse growth effects of the reorientation of credit to household lending (Doyran & Erdogan 2015; dos Santos 2013). Economist Paulo dos Santos observed, "Coupled with the central role lending to poorer households played in the U.S. credit crisis starting in 2007, this underscores the need for deliberate consideration of the economic content of credit to households as an urgent matter of development policy" (2013: 317). While the number of non-performing loans of total loan portfolios in Mexico have been declining with foreign bank entry, debt to income ratios have been rising for both households and firms, posing greater financial risks.

Foreign banks have also reoriented the Mexican bank system towards non-interest income, or fee-based activities for financial market mediation, such as originating derivatives[475]. In Mexico, the share of banks' non-interest income to total income increased from 16.71 percent in 1998 to 57.62 percent in 2011 (Doyran & Erdogan 2015: 339). Simultaneously, gross contingent liabilities as a share of total banking capital grew from 0.63 percent in 2000 to 35.31 percent in 2006 (dos Santos & Lapavistsas 2008: 50). Further evidence suggests that these trends in Mexico have been largely accounted for by foreign banks (Doyran & Erdogan 2015: 338; dos

[474] Although to the contrary, González and Peña (2012) found no distinction between foreign banks and domestic banks in this regard.
[475] By 2014, the gross market value of outstanding of the over-the-counter (OTC) derivative contracts expanded to $21 trillion dollars. The OTC derivatives market is unregulated and it is the largest market in the world.

Santos & Lapavistsas 2008: 50; Haber & Musacchio 2005: 35). The market making activities and new financial products of international banks in Mexico contributed to further consolidation of the global banking industry.

Figure Seven: Mexican Housing and Consumption Loans as Share of Total Loans

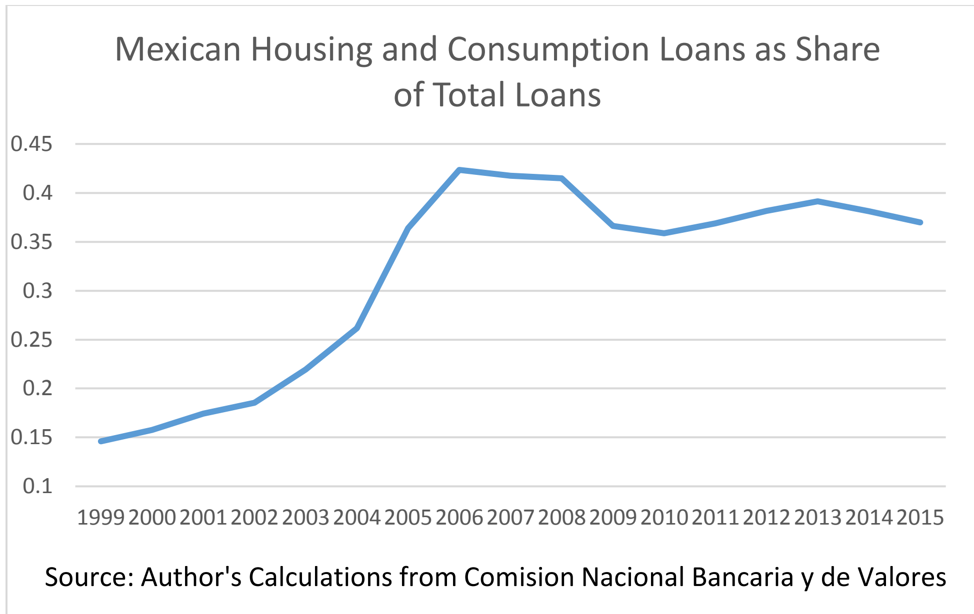
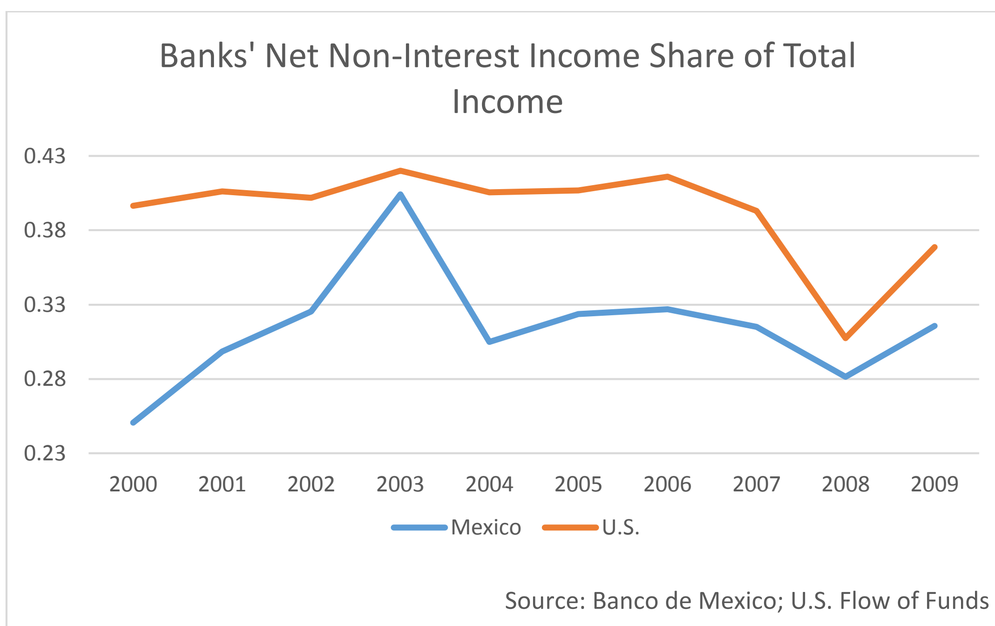



Figure Eight: Banks' Net Non-Interest Income Share of Total Income



| Table 16: Mexico, gross contingent liabilities (as percentage of total banking capital) | |
|---|---|
| 2000 | 0.63 |
| 2001 | 2.84 |
| 2002 | 4.14 |
| 2003 | 6.32 |
| 2004 | 15.77 |
| 2005 | 24.33 |
| 2006 | 35.31 |
| Source: dos Santos, Paulo and Costas Lapavitsas. 2008. "Globalization and Contemporary Banking: On the Impact of New Technology", *Contributions to Political Economy*, 27(1). | |

Appendix Two

| Table 17: NAFTA Chapter 11 Cases up to January 1, 2015 | | | | |
|---|---|---|---|---|
| | Canada | Mexico | United States | NAFTA (total) |
| Total cases filed against Party | 35 | 22 | 20 | 77 |
| Total decided cases filed against Party | 13 | 11 | 11 | 35 |
| Decided cases won/decided cases lost | 7/6 | 6/5 | 11/0 | 24/11 |
| Source: Sinclair, Scott. 2015. "NAFTA Chapter 11 Investor-State Disputes to January 1, 2015." Ottawa: *Canadian Centre for Policy Alternatives*. | | | | |

| Table 18: NAFTA Chapter 11 Claims and Awards by Provision and Country up to January 1, 2015 | | | | | | |
|---|---|---|---|---|---|---|
| Chapter 11 Provision (NAFTA Article) | Canada | | Mexico | | United States | |
| | Total Citations of Article in all Decided or Settled Cases / Total Citations in all Filed Cases | Awards Given for Breaches of Article | Total Citations of Article in all Decided or Settled Cases / Total Citations in all Filed Cases | Awards Given for Breaches of Article | Total Citations of Article in all Decided or Settled Cases / Total Citations in all Filed Cases | Awards Given for Breaches of Article |
| National Treatment (1102) | 7/26 | 3 | 9/15 | 4 | 6/17 | 0 |
| Most Favored Nation (1103) | 4/23 | 1 | 2/6 | 0 | 2/11 | 0 |
| Standard of Treatment (1104) | 2/4 | 0 | 2/4 | 0 | 0/3 | 0 |
| Minimum Standard of Treatment (1105) | 11/32 | 3* | 11/19 | 2** | 7/18 | 0 |

| Performance Requirements (1106) | 5/12 | 2 | 4/6 | 0 | 1/2 | 0 |
|---|---|---|---|---|---|---|
| Transfers (1109) | 0/1 | 0 | 0/1 | 0 | 0/1 | 0 |
| Expropriation (1110) | 9/26 | 2 | 11/18 | 1 | 5/13 | 0 |
| Cases with unavailable documents (missing data) | - | | 3 | | 1 | |
| Cases outstanding | 8 | | 2 | | 2 | |
| *Two of the three awards given by Canada as breaches of Article 1105 were issued prior to the 2001 FTC Interpretation of Article 1105 | | | | | | |
| **One of the two awards given by Mexico as breaches of Article 1105 were issued prior to the 2001 FTC Interpretation of Article 1105 | | | | | | |
| Author's compilation based on Sinclair, 2015 | | | | | | |

| Table 19: NAFTA Chapter 11 Cases Filed by Investors by Nationality | | | | | | | |
|---|---|---|---|---|---|---|---|
| | Canadian Investors | | Mexican Investors | | U.S. Investors | | NAFTA (total) |
| | Against Mexico | Against U.S. | Against Canada | Against U.S. | Against Canada | Against Mexico | |
| Cases Filed | 1 | 19 | 1 | 1 | 34 | 21 | 77 |
| Source: Sinclair, Scott. 2015. "NAFTA Chapter 11 Investor-State Disputes to January 1, 2015." Ottawa: *Canadian Centre for Policy Alternatives*. | | | | | | | |

| Table 20: Types of Regulation Challenged under NAFTA Chapter 11 up to January 1, 2015 | |
|---|---|
| Policy Challenged | Cases |
| Environmental protection | 18 |
| Administration of justice | 7 |
| Agriculture | 6 |
| Health care, pharmaceuticals | 6 |
| Trade remedies | 5 |
| Land use planning | 5 |
| Financial regulation, taxation | 5 |
| Postal services | 2 |
| Other | 11 |

| Source: Sinclair, Scott. 2015. "NAFTA Chapter 11 Investor-State Disputes to January 1, 2015." Ottawa: *Canadian Centre for Policy Alternatives*. |
|---|

Appendix Three:

NAFTA Free Trade Commission carefully scales back "minimum standard of treatment" in 2001

The NAFTA established[476] the Free Trade Commission (FTC) to supervise its implementation and resolve disputes arising from its interpretation. The FTC is composed of "cabinet level representatives" of the NAFTA parties and the FTC's legal interpretations of the agreement are binding upon investor-state arbitral tribunals. To date, the FTC has issued one interpretation[477], in 2001, and its effect was to scale back "minimum standard of treatment" in response to broad claims made by investors under the provision. As the NAFTA came into force in 1994, there was a relatively small amount of BITs in existence and there had been no arbitral awards under the U.S. BIT program. The original drafters of the BIT had never considered that the U.S. could be a respondent to an investor-state case because BITs were initially designed for contract with developing countries, which had not been capital-exporters (Vandevelde 2009: 285). In addition, the U.S. legal system was congruent with the BIT provisions. However, when the U.S. became a NAFTA Chapter 11 defendant in 1998 against a Canadian company seeking a $500 million award it initiated changes to U.S. trade policy.

Early investor-state claims against the NAFTA states rotated around the phrase "fair and equitable treatment" as well as the other minimum standard of treatment provisions. Investors have argued that "fair and equitable treatment" means that once an investment contract is made an investor has an expectation of the regulatory environment for that investment, and governments breach "fair and equitable treatment" when they make regulatory changes after an

[476] Article 2001 of the NAFTA

[477] Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, July 31, 2001. (http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp)

investor has set their expectations. In *Metalclad Corporation v. United Mexican States (2001)*, Metalclad had won a decision against Mexico in which Metalclad claimed expropriation because Mexico denied it fair and equitable treatment. Metalclad was a U.S. company that had purchased land in Mexico to establish a waste disposal facility but the local government denied Metalclad the right to establish the waste facility on environmental grounds. Similarly, in *S.D. Myers, Inc. v. Government of Canada* (2002), U.S. company S.D. Myers, Inc., which produced hazardous waste, had won a partial award against Canada for its claims that Canada's environmentally motivated ban on PCB exports breached the minimum standard of treatment provisions on the grounds that other NAFTA provisions were breached as well. Then in 2001, Methanex, a Canadian firm that produces hazardous gas methanol, brought claims against the State of California seeking $970 million in damages for a ban on the fuel additive MTBE on the grounds that the ban breaches national treatment, denies fair and equitable treatment, and effectively expropriates its investment by diminishing its market share (*Methanex v. United States (2004)*).[478] All three cases became highly controversial in U.S. trade policy debates as the U.S. was negotiating the Free Trade Area of the Americas[479].

When the U.S. became a defendant in the Methanex case the USTR began to change its tune about the definition of minimum standard of treatment, and the USTR asserted that in the early cases the NAFTA tribunal panels had adopted too expansive interpretations of this provision. The USTR and State Department believed that the language "fair and equitable treatment" was limited to the norms that have been "crystallized" in international law through

[478] *Inside U.S. Trade*. "U.S. Cites NAFTA Party Agreement to Limit Investor-State Disputes." May 18, 2001.
[479] *Inside U.S. Trade*. "Zoellick Cool to Restrictions on Investor-State Disputes." April 4, 2001.

repeated decisions over centuries[480]. In contrast, Methanex and other companies argued that fair and equitable treatment was a "free standing commitment" *in addition to* the obligation to provide treatment according to other trade and investment laws, such as WTO obligations[481]. After the launch of *Methanex v. United States*, USTR Zoellick favored issuing the FTC Interpretation of the treatment provision scaling back investor rights on this provision. Regardless of the FTC Interpretation, the tribunal dismissed Methanex's claims in 2004.

The 2001 FTC Interpretation clarified two minimum standard of treatment provisions, firstly, it limited the absolute minimum standard of treatment for investments to "customary" international law, and secondly, it asserted that a breach of another NAFTA article or a different international agreement (such as the WTO) did not constitute a breach of the NAFTA. By inserting the word "customary" into the treatment provision, the FTC referred to "uniform, extensive and representative State practice" (ABA 2010). In so doing, the 2001 FTC Interpretation established a narrower minimum standard of treatment afforded to investments thereby scaling back investor rights to bring claims against states.

[480] Ibd
[481] Ibd

# Annexes

## Annex One

*"Fast-track" and the process of developing of the USTR's negotiating objectives in the NAFTA*

The U.S. Constitution assigns to Congress the authority to "regulate commerce with foreign nations" and "lay and collect taxes, duties, imposts, and excises."[482] Simultaneously, the Constitution transfers to the President broad authority of foreign affairs and the exclusive authority to negotiate treaties and international agreements.[483] The President appoints the USTR, and the USTR centralizes government policy-making on trade and negotiates international trade and investment.[484] In so doing, both the executive and congressional authorities develop and execute U.S. trade and investment agreements.

Fast-track was created by the Trade Act of 1974 and it was designed as a solution the "unwillingness" of trade partners to negotiate due to special interests "inherent" in U.S. trade policy making (cited in Fergusson 2015). Trade partners called upon Congress to not reopen any negotiated provisions and consider trade agreements within a "definite time-frame" (cited in Fergusson 2015). Fast-track was the solution and it mandated Congress to "suspend its ordinary legislative procedures" and vote a trade agreement "up or down" with limited debate and no amendments. In addition, "fast-track" legislation also contained Congress' negotiating objectives for the President, among other checks on the Executive including consultations with Congressional committees.

Fast-track procedures are as follows: the President submits a trade agreement for fast-track authority, Congress has 60 or 90 legislative days to review the proposal and either approve

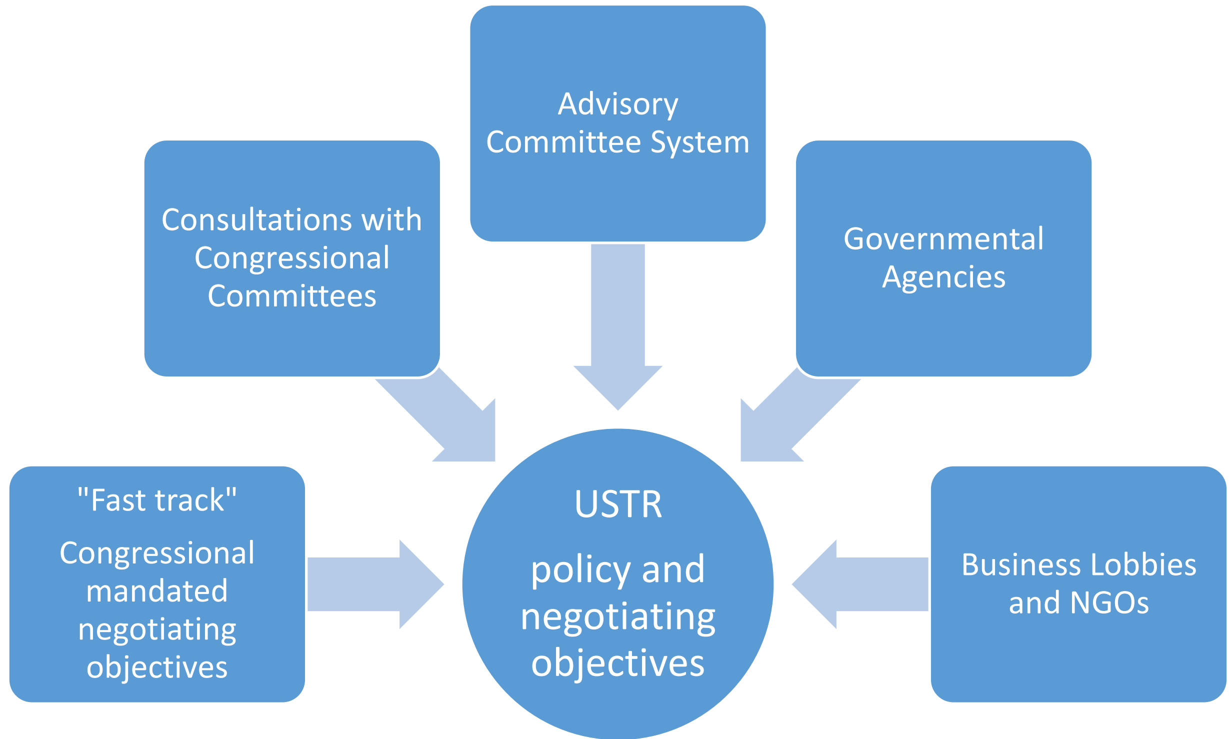
---

[482] U.S. Constitution, Article I, Section 8
[483] U.S. Constitution, Article II
[484] Trade Act of 1974, Reorganization Plan No. 3 of 1979

or disapprove fast-track for the trade agreement. Upon approval of fast-track, during negotiations the USTR must consult the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate, as each joint committee of the Congress "has jurisdiction over legislation involving subject matters which would be affected by the trade agreement."[485] The consultations include: the nature, purposes, policies, and objectives of the agreement and all matters relating to its implementation.[486] In addition, the USTR consults closely with U.S. business and business groups, "since an agreement not acceptable to the broad spectrum of American business is doomed to failure."[487] Beginning with the NAFTA, the USTR would hold stakeholder consultations with non-governmental organizations, including labor unions and environmental groups, who also influence votes in Congress. Lastly, after negotiations are concluded, the President must submit the agreement to Congress for final approval on an "up or down" vote. In sum, the fast-track mechanism provides Congress with: the authority to mandate negotiating objectives; consultations between the USTR and Congress; and Congress' authority over final implementation. In so doing, fast-track grants Congress the authority to influence the outcome of negotiations while the negotiations are within the domain of the Executive.

[485] Trade Act of 1974
[486] Ibid
[487] James Baker, Chairman of the Board of Directors of the U.S. Chamber of Commerce, testimony U.S. Congress. Senate. Committee on Finance. 1990. "United States-Mexico Free Trade Agreement : hearings before the Committee on Finance", One Hundred Second Congress, first session, February 6 and 20, 1991.

Figure Nine: Organizational inputs into USTR's objectives during NAFTA negotiations




*Negotiating process and structure in the NAFTA*

As mandated by the 1974 Trade Act and the 1988 Omnibus Act, the USTR centralized trade policy and negotiations by coordinating with different governmental agencies to determine trade policy, including the State Department, Treasury, Department of Commerce, Agriculture, the Environmental Protection Agency, and other governmental agencies. Therefore, the USTR had members from different governmental agencies. In turn, the USTR had a number of interfaces with the private sector and state governments via the advisory committee system, established by the 1974 Trade Act, which mandated that the USTR "adequately reflect U.S. public and private

sector interests."[488] The Advisory Committee on Trade Policy and Negotiations reflects private sector interests, composed of 45 advisors representing business, industry, and agriculture, and these members were appointed by the President but recommended for appointment but the USTR.[489] The Intergovernmental Policy Advisory Committee provided policy advice on trade matters with significance to state and local governments, and other advisory committees included agriculture, labor, and the environment. In addition, the USTR regularly consulted policy and negotiations with business lobbies and relevant Congressional committees.

[488] "Advisory Committees", Office of the United States Trade Representative, accessed 2014, (available: https://ustr.gov/about-us/advisory-committees)
[489] "Charter of the Advisory Committee on Trade Policy and Negotiations", Office of the United States Trade Representative.

Annex Two

*Do U.S. BIT provisions stimulate FDI inflows to developing countries?*

The effects of U.S. BIT provisions on capital and FDI flows have been studied and debated since the U.S. BIT program began, and the results are very mixed. Some studies demonstrate that U.S. BITs lead to higher FDI inflows while other studies argue that U.S. BITs have no effect on FDI flows. Economists Salacuse and Sullivan (2005) and Buthe and Milner (2009) both determined that BITs attract FDI inflows to developing countries particularly when the developing country contracts with an OECD country. Moreover, Salacuse and Sullivan (2005) found that the U.S. BITs have a greater effect in attracting FDI to developing countries than the BITs of other OECD countries, in particular in attracting U.S. FDI. To the contrary, a 1998 UNCTAD study, one of the first to evaluate the relationship, concluded that "…BITs did not play a primary role in increasing FDI, and that a larger number of BITs ratified by a host country would not necessarily lead to higher FDI inflows" (cited in Sachs and Sauvant 2009: 21). Economist Hallward-Driemeier (2003) and Yackee (2007) also found little support that BITs impact FDI flows. Hallward-Driemeier (2003) found that "…rather than encouraging more FDI flows in riskier environments, BITs only have a positive effect on FDI flows in countries with an already stable business environment and reasonably strong domestic institutions" (cited in Sachs and Sauvant 2009: 21).

The U.S. BIT experience in Africa also casts serious doubt on the relationship between U.S. BITs and FDI. In 2011, only six[490] of the forty-eight countries in Sub-Saharan Africa accounted for 96.4 percent of total U.S. FDI in the region and none had entered into a BIT with the U.S. (Ofodile 2011: 5). The clear lack of correlation between BITs and FDI in Africa was

[490] South Africa, Nigeria, Mauritius, Equatorial Guinea, Angola, and Liberia

frankly stated by President Clinton in two different letters to the Senate for the ratification of BITs with Ecuador and Mozambique, "It is the U.S. policy…to advise potential treaty partners during BIT negotiations that conclusion of such a treaty does not necessarily result in increase in private U.S. investment flows."[491]

FDI is motivated by a range of factors and BITs are only one of those variables. Any analysis of the relationship between BITs and FDI must be done on a case-by-case basis as situational independent and intervening variables clearly must also be considered. Therefore, any conclusions based on the economic and social performance of the NAFTA Investment Chapter are not readily generalizable to other TPP members.

---

[491] Letter Of Submittal from U.S. President Clinton to U.S. Senate regarding Treaty Between the United States of America and the Republic of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment, U.S. Department of State (May 1, 2000).

Annex Three

*Mexico's pre-NAFTA trade and investment liberalizations*

The NAFTA likely had little impact on inward FDI to Canada and the U.S. because both countries were already open to investment and with strong investor rights. However, for Mexico the NAFTA and pre-NAFTA investment liberalizations were a stark departure from Mexico's import substitution industrialization strategy during the Cold War. In 1993, Mexico's inward stock of FDI was just $52 billion, about 7 percent of GDP. By 2012, the stock reached $315 billion, some 27 percent of GDP (Hufbauer et. al. 2014). However, it is difficult to separate the effects of NAFTA from Mexico's pre-NAFTA investment liberalizations on inward FDI to Mexico.

The U.S.-Mexico trade and investment relationship has international attention as the U.S. is the top capital-exporting developed country and Mexico has been among the top two capital-importing developing countries in the hemisphere (Brazil is the other), and they share a large border. Until the early 1980s, Mexico had far reaching restrictions on foreign investment as Mexico pursued import-substitution industrialization. Following the Mexican debt crisis in the early 1980s, which left Mexico in need of dollars to pay its debt, Mexico began to liberalize foreign investment measures beginning by reforming the maquiladora program in 1983 by relaxing controls on foreign investment for the Mexican border region.

Maquiladoras are production plants on the Mexican side of the U.S. border that export goods assembled with imported inputs. Maquiladoras are generally foreign firms that perform the assembly stage of production of goods using low-wage (typically female) Mexican labor and relaxed environmental standards. From the perspective of Mexican policymakers, the maquiladora program served two purposes, "Mexico needed the employment, the U.S.

companies in particular needed industrial-competitiveness as U.S. –produced labor-intensive products were no longer price competitive in the U.S. market" (Hadjimarcou et. al. 2013: 208). In the 1980s, a series of currency devaluations helped to strengthen the attractiveness of the maquiladora program to U.S. FDI, and in turn, even as wages ranged between $0.60 and $0.70 cents an hour it was 40 percent higher than the average stipend (Hadjimarcou et. al. 2013: 209). In 1989, the Salinas administration generalized maquiladora-type investment liberalization to the other Mexican states and broadened the law to include other capital flows. From the Mexican perspective, the NAFTA generalized the maquiladora model, and for this reason it is empirically difficult to isolate the effects of NAFTA on U.S. FDI to Mexico.

## Annex Four

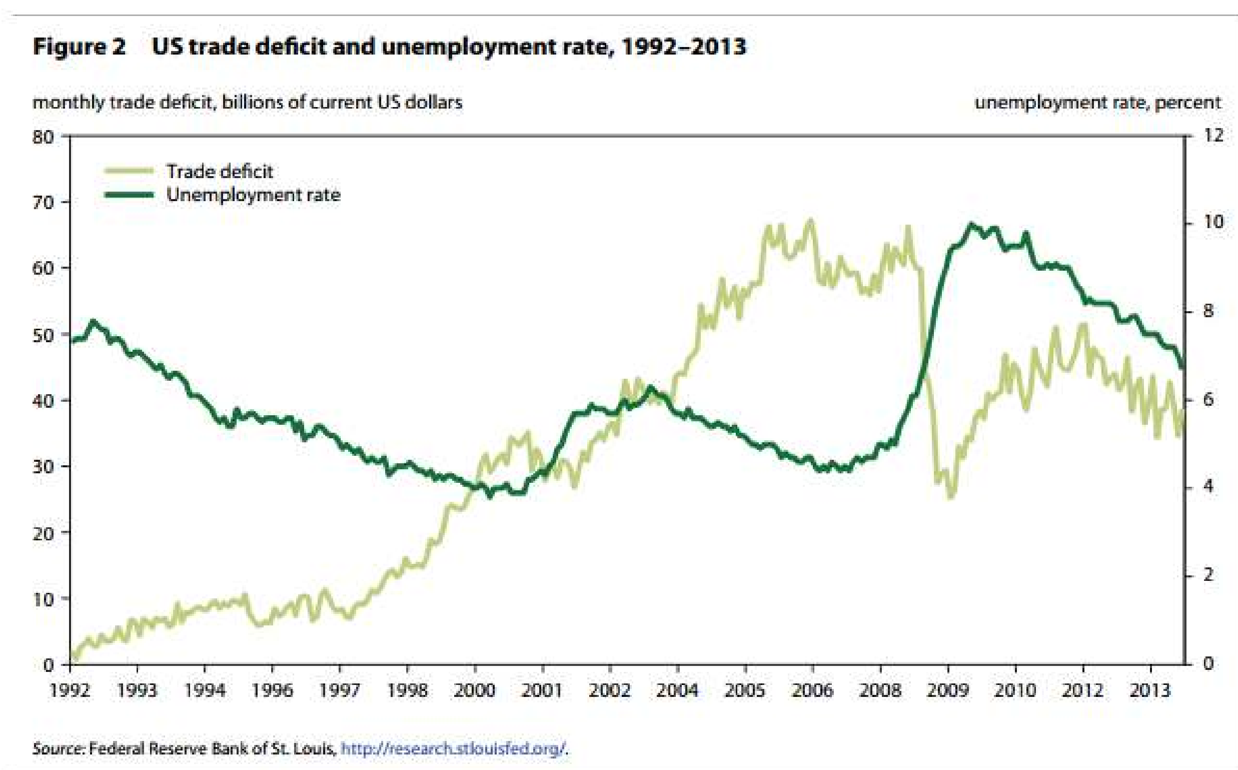
## Effects on U.S. Labor and Jobs, Claims of NAFTA Proponents and Opponents

### *Claims of NAFTA Proponents*

NAFTA proponents at the Peterson Institute for International Economics find that since NAFTA's implementation in 1994, trade with Mexico produces net gains for U.S. citizens despite a relatively small net job loss (Hufbauer et. al. 2014). Economists Gary Clyde Hufbauer et. al. (2014) estimate that from 2009 to 2011, over 4 million people in the U.S. become involuntarily unemployed each year and 203,000 of those workers (about 5 percent) lost their jobs due to trade with Mexico (2014: 11). However, based on U.S. exports to Mexico from 2009 to 2013, in each year 188,000 workers gained new jobs that are supported by trade with Mexico, and those new manufacturing jobs for export pay better than the lost import-competing jobs (Hufbauer et. al. 2014: 13). Therefore, by arithmetic of jobs lost minus jobs gained, from 2009 to 2013, the U.S. net job loss by trade with Mexico was roughly 15,000 annually, which is nearly "imperceptible" within the context of far greater job losses associated with the broader trends of the U.S. economy (Hufbauer et. al. 2014: 13).

Despite the small net job loss from trade with Mexico, Hufbauer et. al. cite economist Robert Z. Lawerence who found that in 2008, for each net U.S. job loss to trade with China the US economy gained about $900,000 via enhanced productivity and lower prices in goods and services (2014: 13). Hufbauer et. al. estimate by these same calculations, from 2009 to 2013, for each net job lost to Mexico the US economy gained "several hundred thousand dollars" (2014: 13). To that end, Hufbauer et. al. do not find any correlation between the U.S. trade deficit and the unemployment rate.

Figure Ten: No correlation between U.S. trade deficit and official unemployment rate (from Hufbauer et. al. 2014)




To the support of NAFTA proponents, Autor et al. (2013) found that while U.S. imports from China have exerted "a modest negative effect" on U.S. wages in manufacturing, imports from Mexico had no significant effect on US wages in the manufacturing sector (cited in (Hufbauer et. al. 2014: 17). These findings were supported by studies from McLaren and Hakobyan (2010), Autor, Dorn, and Hanson (2013), and Edwards and Lawrence (2013). Based on this literature review, Hufbauer et. al. concluded that import competition from Mexico has not suppressed wage growth over the past two decades (2014: 17). The takeaway conclusion from Hufbauer et. al. (2014) is that since NAFTA, trade with Mexico has produced net benefits to the U.S. economy but with uneven distribution, whether or not the winners compensate the losers is

a political question (usually addressed by debates in Congress over the Trade Adjustment Assistance program which provides support for workers displaced by international trade).

Similarly, economists Theodore H. Moran and Lindsay Oldenski conclude that U.S. TNCs that have offshored to Mexico have become more competitive globally and in turn they have increased their investment and employment at home in the U.S. (2014). Moran and Oldenski analyzed confidential firm-level data from U.S. Bureau of Economic Analysis on the international activities of US-owned MNCs between the years 1990 and 2009. Moran and Oldenski reported,

> "…expansion in Mexico by a [US-based MNC] is associated with domestic U.S. expansion by the same firm…These results are consistent with the complementarities that we found using all countries in which U.S. firms invest. U.S. firms that have greater sales, hire more workers, spend more on R&D, export more goods, and invest more capital in Mexico also have greater sales, hire more workers, spend more on R&D, export more goods, and invest more capital in the United States. So the overall message is that greater investment in Mexico by U.S. firms benefits both countries" (2014: 40).

By these results, outward FDI helps U.S. firms to become more globally competitive which in turn expands their domestic operations and employment in the U.S. due to their increased dynamism. Responding to United Auto Workers' demands for cessation to offshoring to Mexico, Moran and Oldsenski contest that offshoring to Mexico benefits U.S. workers inasmuch as it facilitates the globally competitive position of the firm, "…the competitive fate of UAW workers at Ford's US assembly facilities actually depends on NAFTA" (2014: 41).

*Claims of NAFTA opponents*

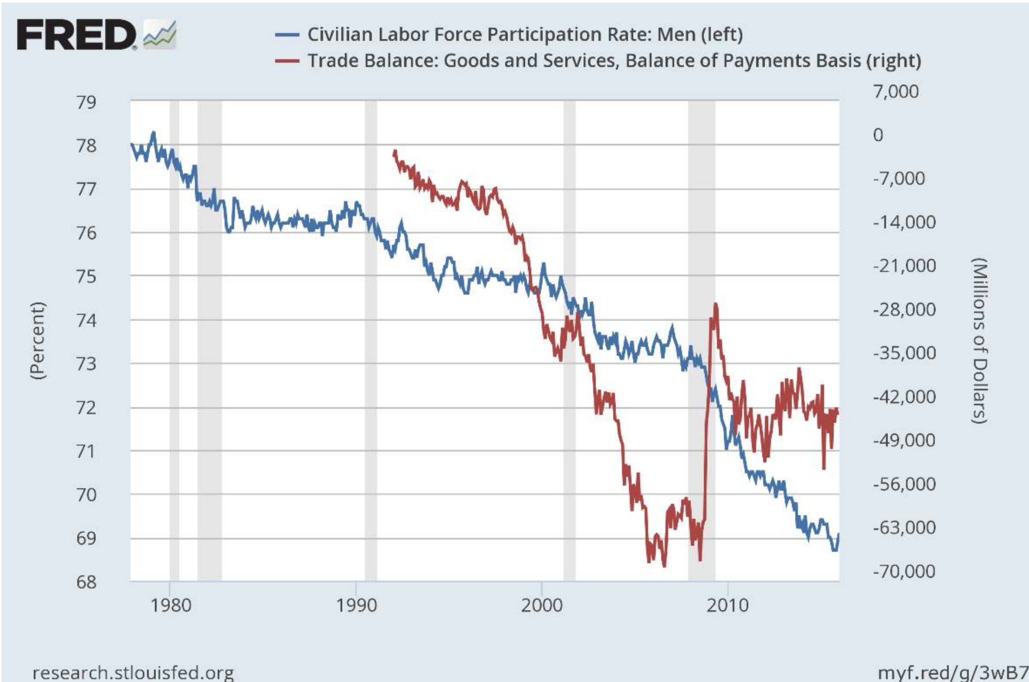
In direct opposition to research from the Peterson Institute for International Economics, U.S. public interest group Public Citizen argued that NAFTA has contributed to U.S. unemployment and income inequality (2014). In their own report on the twenty year legacy of NAFTA, they cite an estimate from the Economic Policy Institute that since NAFTA, the U.S-trade deficit to Mexico and Canada produced a net job loss of one million by 2004, and one third of those jobs were in the service sector which lost business due to closed manufacturing plants (2014: 8). However, between NAFTA's implementation in 1994 and 2010, U.S. trade with Mexico caused a net loss of 700,000 jobs, a figure reduced from 2004. Public Citizen is clear that, "Much of the job erosion stems from the decisions of U.S. firms to embrace NAFTA's new foreign investor privileges and relocate production to Mexico to take advantage of its lower wages and weaker environmental standards" (2014: 8).

NAFTA opponents, as expressed in the Public Citizen (2014) report, argue that the treaty has reduced wages and undermined unions inasmuch as it enabled firms to threaten workers with offshoring during wage bargaining sessions. A Cornell University study commissioned by the NAFTA Labor Commission found that since NAFTA, as many as 62 percent of U.S. union drives faced employer threats to relocate abroad, and the factory shut-down rate following successful union certifications tripled (cited in "Public Citizen" 2014: 11). The report found that companies made explicit threats to relocate to Mexico in more than 10 percent of the cases, and in other cases there were implicit threats, such as "given NAFTA we may need to reconsider our options," or handing out statistics to workers on the wage differentials between U.S. and Mexican autoworkers (cited in Hufbauer et. al. 2014: 17). The study concluded, "NAFTA created a climate that has emboldened employers to more aggressively threaten to close, or

actually close their plants to avoid unionization" (cited in Hufbauer et. al. 2014: 17). In addition, the AFL-CIO claimed that loss of bargaining power not only undermined wages and hours but also work conditions including health and safety standards (AFL-CIO 1999).

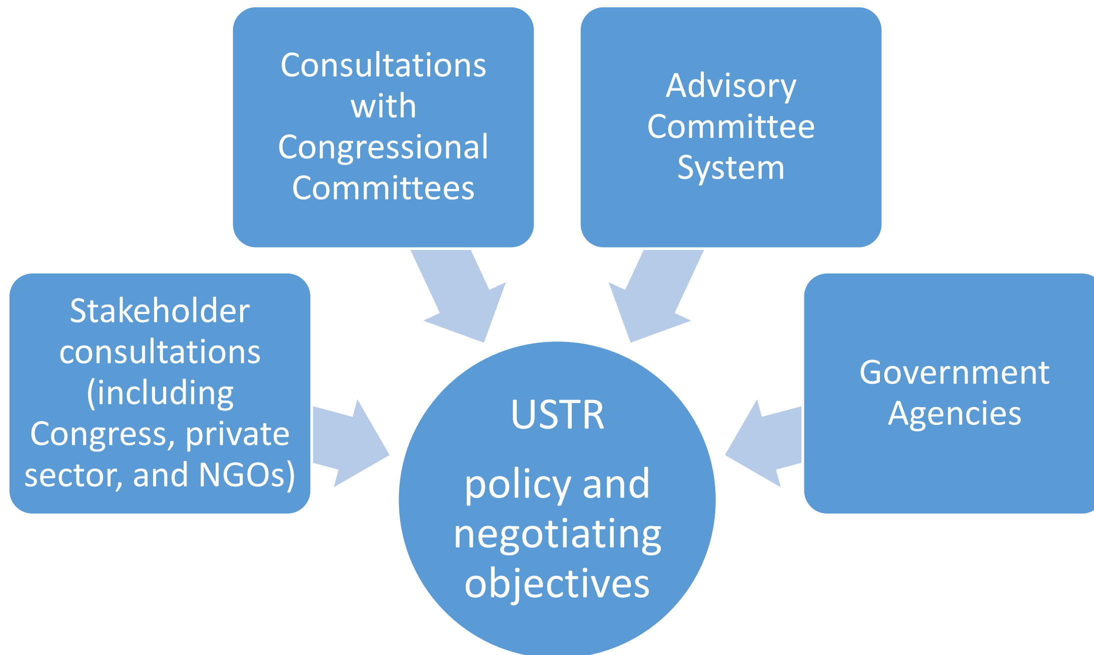
Public Citizen argues that the NAFTA has produced negative welfare effects because workers who have lost their jobs due to trade and have found new employment will typically find said new employment in lower-paying jobs. Further, the wage losses from workers taking lower-paying jobs have been greater than gains in lower prices by cheaper imports. Since NAFTA, two out of every five displaced manufacturing workers who were rehired experienced an annual wage loss of an average of $10,000, and by 2012 that figure had increased to two out of every three workers (2014: 10). Lastly, these wage losses have been far greater than price gains from NAFTA imports. The Center for Economic and Policy Research calculated that U.S. workers without college degrees (63 percent of the workforce) have likely lost an amount equal to 12.2 percent of their wages under NAFTA-style trade even after accounting for the benefits of cheaper goods (a net loss of more than $3,300 per year for a worker earning the median annual wage of $27,500.67) (2014: 12). This welfare loss has contributed to income inequality inasmuch as the average U.S. wage has grown less than one percent annually in real terms while worker productivity has risen at more than three times that pace.

Figure Eleven: U.S. labor force participation rate vs. trade balance



Annex Five: Inputs into the development of the United States Trade Representative's negotiating objectives in the TPP

Figure Twelve: Organizational inputs into USTR's objectives during TPP negotiations




*The battle for trade promotion authority (TPA, formerly "fast-track")*

The USTR sought to finish the TPP by the end of 2013, and during summer of that year Obama publically requested TPA from Congress, although many in Congress were skeptical of the administration's commitment.[492] As the relevant Congressional committees began the process of drafting TPA legislation, Congress members from both parties warned the administration that it would "take all hands on deck" to win TPA in a hostile Congress.[493] Led by Ranking Rep. Sander Levin, some House Democrats drafted an alternative TPA bill which introduced substantive reforms to trade and investment policy and the bill had the support of the

---

[492] "Obama Asks For Fast-Track Authority, Froman Defers To Congress On Bill," *Inside U.S. Trade*, August 2, 2013.
[493] "TPP Caucus Seeks Meeting To Press Obama For Strong Role On TPP, TPA," *Inside U.S. Trade*, December 6, 2013.

majority of House Democrats.[494] Simultaneously, the majority of House Democrats and a bloc of Republicans announced their opposition to the current TPA while a coalition of labor, environmental, and public interest groups charged that the TPP is a repeat of past "failed" FTAs and pledged to lobby Congress members to oppose TPA, among other goals.[495]

It was not until fall of 2014 that the administration went into full gear to pursue to the TPA. In an essay published in *Foreign Affairs*, USTR Froman announced that TPP negotiations had reached the stage in which TPA was necessary to conclude the TPP, "[B]y ensuring that Congress will consider trade agreements as they have been negotiated by the executive branch, [TPA] would give U.S. trading partners the necessary confidence to put their best and final offers on the table."[496] However, winning the necessary Congressional votes for TPA was complicated by a catch-twenty two - the White House could not get TPA without showing Congress the text of the TPP, and the White House could not show Congress the TPP text without getting TPA to finalize the negotiations.[497] The debate was further compounded by the release of the State Department's annual human rights report which found grave instances of human rights abuses ranging from slavery to pervasive sex trafficking in TPP members Vietnam, Brunei, and especially Malaysia.[498] The TPA contained an amendment that forbade the U.S. to enter FTAs

[494] "TPP Issue Analysis: Investment Chapter," U.S. House of Representatives, Committee on Ways & Means, Minority Staff Report, 114th Congress, November 30, 2015.
[495] "Unions Detail Opposition To Fast Track, TPP After Singapore Ministerial," *Inside U.S. Trade*, December 13, 2013.
[496] Froman, Micheal. 2014. "The Strategic Logic of Trade: New Rules of the Road for the Global Market." *Foreign Affairs*: November/December Issue, 2014.
[497] "White House Advisor Says TPP, Other Deals Hard to Conclude without TPA", *Inside U.S. Trade*, May 2, 2014.
[498] "Senate Republicans, Business Seek To Tackle TPA Trafficking Amendment", *Inside U.S. Trade*, May 1, 2015.

with any country in the most egregious category of human trafficking, however, the problem was eventually resolved when the State Department issued a revision upgrading Malaysia's status.

In May and June of 2014, the TPA failed its original votes in the House and Senate as many Congressional Democrats were demanding a renewal of Trade Adjustment Assistance and measures against currency manipulation as the price for their support for TPA.[499] Trade Adjustment Assistance coordinates federal programs aimed at reducing the impact of import competition as a result of trade and investment agreements. Beginning in 2015, the AFL-CIO in tandem with other unions froze all campaign contributions to pressure Congress members to oppose TPA while growing conservative opposition to U.S. trade policy led to new political alliances across party lines. Minority House Leader Nancy Pelosi announced her opposition to the legislation because House Democrats felt as though they did not have enough input into the TPA. Political trade-offs were made in favor of a stronger Trade Adjustment Assistance while major industry groups stepped up lobbying efforts to win the necessary Congressional votes. Research by *Maplight*, a research organization that specializes in measuring campaign contributions, found that industry groups gave 8.6 times more money ($197.9 million) to House Representatives who voted in favor of TPA than to those who opposed the legislation ($23.1 million).[500] By the end of June, 2015, the TPA had been reintroduced to both the House and Senate where it narrowly passed and the President signed it into law in July. TPA passage

---

[499] "Froman Sees TPP Deal in 2015; Kind Says White House Linking TPA, TAA", *Inside U.S. Trade*, December 5, 2014.
[500] "Industries Supporting Trade Bill Contribute Nearly Nine Times More Than Opposing Industries," *Maplight.org*, submitted by Daniel Stevens, June 12, 2015, (available: http://maplight.org/content/industries-supporting-trade-bill-contribute-nearly-nine-times-more-than-opposing-industries)

enabled the conclusion of TPP negotiations in October and the final text of the agreement was made public in November.

Annex Six:

*Negotiations in market access for FDI and financial services FDI*

2010:

As Malaysia applied for membership in the TPP, it had to address the issues that led to the collapse of negotiations in the U.S.-Malaysia FTA in 2007, and the most painful of these issues were in the financial services sector where Malaysia heavily restricted foreign investment. In Malaysia, foreign investment in a range of sectors had been roughly capped at 30 percent, and in financial services industries caps were much higher if not entirely restricted.[501] In Malaysia's domestic reforms, Malay policymakers addressed affirmative action regulations requiring employment of ethnic Malays, requirements to enter into joint ventures with Malaysian companies, and technology transfers.[502] In financial services, Malaysia increased the amount of equity a foreign investors could own in a financial services companies from 49 percent to 70 percent.[503] A USTR spokesperson responded that Malaysia's unilateral reforms in financial services were a "good initial step" as Malaysia considered TPP membership.[504] To join the TPP, the Malaysian government had to overcome resistance from its independent central bank which was "wary" of financial services liberalization as a boon to foreigners and potential financial instability.[505]

2011:

---

[501] "Senior Malaysian Officials Signal Strong Interest In TPP Participation," *Inside U.S. Trade*, Vol. 28, No. 15, April 16, 2010.
[502] Ibid.
[503] Ibid.
[504] Ibid.
[505] "Malaysian Trade Minister Sees Need to Enter TPP Talks in Near Term," *Inside U.S. Trade*, Vol. 28, No. 38, October 1, 2010.

While labor and skeptical Democrats warned of offshoring of jobs, the business community insisted on the deepest market access for FDI as possible, especially the financial services lobbies. Since the inception of the TPP, as all countries agreed to seek a "high-standard" outcome, countries negotiated market access on a "negative list" basis, in which all sectors are opened and exceptions are negotiated.[506] In March, 2011, negotiators exchanged their initial offers on market access in investment and financial services.[507] Negotiators in investment and services negotiated their countries' sectoral exceptions to TPP obligations as a group.[508] Singapore had tabled a rollback of market access from the U.S.-Singapore FTA, to which the USTR responded that it was a "non-starter." Vietnam had never signed a U.S.-style FTA and was not prepared to offer deep market access and they were the last to make market access offers, which slowed the negotiations. In his December Congressional testimony, a leader of The U.S. Business Coalition for TPP demanded, "Singapore and Vietnam must open their financial markets."[509]

2012:

Major U.S. financial services lobbies penned two open letters to the USTR in 2012. The first urged the USTR, "As the 13th negotiating round in San Diego approaches, we are concerned that a final TPP financial services chapter may fail to meet the high-standards

---

[506] Ibid.
[507] "TPP Blog," Office of the United States Trade Representative, Free Trade Agreements, TPP, (available: https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-blog)
[508] "TPP Makes Slow Progress on Market Access, Vietnam Takes Tough Line," *Inside U.S. Trade*, Vol. 29, No. 30, July 29, 2011.
[509] "Hearing on Trans-Pacific Partnership", Hearing Before the Subcommittee on Trade of the Committee on Ways and Means, *U.S. House of Representatives*, One Hundred Twelfth Congress, First Session, December 14, 2011.

established by past FTAs, including full market access, national treatment, and a clear and enforceable commitment to permit cross-border data transfer and processing."[510] The financial services lobbies outlined bullet point market access and regulatory demands of each TPP member, in addition to expanding core investor protections from the investment chapter to financial services investors (in past U.S. FTAs, ISDS only applied to "most favored nation" and "national treatment" for the financial services sector).[511] Conversely, the ASEAN countries in the TPP (Malaysia, Singapore, Brunei, and Vietnam) were particularly resistant to U.S. market access in financial services.[512] In 2009, Malaysia had increased the cap on foreign ownership in the banking and financial sector but would not go further. In response, U.S. negotiators took the position that opening their service sectors was in their own best interest while U.S. financial services lobbies pressed Malaysia for an elimination of caps on FDI in financial services.[513] For Vietnam, USTR officials had been helping their Vietnamese counterparts to structure Vietnam's offer on market access in services and investment such that it only addresses Vietnam's "discrete interests."[514]

The second letter from financial services lobbies was to issue a "strong support" for the inclusion of Mexico, Canada, and Japan in the TPP, provided that each country worked to further

---

[510] "Re: Financial Services Protections in the Trans-Pacific Partnership Agreement," Letter to USTR Kirk from The Securities Industry and Financial Markets Association (SIFMA) and The Financial Services Forum, June 29, 2012.
[511] Ibid.
[512] "USTR Official Flags ASEAN Countries' Sensitives in TPP Services Talks," *Inside U.S. Trade*, Vol. 30, No. 30, July 27, 2012.
[513] Ibid.
[514] "U.S. Trade Officials Visit Vietnam to Discuss TPP Services, Investment," *Inside U.S. Trade*, Vol. 30, No. 46, November 23, 2012.

the objectives of the financial services lobbies.[515] In the case of Japan, a major sticking point in bilateral consultations between Japan and the U.S. was competition policy with the state-owned banking and insurance entity, Japan Post. In 2012, Japan had issued new legislation that would allow Japan Post Bank and Japan Post Insurance to issue new financial products with less regulatory hurdles than a foreign owned bank or insurance company. U.S. industry and the USTR responded that it was a step back from moving toward the high-standards of the TPP and for Japan to join the TPP then Japan would need to address the USTR's "…serious and long-standing level playing field concerns with respect to Japan Post in the insurance, banking and express delivery sectors."[516]

Moreover, the financial services lobby was calling for a ban on regulations that would require financial institutions to store financial data within a country's borders, and they described it as an "essential" provision of any trade deal.[517] Indeed, the USTR had insisted on an "e-commerce" chapter in the TPP and binding obligations that would require MNCs to establish or use local service providers. In 2011, the largest U.S. services MNCs, ranging from Silicon Valley to global banks, drafted a position paper on the issue for presentation to APEC. [518] A senior vice president at global bank Citigroup explained that developing countries were beginning to implement data localization requirements as a means to boost domestic employment, technology transfer, or foreign investment.[519]

---

[515] "Securities Industry and Financial Markets Association Comments on the Participation of Mexico, Canada and Japan in the Trans-Pacific Partnership," Securities Industry and Financial Markets Association, February 27, 2012,
[516] "Japan Post Reform Bill May Complicate Efforts For Japan to Join TPP," *Inside U.S. Trade*, Vol. 30, No. 14, April 6, 2012.
[517] Ibid.
[518] "Businesses Unveil Free Data Flow Objectives, Plan to Highlight at APEC," *Inside U.S. Trade*, Vol. 29, No. 43, November 4, 2011.
[519] Ibid.

2013:

The leaked notes from the anonymous Chief Negotiator revealed that the U.S. was trying to limit the scope of general exceptions to the investment chapter, thereby creating greater market access for FDI. The U.S. proposal, which was supported by Australia and New Zealand, was to limit the sectoral carve-outs from the obligations of the investment chapter to only specific provisions, notably, "national treatment" and "most favored nation."[520] The counter proposal, which was supported by Chile, Japan, Brunei, Malaysia, and Vietnam, would have entirely carved-out economic sectors or industries from the all of the obligations of the investment chapter, not just specific provisions, which would limit market access.[521]

2014:

By 2014, negotiations in investment and financial services had largely been concluded in the area of investor rights and technical rules and the focus of the talks shifted to market access and general exceptions to market access. Malaysia, Vietnam, and Japan were the countries that did not have a previous FTA in place with the U.S. and they continued to have the most contentious market access proposals relative to the demands of the USTR and U.S. business groups, who sought an agreement with the highest commercial value possible. By mid-year, according to a U.S. business lobbyist, Vietnam, Malaysia and Japan proposed a broad exception that would exempt all new services that are developed in the future from the TPP investment

[520] "Excerpts from internal government commentary on the TPP negotiations, minor editing to protect the author country," *Wikileaks*, November, 2013, (available: https://wikileaks.org/IMG/pdf/tpp-salt-lake-extracts-.pdf)
[521] Ibid.

chapter and other rules.[522] As market access commitments were on a “negative list” basis, in which all sectors are on the table and countries negotiate exceptions, the proposal would undermine the “negative list” format which was unacceptable for the USTR and U.S. business groups. Moreover, Vietnam and Malaysia sought to ban investment on entire sectors which was rejected by the USTR as a basis for negotiations.[523] Their resistance was particularly strong towards FDI in the financial services sector, where each country had highly protected and regulated banking and financial industries.

2015:

*Data localization requirements*

Since at least 2012, the U.S. financial services industry had lobbied the USTR for a ban on any regulations that would require multinational financial institutions to store its client data on local data servers.[524] By summer 2015, U.S. financial institutions learned that the TPP did not include this provision, motivating a lobbying effort to change the TPP text while setting precedent for future agreements. At the crucial moment in which the Obama administration was trying to gather industry support for the TPP, the major financial services lobbies chose to withhold their support for the TPP until the administration addressed the issue (in addition to a market access restraint in Malaysia, discussed below).[525] In response, officials from the Treasury,

---

[522] “Under The Radar, TPP Parties Wrestle Over Carveouts On Services, State-owned enterprises,” *Inside U.S. Trade*, July 25, 2014.
[523] Ibid.
[524] “Re: Financial Services Protections in the Trans-Pacific Partnership Agreement,” Letter to USTR Kirk from The Securities Industry and Financial Markets Association (SIFMA) and The Financial Services Forum, June 29, 2012.
[525] Including the Coalition for Service Industries, Financial Services Roundtable, and American Council of Life Insurers.

the State Department, and the USTR met with representatives of the industry to determine the type of assurances the industry was seeking.[526] The meeting revealed that the Obama administration had an inter-agency dispute over the issue. The Treasury Department, with the support of the Federal Reserve and the Federal Communications Commission, had opposed the provision during negotiations because they wanted to maintain access to banking and other financial data for regulatory purposes.[527] However, the USTR advocated for the provision on behalf of financial industries, arguing that without the provision U.S. firms would be at a competitive disadvantage in the region. Since the TPP was already concluded and the negotiators had agreed not to reopen the text, the issue could not be resolved in the TPP. As a compromise with the financial industry, the Treasury drafted language to include in future FTAs and BITs that would address the issue and the industries realigned themselves to support the TPP.[528]

*Market access for FDI*

As the conclusion of negotiations neared the market access talks became increasingly "heated," particularly as some ASEAN countries were seeking broad sectoral exceptions or carve-outs and especially in financial services.[529] The most problematic market access exception was that Malaysia had secured the right to block inward FDI in the financial services sector if Malaysian authorities determined that such investment was not in the "national interest."[530] In

[526] "TPP support springs another leak: financial services" by Victoria Guida and Colin Wilhelm, *Politico*, November 24, 2015.
[527] Ibid.
[528] "Lew Reiterates Possibility of TPP Side Deal, But Emphasizes Future Fix," *Inside U.S. Trade*, March 25, 2016.
[529] "Ministers Face Down Long List of Thorny Issues as Hawaii Round Starts," *Inside U.S. Trade*, July 24, 2015.
[530] "Financial Services Firms Fight TPP Data Flow Rules, Backed by House GOP," *Inside U.S. Trade*, November 20, 2015.

response, U.S. financial services industries and a handful of supportive Congress members withheld their support for the TPP, arguing that Malaysia's investment screening in financial services is "highly subjective" and "perpetuates discrimination" while setting bad precedent for future negotiations.[531] Other countries (Australia, Canada, Mexico, and New Zealand) also retained investment screens although not specific to the financial services sector, however, according to U.S. industry groups, "U.S. negotiators were successful in mitigating the potential impact of these screens."[532] The USTR successfully increased the monetary threshold and/or scope of investment screening in Canada, Mexico, Australia, and New Zealand (notably, Canada's threshold was significantly increased over the current NAFTA threshold).[533] U.S. industry groups advised the USTR that TPP market access talks should be a minimum baseline for future market access negotiations, "If new countries express interest in acceding to TPP, their offers must improve on the existing TPP provisions and not replicate the barriers described above."[534] The USTR concurred and industry moved to support the TPP.

The long, thorny list of sectoral exceptions to TPP investment obligations mostly affected U.S. multinational services firms. In many services sectors, including accounting, engineering, audiovisual services, and energy services, countries generally matched their TPP market access commitments to their WTO obligations in an unproblematic way.[535] However, in other sectors,

---

[531] Ibid.
[532] "Report of the Industry Trade Advisory Committee on Services and Finance Industries," December 3, 2015, *Industry Trade Advisory Committee on Services and Finance Industries* (ITAC 10), Advisory Committee Report to the President, the Congress and the United States Trade Representative on the Trans-Pacific Partnership Trade Agreement (TPP).
[533] Ibid.
[534] "Report of the Industry Trade Advisory Committee on Services and Finance Industries," December 3, 2015, *Industry Trade Advisory Committee on Services and Finance Industries* (ITAC 10), Advisory Committee Report to the President, the Congress and the United States Trade Representative on the Trans-Pacific Partnership Trade Agreement (TPP).
[535] Ibid.

U.S. services corporations took issue with restrictive market access commitments, including healthcare services (Vietnam, Singapore, Mexico); legal services (Brunei, Chile, Malaysia, Singapore, and Vietnam); and financial services which were the most complex and were contained in a separate annex. Countries took a range of exceptions to the financial services chapter, including, foreign ownership limitations and restrictions in operations when incorporated in a certain form (Canada, Vietnam); branching restrictions or requirements (Brunei, Malaysia, Singapore, Vietnam); subsidies and other advantages for local entities (Brunei, Malaysia, Mexico, New Zealand and Singapore); "arbitrary" nationality or citizenship requirements for employees and personnel (Brunei, Canada, Chile, Malaysia, Mexico, Singapore).[536] Moreover, according to the U.S. financial services industry, some TPP members did not improve upon commitments from existing FTAs with the U.S. (Singapore, Chile), while other TPP members made "low quality" offers (Vietnam, Malaysia).[537] In the banking and insurance sectors in Japan, Japan and the U.S. came to a bilateral agreement codified in a side letter to the TPP that Japan's state-owned enterprise in banking and insurance, Japan Post, would open its sales network to foreign investors.[538] Malaysia successfully secured broad carve-outs for their "Bumiputra policies" which provide preferential treatment to businesses owned by ethnic Malays in areas like services and government procurement.[539]

---

[536] Ibid.
[537] Ibid.
[538] "Japan Has 18 Side Letters to TPP, Including on Autos, NTMS, Rice with U.S.," *Inside U.S. Trade*, October 30, 2015.
[539] Ibid.

References

Abbott, Frederick M.. 1993. "NAFTA and the Future of United States - European Community Trade Relations: The Consequences of Asymmetry in an Emerging Era of Regionalism". *Hastings International and Comparative Law Review*. 16; 489.

Abraham E. Lowenthal. 1978. "Latin America: A Not-So-Special Relationship," *Foreign Policy*, Vol 32: 107.

Acemoglu, Daron and Nikolaus Hildebrand. 2017. "Increasing Concentration and Persistence of Innovation: Facts and Theory." Working Paper, Massachusetts Institute of Technology.

Admati et al. 2010. Admati, A.R., DeMarzo, P.M., Hellwig, M.F., Pfleiderer, P. "Fallacies, Irrelevant Facts, and Myths in the Discussion of Capital Regulation: Why Bank Equity is not Expensive." *Stanford GSB*: Research Paper No. 2065.

AFL-CIO. 1999. *Resolutions: Book One*.

AFL-CIO. 2014. "NAFTA at 20." Washington DC.

AFP. 2016. "Apec leaders urged to defend free trade after Trump win," *Agence France-Presse,* published November 19, 2016. (available: https://www.theguardian.com/world/2016/nov/19/apec-leaders-urged-to-defend-free-trade-after-trump-win)

Aggarwal, Vinod, Ralph Espach and Joseph Tulchin. 2004. *The Strategic Dynamics of Latin American Trade*. Woodrom Wilson Press and Stanford University Press.

Allen, Franklin and Anthony M. Santomero. 2001. "What do financial intermediaries do?" *Journal of Banking and Finance*: vol. 25.

Alschner, W. and D. Skougarevskiy (2015). Consistency and Legal Innovation in the BIT Universe. Stanford Public Law and Legal Theory Working Paper Series No. 2595288.

Alvarez, Jose. 2004. "The Ripples of NAFTA" in *NAFTA Investment Law and Arbitration*, ed. T. Weiler. Boston: Martinus Nijhoff Publishers.

Alvarez, Jose. 2009. "The Evolving BIT" in *Investment Treaty Arbitration and International Law*. Ian Laird and Todd Weiler, eds., Huntington, N.Y: JurisNet.

American Bar Association (ABA). 2010. "A Summary of the U.S. Position on the Minimum Standard of Treatment Obligation in NAFTA Article 1105(1)".

Athukorala, Prema-chandra. 2010. "Production Networks and Trade Patterns in East Asia: Regionalization or Globalization?" *Asian Development Bank.*

Autor, David H. 2013. "The "task approach" to labor markets: an overview." *Journal of Labor Market Research.*

Autor, David H. and David Dorn. 2012. "The Growth of Low Skill Service Jobs and the Polarization of the U.S. Labor Market". *American Economic Review*.

Autor, David H. and Dorn, David and Katz, Lawrence F. and Patterson, Christina and Van Reenen, John. 2017a. "Concentrating on the Fall of the Labor Share". NBER Working Paper No. w23108. Available at SSRN: https://ssrn.com/abstract=2907911

Autor, David H., David Dorn, and Gordon H. Hanson. 2013. "The China Syndrome: Local Labor Market Effects of Import Competition in the United States". *NBER Working Paper*: No. 18054. Cambridge, MA: National Bureau of Economic Research.

Autor, David, David Dorn, Lawrence F. Katz, Christina Patterson, and John Van Reenen. 2017b. "The Fall of the Labor Share and the Rise of Superstar Firms." Working Paper, Massachusetts Institute of Technology.

Ayres, Jeffrey. 2004. "Power Relations Under NAFTA: Reassessing the Efficacy of Contentious Transnationalism". *Studies in Political Economy*: Vol 74.

Baker, Dean. 2016. *Rigged: How Globalization and the Rules of the Modern Economy Were Structured to Make the Rich Richer*. The Center For Economic and Policy Research.

Barnet, Richard J., and Ronald E. Muller. 1974. *Global Reach: The Power of the Multinational Corporations.* Cambridge: Touchstone.

Baumol, William J. and Ralph E. Gomory. 2001. *Global Trade and Conflicting National Interests.* The MIT Press.

Been, V.L. and J.C. Beauvais. 2008. "The Global Fifth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine". *New York University Law Review:* vol. 30.

Behsudi, Adam. 2015. "Will Trans-Pacific deal go up in tobacco smoke?" *Politico*, published August 12, 2015.

Bergstein, Fred. 2007. "Toward a Free Trade Area of the Asia Pacific." *Peterson Institute for International Economics*. Policy Briefs in International Economics: Number PB07.

Bergsten, Fred and Jeffrey Schott. 1997. "A Preliminary Evaluation of NAFTA". Testimony before the Subcommittee on Trade Ways and Means Committee. Washington, DC: United States House of Representatives.

Blecker, Robert A. 2009. "External Shocks, Structural Change, and Economic Growth in Mexico, 1979–2007". *World Development*: vol. 37 (7), pp. 1274- 1284.

Blecker, Robert A. and Mario Seccareccia. 2008. "Would a North American monetary union protect Canada and Mexico against the ravages of "Dutch disease"? A post-financial crisis perspective" in The Political Economy of Monetary Policy and Financial Regulation: A Conference in Honor of Jane D'Arista, May 2-3, 2008, *Political Economy Research Institute* (PERI), University of Massachusetts, Amherst, USA.

Block, Fred. 2001. “Introduction” in *The great transformation: the political and economic origins of our time* by Karl Polanyi. 2001. Boston: Beacon Press.

Bluestone, Barry and Bennett Harrison. 1982. *The Deindustrialization of America: Plant Closings, Community Abandonment, and the Dismantling of Basic Industry*. New York: Basic Books.

Bolio, Eduardo and et al. 2014. “A Tale of Two Mexicos: Growth and Prosperity in a Two-Speed Economy.” London: McKinsey Global Institute.

Borchard, Edwin. 1940. "Minimum Standard of the Treatment of Aliens," *Faculty Scholarship Series*. Paper 3469.

Brynjolfsson, Erik, and Andrew McAfee. 2014. T*he Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies.* WW Norton & Company.

Büthe, Tim and Helen V. Milner. 2009. “Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis” in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, edited by K. Sauvant and L. Sachs. New York: Oxford University Press.

Cameron, Maxwell A. and Brian W. Tomlin. 2000. *The Making of NAFTA: How The Deal Was Done*. Ithaca: Cornell University Press.

Caplan, Bryan. 2008. *The Myth of the Rational Voter: Why Democracies Choose Bad Policies*. NJ: Princeton University Press.

Cappel. Jacob. 2015. “The Volcker Rule: A Reminder of the Need for Additional Remedies for Party-to-Party NAFTA Disputes” *Case W. Res. J. Int'l L*: vol 47: 377.

Chang, C and Kluegel, K. 2014. “Protectionism and containment in the twenty-first century: Trans-Pacific partnership (TPP)”, in *Proceedings of the 2nd International Conference on*

*Economics, Finance and Management Outlooks*, Punjab, Pakistan, 20 - 21 December 2014, pp. 208-218.

Chang, Ha-Joon. 2007. *Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism*. London: Bloomsbury Press.

Charles Kindleberger and Emile Despres and Walter S. Salant. 1966. "The Dollar and World Liquidity - A minority view." *The Economist*, Issue 6389, pg. 526, published: February 5, 1966.

Cheng, Tun-jen and Peter C. Y. Chow. 2014. "The TPP and the Pivot: Economic and Security Nexus" in *The US Strategic Pivot to Asia and Cross-Strait Relations: Economic and Security Dynamics* edited by Peter C. Y. Chow. New York: Palgrave and Macmillan.

Chorev, Nitsan. 2005. "The Institutional Project of Neo-liberal Globalism: The Case of the WTO." *Theory and Society* 34: 317–55.

Chorev, Nitsan. 2007. *Remaking U.S. Trade Policy: From Protectionism to Globalization*. Ithaca, N.Y.: Cornell University Press.

Chorev, Nitsan. 2010. "Fixing Globalization Institutionally: U.S. Domestic Politics of International Trade." *International Sociology* 25 (1): 54-74.

Choudhury, Barnali, Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?. Vanderbilt Journal of Transnational Law, 2008.

Choudhury, Barnali. 2008. "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?". *Vanderbilt Journal of Transnational Law*, 2008.

CIL. 2011. “2011 ASEAN Framework for Regional Comprehensive Economic Partnership,” Adopted in Bali, Indonesia on 17 November 2011, *Centre For International Law*, (available: https://cil.nus.edu.sg/rp/pdf/2011%20ASEAN%20Framework%20for%20Regional%20Comprehensive%20Economic%20Partnership-pdf.pdf)

Claessens, S. and Lee, J. K. 2003. “Foreign Banks in Low Income Countries: Recent Developments and Impacts,” in J. Hanson, P. Honohan, and G. Majnoni, (eds.), *Globalization and National Financial Systems.* Washington, DC: World Bank.

CN Notes Leak. 2013. “Excerpts from internal government commentary on the TPP negotiations, minor editing to protect the author country.” *Wikileaks*, Published November, 2013, (available: https://wikileaks.org/IMG/pdf/tpp-salt-lake-extracts-.pdf).

Cole, E.T. and Ensign, P.C. 2005. “An Examination of US FDI into Mexico and Its Relation to NAFTA: Toward a Balanced Understanding of the Effects of Environmental Regulation and the Factor Endowments that Affect the Location Decision”. *International Trade Journal*: 19(1): 1–30.

Collier, David. 2011. “Understanding Process Tracing.” *Political Science and Politics*, Vol. 44, No. 4 (2011): 823-30.

Collier, Ellen C. 1993. “Instances of use of United States forces abroad, 1798–1993,” *Congressional Research Service*: October 1993.

Contreras A, Rodrigo. 2013. “Nuevo Tablero Mundial.” *Caretas*: Edicion 2283, published May 16, 2013.

Correa, Eugenia. 2004. “Cambios en el Sistema bancario en Aermica Latina: carateristics y resultados”. Universidad de Madrid: *Claves de la Economia Mundial*.

Cumming, J. and R. Froehlich. 2007. "NAFTA Chapter XI and Canada's Environmental Sovereignty: Investment Flows, Article 1110 and Alberta's Water Act". *University of Toronto Faculty of Law Review:* vol. 65: 107.

Dávila-Villers, David R. 1998. "NAFTA on Second Thoughts: A Plural Evaluation". Maryland: *Rowman & Littlefield Publishing Group.*

De Haas, Ralph. 2012. "Foreign banks and financial stability: lessons from the Great Recession" in *Financial Stability in Emerging Markets. Dealing with Global Liquidity* ed. Ulrich Volz. Bonn: German Development Institute.

Del Duca, Patrick. 2003. "The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization." *UCLA Law Review*, Vol. 51.

Dernburg, T.F. 1989. *Global Macroeconomics*. New York: Harper & Row.

Destler, I. M. 2005. *American Trade Politics, 4th Edition.* Massachusets: Institute for International Economics.

Detragiache, Enrica and et. al. 2006. "Foreign Banks in Poor Countries: Theory and Evidence" *IMF Working Paper*: Vol. , pp. 1-50.

Devereaux, Charan and Robert Z. Lawrence and Michael D. Watkins. 2006. *Case Studies in Us Trade Negotiation, Volume 1: Making the Rules*. Washington DC: Peterson Institute for International Economics.

Dobson, Wendy. 1994. "What Is NAFTA's Significance for APEC?" *Journal of Asian Economics*, Vol. 5, No. 4, Winter 1994, pp. 459-469.

dos Santos, Paulo and Costas Lapavitsas. 2008. "Globalization and Contemporary Banking: On the Impact of New Technology", *Contributions to Political Economy*, 27(1), 31-56.

dos Santos, Paulo. 2012. “A Policy Wrapped in ‘Analysis’—The World Bank’s Case for Foreign Banks”, in K Bayliss, B Fine and E Van Waeyenberge (eds), *The Political Economy of Development: The World Bank, Neoliberalism and Development Research.* London: Pluto.

dos Santos, Paulo. 2013. “A Cause for Policy Concern: The Expansion of Household Credit in Middle-Income Economies”, *International Review of Applied Economics*, 27(3), 316-338.

Doyran, Mine Aysen and Emre Erdoğan. 2015. “Are Foreign Banks Better Performers Than Domestic Counterparts? Examining the Financialization Hypothesis in Mexico”. *Latin American Business Review*: 16:4, 327-370.

Dreiling, Michael C. and Derek Y. Darves. 2016. *Agents of Neoliberal Globalization Corporate Networks, State Structures, and Trade Policy*. London: Cambridge University Press.

Dreiling, Michael, and Derek Darves. 2011. “Corporate Unity in American Trade Policy: A Network Analysis of Corporate-Dyad Political Action.” *American Journal of Sociology* 116 (5): 1514–63.

Duménil, Gérard, and Dominique Lévy. 2004. *Capital Resurgent: Roots of the Neoliberal Revolution*, translated by Derek Jeffers. Cambridge, Mass.: Harvard University Press.

Elms, Deborah K.  and Patrick Low. 2013. "Global Value Chains in a Changing World." Fung Global Institute (FGI), Nanyang Technological University (NTU) and World Trade Organization (WTO).

Elms, Deborah. 2015. “The Origins and Evolution of the Trans-Pacific Partnership (TPP) Trade Negotiations.” *Asian Trade Centre Working Paper*: January, 2015.

Evans, Rhonda, and Tamara Kay. 2008. "How Environmentalists 'Greened' Trade Policy: Strategic Action and the Architecture of Field Overlap." *American Sociological Review* 73 (6): 970–91.

Fearon, James D. 1991. "Counterfactuals and Hypothesis Testing in Political Science." *World Politics*, Vol. 43, No. 2 (Jan. 1991), pp 169-195.

Feketekuty, Geza. 1988. *International Trade in Services: an overview and blueprint for negotiations.* Washington DC: American Enterprise Institute for Public Policy Research.

Felix, David. 2001. "Why International Capital Mobility Should be Curbed, and How it could be Done." St. Louis: *Washington University,* (http://www.peri.umass.edu/fileadmin/pdf/financial/fin_Felix.pdf)

Fergusson, Ian. 2015. "Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy". *Congressional Research Service*: 7-5700.

Fernandez, Roberto, and Roger Gould. 1994. "A Dilemma of State Power: Brokerage and Influence in the National Health Policy Domain." American Journal of Sociology 99 (6): 1455–91.

Fletcher, Ian. 2010. *Free Trade Doesn't Work: What Should Replace it and why*. U.S. Business and Industry Council, 2010.

Flood, C.M. and T.D. Epps. 2002. "Have We Traded Away the Opportunity for Innovative Health Care Reform? The Implications of the Nafta for Medicare". *McGill Law Review:* vol. 747.

Frank & Levin. 2012. "Letter Concerning Capital Controls to Secretary Geithner from Rep. Frank and Rep. Levin," May 23, 2012, (available: http://democrats.financialservices.house.gov/uploadedfiles/media/file/press/112/frank_%

20levin%20letter%20to%20geithner%20re%20capital%20controls_%20may%2023_%20 20120003.pdf)

Friedman, Thomas L. 2012. *The Lexus and the Olive Tree: Understanding Globalization*. Picador; 2 edition.

Froman, Michael. 2016. "Remarks by Ambassador Michael Froman at the Cato Institute Forum," *United States Trade Representative*, Press Office, June 30, 2016.

Froud, Julie, and et. al. 2014. "Financialization across the Pacific: Manufacturing Cost Ratios, Supply Chains and Power". *Critical Perspectives on Accounting*: vol. 25/1.

Gabrielle Kaufmann- Kohler. 2011. "Interpretive Powers of the Free trade Commission and the Rule of Law". *Fifteen Years of NAFTA Chapter 11 Arbitration*. International Arbitration Institute.

Galindo, Luis Miguel and Jaime Ros. 2009. "Alternatives to Inflation Targeting in Mexico", in *Beyond Inflation Targeting: Assessing the Impacts and Policy Alternatives*, ed. G.A. Epstein and A.E. Yeldan, Cheltenham. Northampton, MA: Edward Elgar.

Gallagher, Kevin P. and Lyuba Zarsky. 2007. *The Enclave Economy: Foreign Investment and Sustainable Development in Mexico's Silicon Valley*. Cambridge: MIT Press.

Gallagher, Kevin P. 2004. "Free Trade and the Environment: Mexico, NAFTA, and Beyond". *Americas Program* (Silver City, NM: Interhemispheric Resource Center, September 17, 2004).

Gallagher, Kevin P. 2009. "NAFTA and the Environment: Lessons from Mexico and Beyond," in Kevin P. Gallagher, Enrique Dussel Peters, and Timothy Wise (eds) *The Future of North American Trade Policy: Lessons from NAFTA*. Boston: The Frederick S. Pardee Center for the Study of the Longer-Range Future, Boston University.

Gallagher, Kevin P. 2013. *The Clash of Globalizations: Essays on the Political Economy of Trade and Development Policy.* London: Anthem Press.

Gallagher, Kevin P. 2014. *Ruling Capital: Emerging Markets and the Reregulation of Cross-Border Finance.* Ithaca: Cornell University Press.

Gallagher, Kevin P. and Lyuba Zarsky. 2007. *The Enclave Economy: Foreign Investment and Sustainable Development in Mexico's Silicon Valley*. MIT Press.

Gallagher, Kevin. 2014. *Ruling Capital: Emerging Markets and the Reregulation of Cross-Border Finance.* Ithaca: Cornell University Press.

Geithner, Timothy. 2011. "Open Letter to Mr. Ricardo Hausmann," Secretary of the Treasury Timothy Geithner, April 12, 2011, (available: http://www.ase.tufts.edu/gdae/policy_research/Geithner_response_to_capital_controls_letter.pdf)

Gerbasi, J. and M.E. Warner. 2007. "Privatization, Public Goods, and the Ironic Challenge of Free Trade Agreements". *Administration & Society:* vol. 39: 127.

Gilpin, Robert. 1975. *U.S. Power and the Multinational Corporation: The Political Economy of Foreign Direct Investment*. Basic Books;The Political economy of international relations series.

Gowan, Peter. 1999. *The Global Gamble: Washington's Faustian Bid for World Dominance*. NY: Verso Books.

Greenspan, Alan. 2007. The Age of Turbulence: Adventures in a New World. New York: Penguin Books.

Grossman, Gene, and Elhanan Helpman 1994. "Protection for Sale." *American Economic Review* 89: 833–850.

Haber, Stephen H. and Aldo Musacchio. 2013. "These Are the Good Old Days: Foreign Entry and the Mexican Banking System". *NBER Working Paper*: No. 18713.

Hadjimarcou, John, and et. al. 2013. "Maquiladoras in the 21st Century: Six Strategies for Success". *Business Horizons*: vol 56 (2).

Hallward-Driemeir, Mary. 2003. "Do Bilateral Investment Treaties Attract FDI? Only a bit - and they could bite". World Bank Policy Research Paper WPS 3121. (Available at: http://wwwwds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/09/23/000094946_03091104060047/Rendered/PD F/multi0page.pdf).

Hanson, Jim M.. 1996. *The Next Cold War?: American Alternatives for the Twenty-first Century*. California: Greenwood Publishing Group.

Harvey, David. 2005. *A Brief History of Neoliberalism*. Oxford: Oxford University Press.

Hayward, Steven. 2010. *The Age of Reagan: A History, 1974-2008*. New York: Harper Perennial.

Hills, Carla. 2008. Cited in "Future of U.S. trade policy: perspectives from former U.S. trade representatives," Hearing before the Committee on Finance, *United States Senate*, One Hundred Tenth Congress, second session, July 29, 2008.

House of Representatives. 2009. "Investment Protection in US Trade and Investment Agreements," One Hundred Eleventh Congress, First Session, May 14, 2009, Serial 111–200.

Hudson, Michael. 2003. *Super Imperialism: The Economic Strategy of American Empire*. London: Pluto Press; 2nd edition.

Hufbauer, Gary Clyde and Jeffrey J. Schott. 2005. "NAFTA Revisited: Achievements and Challenges". Washington DC: *Peterson Institute for International Economics*.

Hufbauer, Gary Clyde, and et. al. 2014. "NAFTA at 20: Misleading Charges and Positive Achievements" in *NAFTA 20 Years Later*. PIIE Briefing No. 14-3. Washington DC: *Peterson Institute for International Economics*.

Hussain, Imtiaz. 2012: *Reevaluating NAFTA: Theory and Practice*. New York: Palgrave-Macmillan.

Ibarra, Carlos A. 2011. "Capital Flows and Real Exchange Rate Appreciation in Mexico". *World Development*: vol. 39 (12), pp. 2080-2090.

Ibarra, Carlos A. 2013. "Capital Flows and Private Investment in Mexico". *Economía Mexicana*: vol. 3, pages 65-99.

Ikenson, Daniel J. 2014. "A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement". *The CATO Institute*, Free Trade Bulletin No. 57, March 4, 2014.

Inside U.S. Trade. 2010. "Business Sends Obama Mixed Messages On Disciplining State-owned enterprises In BITs," *Inside U.S. Trade*, Vol. 28, No. 3, January 29, 2010.

International Monetary Fund. 2012. *The Liberalization and Management of Capital Flows: An Institutional View*. Washington DC: International Monetary Fund.

International Monetary Fund. 2016. "Money Matters, An IMF Exhibit - The Importance Of Global Cooperation, Reinventing The System (1972-1981)". *International Monetary Fund*, available: https://www.imf.org/external/np/exr/center/mm/eng/sc_sub_3.htm).

ITC. 2016. "Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors," *United States International Trade Commission*, May 18, 2016, Publication Number: 4607, Investigation Number: TPA-105-001.

Jaimovich, Nir and Henry E. Siu. 2012. “The Trend is the Cycle: Job Polarization and Jobless Recoveries”. *National Bureau of Economic Research.* Working Paper No. 18334. Issued in August 2012.

January Leak. 2015. “Trans-Pacific Partnership treaty: Advanced Investment Chapter working document for all 12 nations (January 20, 2015 draft).” *WikiLeaks*, Published March 25, 2015, (available: https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf).

Jenkins, B.W. 2007. “The Next Generation of Chilling Uncertainty: Indirect Expropriation Under CAFTA and its Potential Impact on Environmental Protection”. *Ocean and Coastal Law Journal:* vol. 12: 269.

Johnson, O. Thomas and Jonathan Gimblett. 2011. "From Gunboats to BITs: the Evolution of Modern International Investment Law," in *Yearbook on International Investment Law and Policy* (K. Sauvant ed., 2011).

June Leak. 2012. “TPP Investment Chapter, June, 2012 Leak,” Published by *Citizen's Trade Campaign*, (available: http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf).

Kalleberg, Arne. 2013. *Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment Systems in the United States 1970s to 2000s*. Russell Sage Foundation.

Karl Sauvant, “FDI Protectionism Is on the Rise,” Policy Research Working Paper 5052, *The World Bank* at 1, September, 2009.

Kay, Tamara. 2005. “Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America.” *American Journal of Sociology* 111 (3): 715–56.

Kelsey, Jane. 2008. *Serving Whose Interests?: The Political Economy of Trade in Service Agreements*. New York: Routledge-Cavendish.

Kelsey, Jane. 2012. "Investment Developments in the Trans-Pacific Partnership Agreement". *Institute for Sustainable Development*. Published online, (available: http://www.iisd.org/itn/2012/01/12/investment-developments-in-the-trans-pacific-partnership-agreement/)

Kim, Sangkyom, Innwon Park and Soonchan Park. 2011. "Regional Economic Integration in the Asia Pacific Region: Is an FTAAP the Catalyst for One Community?" *APEC Study Series: vol.* 11-01. Seoul: Korea Institute for International Economic Policy.

Korinek, Anton and Jonathan Kreamer. 2014. "The redistributive effects of financial deregulation." *Journal of Monetary Economics*: 68: S55-S67.

Krippner, Greta. 2011. *Capitalizing on Crisis: The Political Origins of the Rise of Finance.* Cambridge, Massachusetts: Harvard University Press.

Krugman, Paul, Maurice Obstfeld, and Marc J. Melitz. 2012. *International Economics: Theory and Policy*. Boston: Pearson Education. 9th Edition.

Krugman, Paul. 1996. *Pop Internationalism.* Cambridge: MIT Press.

Kurtz, Jurgen. 1998. "A General Investment Agreement in the WTO - Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment". *University of Pennsylvania Journal of International Economic Law*: Vol. 713.

Langley, Lester D. 2001. *The Banana Wars: United States Intervention in the Caribbean, 1898-1934*. Rowman & Littlefield Publishers; 2nd edition.

Lawrence, J.C. 2006. "Chicken Little Revisited: NAFTA Regulatory Expropriations After *Methanex*". *Georgia Law Review:* vol. 41: 261.

Lazonick, W. and M. O'Sullivan. 2000. "Maximizing shareholder value: A new ideology for corporate governance." *Economy & Society*: Vol. 29, no. 1.

Lester, Simon. 2015. "Responding to the White House Response on ISDS". *The CATO Institute*, Cato At Liberty, February 27, 2015.

Levin, Sander. 2015. "Ranking Member Sander Levin Floor Speech on Trade," May 21, 2015 (Remarks as prepared), (available: http://levin.house.gov/levin-trade-speech-withhold-fast-track-until-tpp-course)

Luce, Stephanie and Lynne Turner. 2012. "Pre-Ratification Impact of U.S. Trade Agreements on Labor Standards". *International Labour Organization*.

Mankiw, Gregory. 2015. "Economists Actually Agree on This: The Wisdom of Free Trade," *The New York Times*, published April 24, 2015.

Mason, J. W. 2014. "Balance of Payments Constraints, the U.S. Current Account, and the Crisis of 2008". Department of Economics, *John Jay College of Criminal Justice*, Working Paper 2014-02. (Available: http://johnjay.jjay.cuny.edu/files/departments/economics/Mason_2014_-_Balance_of_Payments_Constraints_the_US_Current_Account_Deficit_and_the_Crisis_of_2008.pdf)

Mayer, Frederick. 1998. *Interpreting NAFTA: The Science and Art of Political Analysis*. New York: Columbia University Press.

McCarthy, Michael. 2016. "The Monetary Hawks". *Jacobin Magazine*. Published: August 8, 2016, (available: https://www.jacobinmag.com/2016/08/paul-volcker-ronald-reagan-fed-shock-inflation-unions/).

McCracken, Paul. 1971. "Memorandum for the President". Washington DC: *The Secretary for the Treasury*, published: August 9, 1971, (available: https://fraser.stlouisfed.org/files/docs/historical/nixon/mccmem710809.pdf).

Menghetti, Linda. 2011. "How a High Standard and Enforceable TPP Investment Chapter Promotes Exports and Growth," Presented at Chicago TPP Round, September 10, 2011.

Mills, C. Wright. 1959. *The Sociological Imagination*. NY: Oxford University Press.

Minor, Michael. 1994. "The Demise of Expropriation as an Instrument of LDC Policy, 1980–1992". *Journal of International Business Studies*: Vol. 25, pp. 177–88.

Moran, Theodore, and Lindsay Oldenski. 2014. "How US Investments in Mexico Have Increased Jobs at Home" in *NAFTA 20 Years Later*. PIIE Briefing No. 14-3. Washington DC: *Peterson Institute for International Economics*.

Needham, Vicki. 2017. "Ross prefers inking bilateral trade agreements". *The Hill*, published January 18, 2017, (available: http://thehill.com/policy/finance/314846-ross-prefers-inking-bilateral-trade-agreements).

OECD. 2010. *Measuring Globalisation: OECD Economic Globalisation Indicators 2010*. OECD: OECD Economic Globalisation Indicators.

Ofodile, Uche Ewelukwa. 2011. "The U.S.-Rwanda Bilateral Investment Treaty: Any Cause for Celebration?". *Africa Law Today.* (Available at http://www.americanbar.org/content/dam/aba/uncategorized/international_law/uche_ewelukwa_ofodile_us.authcheckdam.pdf).

Oldenski, Lindsay. 2014. "Offshoring and the Polarization of the US Labor Market". *Industrial and Labor Relations Review*, vol. 67.

Paletta, Damian and Ana Swanson. 2017. “Trump suggests ignoring World Trade Organization in major policy shift”. The Washington Post. Published March 1, 2017, (available: https://www.washingtonpost.com/news/wonk/wp/2017/03/01/trump-may-ignore-wto-in-major-shift-of-u-s-trade-policy/?utm_term=.baddfe5f017a)

Palit, Amitendu. 2014. *The Trans-Pacific Partnership, China and India: Economic and Political Implications*. New York: Routledge.

Panitch, Leo, and Sam Gindin. 2012. *The Making of Global Capitalism: The Political Economy Of American Empire*. NY: Verso Books.

Peters, Enrique Dussel and Kevin P. Gallagher. 2013a. “China’s Economic Effects on the U.S.-Mexico Trade Relationship: Towards a New Triangular Relationship?” in *China and the New Triangular Relationships in the Americas* ed. Peters et. al. Universidad Nacional Autónoma de México: *Centro de Estudios China-México*.

Peters, Enrique Dussel and Kevin P. Gallagher. 2013b. “NAFTA's uninvited guest: China and the disintegration of North American trade”. New York: *CEPAL review*: 110.

Peters, Enrique Dussel. 2009. “Manufacturing Competitiveness: Toward a Region Development Agenda,” in Kevin P. Gallagher, Enrique Dussel Peters, and Timothy Wise (eds) *The Future of North American Trade Policy: Lessons from NAFTA*. Boston: The Frederick S. Pardee Center for the Study of the Longer-Range Future, Boston University.

Peters, Enrique Dussel. 2009. “Manufacturing Competitiveness: Toward a Region Development Agenda,” in Kevin P. Gallagher, Enrique Dussel Peters, and Timothy Wise (eds) *The Future of North American Trade Policy: Lessons from NAFTA*. Boston: The Frederick S. Pardee Center for the Study of the Longer-Range Future, Boston University.

Petri, Peter A., Michael G. Plummer, and Fan Zhai. 2012. The Trans-Pacific Partnership and Asia-Pacific Integration: A Quantitative Assessment." *Peterson Institute for International Economics*. Washington, D.C.

Petri, Peter A., Michael G. Plummer, and Fan Zhai. 2013. "Adding Japan and Korea to the TPP." *Peterson Institute for International Economics*. Washington, D.C.

Polanyi, Karl. 2001. *The great transformation: the political and economic origins of our time*. Originally published 1944. Boston: Beacon Press, Second Beacon Paperback edition published in 2001.

Porterfield, M.C. 2004. "International Expropriation Rules and Federalism". *Stanford Environmental Law Journal:* vol. 3.

Porterfield, Mathew C. and Christopher R. Byrnes. 2011. "Philip Morris v. Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?" *Investment Treaty News*, July 12, 2011.

Prashad, Vijay. 2008. *The Darker Nations: A People's History of the Third World.* New Press.

Prashad, Vijay. 2013. *The Poorer Nations: A Possible History of the Global South.* Verso.

Public Citizen. 2014. "NAFTA's 20-Year Legacy and the Fate of the Trans-Pacific Partnership" *Public Citizen's Global Trade Watch*.

Qureshi, Lubna Z. 2009. *Nixon, Kissinger, and Allende: U.S. Involvement in the 1973 Coup in Chile*. Lexington Books; 1rst edition.

Raghavan, Chakravarthi. 2011. "Financial Services, the WTO and Initiatives for Global Financial Reform," Background Paper for the Group of 24, *Reforming the International Financial System for Development* (ed. Jomo Kwame Sundaram). Columbia University Press.

Rajagopal, Balakrishnan. 2003. *International Law from Below: Development, Social Movements and Third World Resistance*. Massachusetts: Cambridge University Press.

Reagan, Ronald. 1983. “Statement on International Investment Policy”, September 9, 1983.

Redfern, Alan. 2003. “Dissenting Opinions in International Commercial Arbitration: the Good, the Bad and the Ugly,” *Freshfields Lecture*, 20 Arbitration International 223.

Reinert, Erik S. 2007. *How Rich Countries Got Rich…and Why Poor Countries Stay Poor*. New York: Carroll & Graf Publishers.

Reinhart, Carmen and Kenneth Rogoff. 2009. *This Time Is Different: Eight Centuries of Financial Folly*. Princeton University Press.

Reinhert, Erik. 2013. “The only way out is through organised debt default”. Geopolitika No. 63, May 2013, accessed March 1, 2017, (available: http://www.geopolitika.rs/index.php/en/english-home/248-eng/english-content/sample-english-subcategory/553-erik-s-reinert).

Ricardo, David. 1821. *On the Principles of Political Economy and Taxation*. London: John Murray. 3rd Edition.

Rickards, James. 2012. *Currency Wars: The Making of the Next Global Crisis*. Portfolio; Reprint edition (August 28, 2012).

Rioux, Michèle and Christian Deblock. 2010. “NAFTA - A Model Running Out of Breath?” *CESifo Forum*: Vol. 11, no 4.

Ritzer, George. 2003. *The Globalization of Nothing*. Sage Publications, Inc.

Roach, Stephen. 2014. *Unbalanced: The Codependency of America and China*. Yale University Press.

Robertson, Raymond. 2004. “Defining North American Economic Integration.” *2004 NAAMIC conference paper,* April 13, 2004.

Robinson, Joan. 1973. *Collected Economic Papers, Volume four*. Oxford: Basil Blackwell.

Romero, Eduardo Silva, 2005. “Brèves observations sur l’opinion dissidente,” Les arbitres internationaux in Société de législation comparée at 179-186.

Roth, Zachary. 2012. “Obama, Holder let another big bank off the hook,” *MSNBC*, Published December 13, 2012, (available: http://www.msnbc.com/msnbc/obama-holder-let-another-big-bank-the-ho).

Rugman, Alan and Chang H. Oh. 2008. “Friedman's Follies: Insights on the Globalization/Regionalization Debate,” *Business and Politics*, Vol. 10, No. 2 (2008).

Sachs, Lisa and Karl P. Sauvant. 2009. “BITs, DTTs, and FDI flows: An Overview” in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, edited by K. Sauvant and L. Sachs. New York: Oxford University Press.

Salacuse, Jeswald W. and Nicholas P. Sullivan. 2005. “Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain”. *Harvard International Law Journal*: vol. 45: 67.

Samuelson, Paul A. 2004. "Where Ricardo and Mill Rebut and Confirm Arguments of Mainstream Economists Supporting Globalization." *Journal of Economic Perspectives,* 18(3): 135-146.

Sassen, Saskia. 2008. *Territory, Authority, Rights : From Medieval to Global Assemblages*. Princeton, NJ, USA: Princeton University Press.

Schatan, Claudia and Jorge Carillo. 2006. “El medio ambiente y la maquila en México: un problema ineludible”. *United Nations*: CEPAL.

Schefer, Krista N. 1999. *International Trade in Financial Services: The NAFTA Provisions*. London: Kluwer Law International. International Banking, Finance and Economic Law, Volume 13.

Schlesinger, Stephen, and Stephen Kinzer, and John H. Coatsworth. 2005. *Bitter Fruit: The Story of the American Coup in Guatemala*. David Rockefeller Center for Latin American Studies; Revised edition.

Schmitt, John, and Heidi Shierholz, and Lawrence Mishel. 2013. “Don't Blame the Robots: Assessing the Job Polarization Explanation of Growing Wage Inequality.” *Economic Policy Institute:* Working Paper.

Sek, Lenore. 1999. “Fast-Track Legislative Procedures for Trade Agreements: The Great Debate of 1991.” *Congressional Research Service*: Report 97-885, Foreign Affairs, Defense, and Trade Division, Updated May 3, 1999.

Senate. 1991. “United States-Mexico Free Trade Agreement: hearings before the Committee on Finance”, U.S. Senate, Committee on Finance, One Hundred Second Congress, first session, February 6 and 20, 1991.

Senate. 2011. “APEC 2011: breaking down barriers, creating economic growth,” hearing before the Committee on Finance, United States Senate, One Hundred Twelfth Congress, first session, March 31, 2011.

Senate. 2014. “President Obama's 2014 trade policy agenda: hearing before the Committee on Finance,” *United States Senate*, One Hundred Thirteenth Congress, second session, May 1, 2014.

Shaikh, Anwar. 2007. *Globalization and the Myths of Free Trade: History, theory, and empirical evidence*. Routledge Frontiers of Political Economy, Routledge, New York, NY. Introduction.

Shihara, Ibrahim F.I. 1986. "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSlD and MIGA". *ICSID* Review—*Foreign Investment Law Journal*.

Shrybman, S. 2001. "A Legal Opinion Concerning the Potential Impacts of International Trade Disciplines on Proposals to Establish a Public-Private Partnership to Design, Build and Operate a Water Filtration Plant in the Seymour Reservoir". Prepared for the *Canadian Union of Public Employees* (17 July 2001).

Shrybman, S. 2008. "Pemex, Privatization and the NAFTA Trap". Presentation on behalf of the *Canadian Union of Public Employees* and the *Communications, Energy, and Paperworkers Union of Canada* (June 2008).

Sidaoui, José, and et. al. 2011. "The global financial crisis and policy response in Mexico". BIS papers no. 54.

Sigmond, Karen B. 2008. *Mexican Banking Laws: Evolution into NAFTA and the Global Economy*. Saarbrücken, Germany: VDM Verlag Dr. Müller.

Silber, William L. 2012. *Volcker: The Triumph of Persistence*. London: Bloomsbury Press.

Silver, Beverly. 2004. *Forces of Labor: Workers' Movements and Globalization since 1870.* New York: Cambridge University Press.

Sinclair, Scott. 2015. "NAFTA Chapter 11 Investor-State Disputes to January 1, 2015." Ottawa: *Canadian Centre for Policy Alternatives*.

Sklair, Leslie. 2002. *Globalization: Capitalism and Its Alternatives*. Oxford: Oxford University Press.

Spears, Suzanne A. 2010. “The Quest for Policy Space in a New Generation of International Investment Agreements.” *Journal of International Economic Law*: 12(2), pp507-538.

Stein, Judith. 2010. *Pivotal Decade: How the United States Traded Factories for Finance in the Seventies*. New Haven: Yale University Press.

Stewart, David. 1995. The Gatt Uruguay Round: A Negotiating History (1986-1992). Boston : Kluwer Law and Taxation Publishers, 1st Edition.

Strange, Susan. 1996. *The Retreat of the State: The Diffusion of Power in the World Economy*. Cambridge Studies in International Relations; Cambridge: Cambridge University Press.

Streeten, P. 1996. “Free and Managed Trade” in *National Diversity and Global Capitalism*, edited by S. Ber- ger and R. Dore. Ithaca, N.Y., and London: Cornell University Press.

Swiston, Andrew J. and Tamim Bayoumi. 2008. “Spillovers Across NAFTA”. *IMF Working Papers*: Vol. , pp. 1-32.

Taylor, Lance. 2010. *Maynard's Revenge The Collapse of Free Market Macroeconomics*. Harvard University Press.

Triffin, Robert. 1978. “Gold and the dollar crisis: yesterday and tomorrow”. Essays in international finance: Issue 132. *International Finance Section, Dept. of Economics, Princeton University*. (Available: https://www.princeton.edu/~ies/IES_Essays/E132.pdf).

UN Documents. 1974. “Charter of Economic Rights and Duties of States.” Resolution adopted by the General Assembly 3281 (XXIX). Twenty-ninth session Agenda item 48.

UNCTD. 2011. “World Investment Report, 2011,” *United Nations Conference on Trade and Development*.

UNCTD. 2011. “World Investment Report, 2011,” *United Nations Conference on Trade and Development*.

UNCTD. 2013. “World Investment Report, 2013,” *United Nations Conference on Trade and Development*.

UNCTD. 2013. “World Investment Report, 2013,” *United Nations Conference on Trade and Development*.

US- China Business Council (2012).USCBC 2012. “China Business Environment Survey Results: Continued Growth and Profitability: Tempered Optimist Due to Rising Costs, Competition, and Market Barriers.” Washington, DC: The US-China Business Council.

USTR. 2011. “Deputy USTR Updates on TPP,” Office of the United States Trade Representative, Press Release, October, 2011, (https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/october/deputy-ustr-updates-tpp).

USTR. 2013. “New U.S. Proposal on Tobacco Regulation in the Trans-Pacific Partnership,” Office of the United States Trade Representative, Press Release, August, 2013.

USTR. 2014. “The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors,” Office of the United States Trade Representative, Press Release, March, 2014.

USTR. 2015. “ISDS: Important Questions and Answers,” *The United States Trade Representative*, Press Office, Blog, March, 2015 (available: https://ustr.gov/about-us/policy-offices/press-office/blog/2015/march/isds-important-questions-and-answers-0).

USTR. 2015. “ISDS: Important Questions and Answers,” *The United States Trade Representative*, Press Office, Blog, March, 2015 (available: https://ustr.gov/about-us/policy-offices/press-office/blog/2015/march/isds-important-questions-and-answers-0).

USTR. 2016. “Remarks by Ambassador Michael Froman at the Cato Institute Forum Remarks,” *Office of the United States Trade Representative*, Ambassador Michael Froman at the

Cato Institute Forum Washington, D.C. June 30, 2016, (available: https://ustr.gov/about-us/policy-offices/press-office/speechestranscripts/2016/june/Remarks-Ambassador-Froman-Cato-Institute-Forum).

USTR. 2017. "2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program". United States Trade Representative. Published March, 2017, (available: https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf ).

Vallizadeh, Ehsan and et. al. 2015. "Offshoring of Medium-skill Jobs, Polarization, and Productivity Effect: Implications for Wages and Low-skill Unemployment". *Munich Personal*, RePEc Archive.

Vandevelde, Kenneth J. 1988. "The Bilateral Investment Treaty Program of the United States." *Cornell International Law Journal*: Vol. 21: Iss. 2, Article 1.

Vandevelde, Kenneth J. 2010. *Bilateral Investment Treaties: History, Policy and Interpretation*. Oxford University Press.

Vandevelde, Kenneth. 2009. "A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host State Interests" in *Yearbook on International Investment Law and Policy* ed. Karl P. Sauvant. London: Oxford Press.

Vandevelde, Kenneth.. 2011. "Model Bilateral Investment Treaties: The Way Forward." *Southwestern Journal of International Law*: Vol. 18.

Villareal, M. Angeles and Ian Fergusson. 2013. "NAFTA at 20: Overview and trade effects". Washington, DC: *Congressional Research Service*.

Volcker Group. 1969. “Memorandum for the President”. Washington DC: *The Secretary for the Treasury*, published: June 23, 1969, (available: https://fraser.stlouisfed.org/files/docs/historical/nixon/kenmem690623.pdf)

Volcker, Paul and Toyoo Gyohten. 1992. *Changing Fortunes: the World’s Money and the Threat to American Leadership*. New York: Times Books.

Wagner, Constance Z. 1999. “The New WTO Agreement on Financial Services and Chapter 14 of NAFTA: Has Free Trade in Banking Finally Arrived?” *NAFTA: Law and Business Review of the Americas*, Vol. 5, p. 5, Winter 1999; Saint Louis U. Legal Studies Research Paper.

Wallach, Lori. 2012. “Renco Uses U.S.-Peru FTA to Evade Justice for La Oroya Pollution,” *Public Citizen*, (available: https://www.citizen.org/documents/renco-la-oroya-memo.pdf).

Wallach, Lori. 2012. “Renco Uses U.S.-Peru FTA to Evade Justice for La Oroya Pollution,” *Public Citizen*, (available: https://www.citizen.org/documents/renco-la-oroya-memo.pdf).

Wang, Teresa. 2006. “Moving from Bilateral Ignorance to Bilateral Knowledge: Mexico and the Chinese Economy,” Center for Latin American Studies, UC Berkeley.

Warren, Elizabeth. 2015. “The Trans-Pacific Partnership clause everyone should oppose,” The Washinton Post, Published February 25, 2015, (available: https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.10a69ee6a20d)

Watkins, Ralph. 2013. “Meeting the China Challenge to Manufacturing in Mexico” in *China and the New Triangular Relationships in the Americas* ed. Peters et. al. Universidad Nacional Autónoma de México: *Centro de Estudios China-México*.

Weber, Max. 1921. “Politics as a Vocation,” Published as “Politik als Beruf.” Muenchen: Gesammelte Politische Schriften.

Weisman, Jonathan. 2015. “Trans-Pacific Partnership Seen as Door for Foreign Suits Against U.S.”, *The New York Times*, Published March 25, 2015.

Wenhua Shan, From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape inInternational Investment Law, 27 Nw. J. Int'l L. & Bus. 631 (2006-2007)

Werksman, J., and et. al. 2001. “Will International Investment Rules Obstruct Climate Protection Policies?” Report for the *World Resources Institute*.

Wethington, Olin. 1994. *Financial Market Liberalization: The NAFTA Framework*. Minnesota: West Publishing Company.

White House. 2014. “Remarks by the President at Meeting of the Export Council,” *The White House,* Office of the Press Secretary, December 11, 2014.

White House. 2014. “Remarks by the President at the Business Roundtable,” *The White House*, Office of the Press Secretary, December 03, 2014.

White House. 2015. “The Economic Benefits of U.S. Trade,” *The White House*, May 2015.

WTO. 2016. “Understanding the WTO: Basics,” *World Trade Organization*, (available: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm)

Xiao, Yifei. 2015. “Competitive Mega-regional Trade Agreements: Regional Comprehensive Economic Partnership (RCEP) vs. Trans-Pacific Partnership (TPP). 20 April 2015. CUREJ: College Undergraduate Research Electronic Journal, University of Pennsylvania, http://repository.upenn.edu/ curej/194.

Yackee, Jason W. 2007. “Do Bits Really Work? Revisiting the Empirical Link between Investment Treaties and Foreign Direct Investment”. Univ. of Wisconsin Legal Studies Research Paper No. 1054. (Available at SSRN: http://ssrn.com/abstract=1015083).

Zients, Jeffrey. 2015. “Investor-State Dispute Settlement (ISDS) Questions and Answers”, The White House, Published February 26, 2015, (available: https://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers).