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AMERICA FIRST? HOW TO TAKE A BALANCED APPROACH TO REFORMING THE ISDS PROVISION IN NAFTA

By
Robert J Gross Jr.*

I. INTRODUCTION

With the election of President Donald J. Trump and his policy of "America First," the Trump Administration has either re-evaluated or withdrawn from many of the United States' commitments abroad.[1] One example garnering ongoing media attention is the renegotiation of the North American Free Trade Agreement ("NAFTA").[2] NAFTA positively impacted the United States' economy, including increasing trade from $297 billion US to $1.17 trillion US between The United States of America, Canada, and Mexico from 1992-2017, lowering consumer prices due to lower tariffs, and increasing foreign direct investment from Canada and Mexico.[3] While NAFTA has several positive aspects, President Trump's views on NAFTA may be influenced by the negative impact NAFTA has had on United States' manufacturing and President Trump's supporters.[4] If the Trump Administration plans to proceed in the renegotiation of NAFTA or if Congress rejects the United States-Mexico-Canada Agreement,[5] one possible amendment could be the addition of procedural safeguards, based on the Canadian-European Union Comprehensive

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[1] *See* Oren Dorell, *Trumps Foreign Policy Often Puts 'America First' and Alone*, USA TODAY (Jan. 19, 2018, 1:26 PM), https://www.usatoday.com/story/news/world/2018/01/19/trumps-foreign-policy-often-put-america-first-and-alone/1036558001/ (Examples of this shift include the withdrawal from the Paris Climate Deal, the Trans-Pacific Partnership, and Joint Comprehensive Plan of Action with Iran).

[2] *Id.*; *see also President Donald J. Trump is Keeping His Promise to Renegotiate NAFTA*, WHITEHOUSE.GOV (Aug. 27, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-keeping-promise-renegotiate-nafta/?utm_source=link&utm_medium=header.

[3] Kimberly Amadeo, *Six Advantages of NAFTA: The Hidden Benefits of NAFTA*, THE BALANCE, https://www.thebalance.com/advantages-of-nafta-3306271.

[4] *See* Jacqueline Granados, Article, *Investor Protection and Foreign Investment Under NAFTA Chapter 11: Prospects for the Western Hemisphere Under Chapter 17 of the FTAA*, 13 CARDOZO J. INT'L & COMP. L. 189, 195 (2005); *In a return to familiar topics, Trump threatens to terminate NAFTA and insists Mexico will pay for the border wall*, LA TIMES (Aug. 27, 2017, 4:25 PM), http://www.latimes.com/politics/la-pol-updates-trump-tweets-nafta-renegotiation-htmlstory.html (last visited Mar. 8, 2019).

[5] Katie Lobosco, *What's New in the US, Canada and Mexico Trade Deal?*, CNN, https://www.cnn.com/2018/10/01/politics/nafta-usmca-differences/index.html.

Economic and Trade Agreement ("CETA"),[6] to protect State sovereignty from foreign investors.

This paper explores whether the Trump Administration should continue weakening the Investor-State Dispute Settlement ("ISDS") provision found within Chapter 11 of NAFTA.[7] Specifically, this paper argues that the ISDS provisions in NAFTA should be altered and modeled after the CETA example. Part II explores the history of NAFTA, and Part III discusses the ISDS provisions. Part IV then analyzes *Mobil Investments Canada & Murphy Oil Corp. v. Canada* ("*Mobil v. Canada*"), an International Centre for Settlement of Investment Disputes ("ICSID")[8] case. *Mobil v. Canada* exemplifies ISDS arbitration and underscores the main concern with the future of ISDS arbitration in NAFTA, namely, investor's unprecedented ability to affect regulatory regimes and affect State sovereignty. Part V explores the different arguments in support of and against ISDS arbitration in NAFTA and presents an alternative to the ISDS provision that may bridge the gap between Anti- and Pro-ISDS advocates.

II. NEGOTIATION OF THE NORTH AMERICAN FREE TRADE AGREEMENT

In August 1992, approximately a year of negotiations between the United States, Canada, and Mexico (collectively "the Signatory States") concluded in Washington, D.C.[9] Although the negotiations began in June 1991, the process was onerous for the Signatory States because it took a long time for the Signatory States to take the discussions seriously and offer concessions to one another.[10]

In December 1991, the three parties met in Dallas, Texas to formally agree on the NAFTA's provisions.[11] The Signatory States focused their efforts on the least contentious provisions and agreed to officially negotiate hotly-contested terms at a later period.[12] While the least contentious provisions helped negotiations gain momentum, that

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[6] Canadian-European Union Comprehensive Economic and Trade Agreement, Can.-E.U., Oct. 30, 2016, *available at* http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng.

[7] *See* North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 1992 WL 812394, *1 (1993); *See NAFTA Secretariat,* https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=1&secid=539c50ef-51c1-489b-808b-9e20c9872d25#A1101 (hereinafter "NAFTA").

[8] *See* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/en/.

[9] Jennifer A Heindl, Article, *Toward a History of NAFTA's Chapter Eleven*, 24 BERKELEY J. INT'L L. 672, 679 (2006) (hereinafter "Heindl").

[10] *Id.*

[11] *Id.* at 680.

[12] *Id.*

momentum did not last long.[13] Negotiations stalled because Canada wished to keep the provisions of NAFTA close to the terms of the previous Canada-United States Free Trade Agreement ("CUSFTA"), and because Mexico objected to adding expropriation clauses to the agreement.[14]

A. Canada's Issue with NAFTA

Canada feared that a new free trade agreement would shift the economic status quo between the United States and Canada.[15] Prior to NAFTA, Canada and the United States had previously negotiated a free trade agreement which went into effect in 1989: CUSFTA.[16] Prior to CUSFTA, and continuing through NAFTA negotiations, the Canadian government was reluctant to enter into a trade agreement with the United States, fearing economic supremacy by the United States.[17] After CUSFTA was in effect, Mexico entered into trade negotiations with the United States and functionally forced Canada to enter into the NAFTA negotiations.[18] In the negotiation process, Canada remained reluctant to agree to the new treaty.[19] Canada objected to many of NAFTA's provisions, which it deemed substantially different from the provisions in CUSFTA.[20] For example, in CUSFTA, Canada retained the right to review new foreign investments made in its territory.[21] Throughout the renegotiation process, Canada advocated zealously for the retention of the right for Canada to review these new investments.[22] Canada's advocacy eventually persuaded Mexico to join the plight, and the final version of NAFTA adopted the right to review new investments.[23] Negotations moved forward.

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[13] Heindl, *supra* note 9, at 680.

[14] *Id.*

[15] *See id.* at 676.

[16] *Id.*

[17] *Id.*

[18] *Id.* (Canada was forced back into negotiations, fearing falling economically behind Mexico and the United States).

[19] Heindl, *supra* note 9, at at 681.

[20] *Id.* at 680.

[21] *Id.* at 680-81.

[22] *Id*.

[23] *See id.* at 683.

B. *Mexico's Issue with NAFTA*

Mexico took issue with the expropriation provision in NAFTA, which it deemed to be in conflict with the Mexican Constitution's "Calvo Clause."[24] Prior to the enactment of NAFTA, Mexico's Constitution included the Calvo Clause, which allowed the Mexican Government to expropriate foreign investors' property to the State.[25] During NAFTA negotiations, the United States proposed an expropriation clause that guaranteed the "prompt, adequate, and effective" compensation for any taking by the Mexican Government.[26] However, such a clause would be in direct conflict with the Calvo Clause, which "establishe[d] that no foreigner c[ould] have more rights than a Mexican, including rights of protection against expropriation."[27] The Mexican government owned all natural resources on their land.[28] The Calvo Clause also established that foreign investors could not seek assistance from their home nations when suing the Mexican government for expropriations.[29] United States' proposed expropriation clause was unconstitutional under the Calvo Clause, because it would give foreign investors greater rights than Mexican citizens.[30] After numerous negotiations, Mexico and the United States eventually substituted "prompt, adequate, and effective" with "fair market value," which allowed the negotiations to proceed.[31]

III. THE ISDS PROVISIONS WITHIN NAFTA

A. *Chapter 11 Section A: Substantive Prohibitions and Protections*

Section A of Chapter 11 details the substantive prohibitions applicable to the Signatory States and the substantive protections for foreign investors.[32] Section A of NAFTA applies: (1) when one State's regulations affect investors of another State; (2) to investments of individual investors of another State; and (3) to all investments in the State, if sections 1106

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[24] Heindl, *supra* note 9, at 683.

[25] *Id.* at 863; Expropriation is the "governmental taking or modification of an individual's property rights, [especially] by eminent domain." Expropriation, BLACK'S LAW Dictionary (10th ed. 2014).

[26] *See* Heindl, *supra* note 9, at 681.

[27] *Id.* at 678.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 681.

[31] Id. at 682.

[32] *See* NAFTA, *supra* note 7, at *1.

or 1114 apply.[33] Substantively, the ISDS provisions prohibit a State from favoring domestic investors over foreign investors.[34] In addition, a State cannot favor a foreign investor of one of the Signatory States over an investor from another Signatory State.[35] For example, Canada cannot give preferential treatment to Mexican foreign investors over foreign investors from the United States. A second substantive provision states that a Signatory State cannot adopt regulations that require an investor take certain actions, including, but not limited to, mandating the amount of goods and services to export, forcing the investor to purchase manufactured goods from the Signatory State, or acting as the exclusive provider of goods and services."[36] States also cannot place conditions on investment, within their territories, to achieve a percentage of domestic content, to require the purchase or use of goods in their territories, relate the volume of imports to the volume of exports, or restrict the sale of goods within their territories.[37] Finally, a Signatory State may expropriate an investor's property only for a non-discriminatory public purpose, in accordance to due process rights, and must compensate the investor at fair-market value.[38]

B. Chapter 11, Section B: Dispute Resolution Mechanism

Chapter 11, Section B defines NAFTA's dispute resolution mechanism, which arguably has pitfalls that allow investors suing a state to circumvent the State's governance scheme and to infringe on a State's sovereignty. The goal of the dispute resolution mechanism in NAFTA is to provide equal treatment for all parties and to create parity across the Signatory State's laws.[39] When a dispute arises, the parties must negotiate before submitting a claim to arbitration.[40] Additionally, the aggrieved party must wait six months, from the time that the claim arose, before submitting their claim to arbitration.[41]

Section B allows the aggrieved party to submit his or her claims in three separate manners.[42] The aggrieved party can choose ICSID as the forum for the arbitration, ad-hoc arbitration using the ICSID rules, or the United Nations Commission on International Trade

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[33] NAFTA, *supra* note 7, at *1.

[34] *See id.* at *1.

[35] *Id.* at *1-2.

[36] See *id.* at *2-3.

[37] *See id.* at *2-3.

[38] *Id.* at *6-7.

[39] NAFTA, *supra* note 7, at *7.

[40] *Id.* at *8.

[41] *Id*.

[42] *Id*.

("UNCITRAL") tribunals.[43] Chapter 11 also states that three arbitrators are the default configuration of the tribunal – each party selects one arbitrator, and then the parties' arbitrators mutually select a president arbitrator.[44] If the arbitral tribunal has not been constituted within ninety days from the initiation of the claim, the ICSID's Secretary-General appoints the arbitrators, but, due to NAFTA rules, the Secretary-General cannot appoint the president arbitrator.[45]

When a final award is rendered, the tribunal may award money damages and restitution.[46] The award rendered will have no effect on parties not subject to the arbitration.[47] After an award is rendered, a party cannot seek enforcement until 120 days have elapsed and no party has requested annulment or a revision.[48] Notably absent from this dispute resolution mechanism is any ability to stop claims from proceeding in court and through arbitration, any semi-permanent members of an arbital tribunal who are familiar with NAFTA specific provisions and issues, or any right to appeal of substantive issues.

IV. Exemplifying the Issues with the Dispute Resolution Mechanism: Circumventing States' Governance and Infringing on States' Sovereignty

A. *Using NAFTA's Dispute Resolution Mechanisms: Mobil's Case*

In *Mobil Investments Canada & Murphy Oil Corp. v. Canada* ("*Mobil v. Canada*"), Mobil Investments Canada and Murphy Oil (collectively "Claimants") sued Canada under the ISDS framework established in NAFTA's Chapter 11.[49] The dispute arose from the application of the Guidelines for Research and Development Expenditures adopted in 2004 by the Canadian Newfoundland and Labrador Offshore Petroleum Board ("2004

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[43] NAFTA, *supra* note 7, at *8; *About UNCITRAL*, UNCITRAL, http://www.uncitral.org/uncitral/en/about_us.html (last visited Sep 9, 2018).

[44] *Id.* at *9.

[45] *See id.* at *9-10.

[46] *Id.* at *13.

[47] *Id.* at *13-14.

[48] *Id.*

[49] *See Mobil Investments Canada & Murphy Oil Corp. v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision, International Centre for Settlement of Investment Disputes, ¶ 1 (May 22, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1145.pdf (hereinafter "Mobil v. Canada").

Guidelines").[50] The Claimants asserted that Canada violated Articles 1105,[51] 1106,[52] and 1108[53] of NAFTA's Chapter 11.[54] More specifically, the Claimants alleged that Canada "violated Article 1105 of NAFTA by 'failing to provide a stable regulatory framework for the conduct of petroleum development projects in the Newfoundland offshore area and by frustrating Claimants' legitimate expectations with regard to that regulatory framework.'"[55] The Claimants alleged the Board violated Article 1106 by instituting a regulatory scheme that required performance on the part of the Claimants by requiring the Claimants to spenda minimum amount of money on Research and Development ("R&D") and Education and Training ("E&T") within the Providence, regardless of the Claimants' need for that R&D.[56] Finally, the Claimants alleged that this regulatory regime did not fall within the purview of Canada's reservation under Article 1108.[57]

The Tribunal rejected the Claimants' Article 1105 claims. The Tribunal held that the Board made no promises, "either expressly or by a pattern of behavior."[58] The Tribunal also found no provision in the Accord Acts limited the Board's ability to implement a minimum amount of R&D expenditures that the Claimants had to meet.[59] Finally, the Tribunal rejected the Claimants' argument that the Benefits Plans constituted a contractual relationship to which the Board could not make material changes.[60]

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[50] *See* Mobil v. Canada, *supra* note 51, at ¶1.

[51] NAFTA, *supra* note 7, *2 (establishing the minimum standard of treatment required in relation to investors from other Signatory States. A party must afford foreign investors from Signatory States the minimum customary rights under international law.)

[52] *Id.* (outlining the prohibitions against a Signatory State requiring performance by a foreign investor. More specifically, Mobil v. Canada dealt with Article 1106(1)(c) which states, "No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory: . . . to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory.")

[53] *Id.* (outlining when a Signatory State's pre-existing non-conforming duty for foreign investors can be exempted from the requirements of NAFTA through reservation.)

[54] Mobil v. Canada, *supra* note 51, at ¶ 111; Mobil v. Canada, *supra* note 51, at ¶ 172; Mobil v. Canada, *supra* note 51, at ¶¶ 247-249

[55] *Id.* at ¶ 111.

[56] *See id.* at ¶ 172.

[57] *See id.* at ¶¶ 247-249.

[58] *Id.* at ¶ 156.

[59] *Id.* at ¶ 159.

[60] *Id.* at ¶ 166.

The Tribunal ruled in favor of the Claimaints on their Article 1106 claim, holding that the 2004 Guidelines sufficiently forced the investor to perform.[61] The Tribunal acknowledged Canada's argument that there was no express reference to R&D or E&T within Article 1106.[62] However, the Tribunal rejected Canada's argument that R&D and E&T did not fall within the scope of the word "services."[63]

The Tribunal ruled in favor of Claimants on their Article 1108 claim. The Claimants asserted that the 2004 Guidelines were not consistent with Canada's NAFTA reservations due to the Board's post-2004 requirement that Claimants meet a certain threshold expenditure on R&D.[64] The Tribunal reasoned that this policy change "amount[ed] to more than mere changes in the methodology, but in fact reflect[ed] a fundamentally different approach to compliance, compared to the Federal Accord Act and the Hibernia and Terra Nova Benefits Plans."[65] The Tribunal held that the 2004 Guidelines instituted "a different form of Board oversight than previously existed."[66] Accordingly, the Tribunal concluded that the 2004 Guidelines were inconsistent with the reservation.[67]

On January 16, 2015, Mobil Investments Canada Inc. ("Mobil"), one of the collective Claimants in the prior arbitration, filed a subsequent Request for Arbitration.[68] In Mobil's request, they stated that the issue in dispute was the amount of damages owed to Mobil.[69] Mobil also argued that it is subject to ongoing damages due to the Board's continued reliance on the 2004 Guidelines.[70] Mobil requested a decision regarding damages in its favor, including damages, interest, taxes, and fees for commencing the arbitration.[71]

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[61] Mobil v. Canada, *supra* note 51, at ¶ 234.

[62] *See id.* at ¶ 215.

[63] *See id.* at ¶ 216.

[64] *Id.* at ¶¶ 393-95.

[65] *Id.* at ¶ 398.

[66] *Id.* at ¶ 404.

[67] *Id.* at ¶ 413.

[68] *See* Mobil Investments Canada Inc. v. Canada, International Centre for Settlement of Investment Disputes, request for arbitration, *1, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/MobilRequestArbitrationREDACTED.pdf.

[69] *Id.* at ¶ 27.

[70] *Id.* at ¶ 49.

[71] Mobil Investments Canada Inc. v. Canada, International Centre for Settlement of Investment Disputes, request for arbitration, ¶ 55, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/MobilRequestArbitrationREDACTED.pdf.

Additionally, the Canadian Superior Court of Justice dismissed Canada's claim seeking to set aside the arbitral award.[72]

B. Mobil Exemplifies one of the Issues with the NAFTA's Dispute Resolution Scheme

Mobil v. Canada exemplifies the ability for foreign investors to circumvent a State's traditional legal system with little difficulty.[73] In *Mobil*, the Canadian Court of Appeals rejected Mobil's claims,[74] but because of the ISDS provisions in NAFTA, the Claimants subsequently took their claims to arbitration.[75] While the Canadian Court of Appeals found that the Board could require the Claimants to meet minimum levels in R&D within the Providence,[76] the Tribunal found differently.[77] Moreover, Canadian citizens had no recourse after the Tribunal's decision, even though public funds paid Mobil for its lost profits awarded through arbitration.[78] In essence, Mobil was not compelled to submit itself to Canada's court system, given NAFTA's alternative dispute resolution mechanism.

Critics of the ISDS have voiced their concerns that NAFTA's dispute resolution mechanism limits a State's sovereignty. Consider *Mobil v. Canada*, in which Canada's only recourse against the arbitral decision was to remove the guidelines or subject itself to repeated arbitrations from oil companies. In *BG Group PLC v. Republic of Argentina*, Chief Justice Roberts noted this same concern stating that with the alternative dispute resolution mechanism in place, ISDS arbitral tribunals have the ability to stand in judgment

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[72] Attorney General of Canada v. Mobil et al., 2016 O.N.S.C. 790 (Can.), available at https://www.italaw.com/sites/default/files/case-documents/italaw7160.pdf.

[73] *See* 230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) from NAFTA and Other Pacts, CITIZEN (Oct. 25, 2017), *available at* https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf.

[74] Mobil v. Canada, *supra* note 51, at ¶ 355; Mobil v. Canada, *supra* note 51, at ¶ 86.

[75] *Id.* at ¶ 86.

[76] *See id*. at ¶ 86.

[77] *Id.* at ¶ 234; *Id.* at ¶ 398.

[78] *See* 230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) from NAFTA and Other Pacts, CITIZEN (Oct. 25, 2017), *available at* https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf.

of a nation's sovereign regulations.[79] Canada, being the most sued country under ISDS provisions in the world and paying a total of $107 million as of 2015,[80] would likely agree.

V. RENEGOTIATION OF NAFTA: THE CASE FOR AMERICA FIRST

Arguing an America First stance, President Trump has pushed for seismic changes in how the United States approaches foreign policy.[81] Examples of these changes include the withdrawal from the Trans-Pacific Partnership, withdrawal from the Paris Agreement, the refusal to certify Iranian compliance with the Joint Comprehensive Plan of Action, and the repeated rebukes of the United States' closest allies.[82] Ben Rhodes, the Former National Security Advisor under President Obama, has described President Trump's approach not as "taking aim at some of our legacy accomplishments, but [more of a] disavowal of an entire approach to the world."[83]

Against this backdrop, the Trump Administration hopes to weaken NAFTA,[84] including NAFTA's ISDS provisions.[85] While the Trump Administration is unsure about the best way to tackle ISDS, Mr. Lighthizer, the United States Trade Representative, has stated that one option is to allow countries to opt-in to the ISDS provisions.[86] This change would essentially allow countries to decide, on their own terms, whether they would be subject to the provisions of Chapter 11.[87]

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[79] *See* 230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) from NAFTA and Other Pacts, CITIZEN (Oct. 25, 2017), *available at* https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf

[80] Sunny Freedman, *NAFTA's Chapter 11 Makes Canada Most-Sued Country Under Free Trade Tribunals*, HUFFINGTON POST, https://www.huffingtonpost.ca/2015/01/14/canada-sued-investor-state-dispute-ccpa_n_6471460.html.

[81] *See How does Obama's Foreign Policy Look a Year Into Trump*, POLITICO, https://www.politico.eu/article/how-does-barack-obama-foreign-policy-look-a-year-into-donald-trump-presidency/ (last visited Sep. 9, 2018).

[82] *See id.*

[83] *Id.*

[84] *See Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces (last visited Sep. 9, 2018).

[85] *See On NAFTA, Donald Trump's Most Dangerous Opponents are at Home*, THE ECONOMIST (Aug. 31, 2017), https://www.economist.com/news/finance-and-economics/21727912-business-congress-and-law-he-faces-obstacles-nafta-donald-trumps-most.

[86] *Id*.

[87] *See* Adam Behsudi, *Investor Dispute Provision Still at Impasse Ahead of Washington Meeting*, POLITICO (Feb. 21, 2018, 1:22 PM), https://www.politico.com/story/2018/02/21/canada-stands-firm-on-pursuing-bilateral-investor-dispute-process-with-mexico-in-nafta-356665.

A. *General Criticisms of the ISDS Arbitration Scheme in NAFTA*

The Trump Administration's goal in renegotiating NAFTA is to "support higher-paying jobs in the United States and to grow the U.S. economy by improving U.S. opportunities to trade with Canada and Mexico,"[88] but he has received sharp criticisms from American corporations.[89] In fact, several prominent business organizations, such as the United States Chamber of Commerce, Business Roundtable, and the National Association of Manufacturers, delivered a letter to Mr. Lighthizer stating that "[a]ttempts to eliminate or weaken ISDS will harm American businesses and workers and, as a consequence, will serve to undermine business community support for the [NAFTA] moderni[z]ation negotiations."[90]

United States corporations have more than enough reasons to favor ISDS and its retention.[91] United States investors rely heavily on NAFTA's Chapter 11 when investing in Mexico.[92] From 2014 to 2015, United States investors' foreign direct investment in Mexico increased 1,003%, for a total of $15.7 billion.[93] NAFTA disputes constitute a significant portion of the total amount of ICSID arbitrations, with United States investors constituting 138 of the total claimants.[94]

Even though solid arguments for the retention of the ISDS provisions exist, such as protecting foreign investors and ensuring that other countries afford constitutional protections to investors when they do business in foreign countries,[95] critics have continually pointed out the shortcoming with NAFTA's Chapter 11. For example, in a letter, approximately 230 law professors and economics professors urged President Trump to remove ISDS from NAFTA and to not include an ISDS provision within the Trans-Pacific Partnership because of the provision's alleged negative effects.[96] They argued that

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[88] *Id.*

[89] *Id.*

[90] *Business Groups Fire Warning Shot Over NAFTA*, FINANCIAL TIMES, https://www.ft.com/content/f8bd9e3c-88e3-11e7-bf50-e1c239b45787 (last visited Sep. 9, 2018).

[91] *See* Carlos Alverado, *200 Billion Reasons for Keeping Nafta*, KLUWER ARBITRATION BLOG (Apr. 26, 2017), http://arbitrationblog.kluwerarbitration.com/2017/04/26/200-billion-reasons-for-keeping-nafta/.

[92] *See Id.*

[93] *Id.*

[94] *Id.*

[95] Catherine H. Gibson, *ISDS and NAFTA – and ISDS Alternatives*, KLUWER ARBITRATION BLOG (Nov. 29, 2017), http://arbitrationblog.kluwerarbitration.com/2017/11/29/isds-in-nafta-and-isds-alternatives/.

[96] 230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) from NAFTA and Other Pacts, CITIZEN (Oct. 25, 2017), *available at* https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf.

the problem with ISDS is that the provisions allow a private investor to circumvent the previously established mechanisms for dispute resolution, the domestic court systems.[97]

The ability to sue a State directly is also an issue, because the ISDS provisions of NAFTA allows foreign investors to skirt the "the robust, nuanced, and democratically-responsive U.S. legal framework."[98] Over the history of the United States, the United States citizenry has consistently refined the legal process, both from a procedural and an evidentiary standpoint, to make the process fair and consistent with the opinions of the American electorate.[99] ISDS allows foreign investors to succeed in claims that would have otherwise been rejected by a Signatory State's court system, because ISDS arbitrations lack some of the procedural and evidentiary safeguards found in traditional court proceedings.[100] Some of the safeguards not included in the ISDS are the ability to enjoin domestic interests in the dispute resolution proceedings and an appeals process for mistakes of law.[101]

Futhermore, ISDS reduces the administrative costs of moving operations to Canada or Mexico,[102] which in turn, reduces the risk to American companies seeking to relocate their manufacturing overseas, because it reduces the potential costs associated with compliance of violations of foreign regulatory regimes.[103] In a letter written to Mr. Lighthizer, the United States Trade Representative, Congressional members called on the Trump Administration to use an open process and renegotiate NAFTA in a way that helps American workers.[104]

The United States investment in foreign manufacturing has consistently increased under NAFTA, while American manufacturing has stagnated.[105] NAFTA significantly burdened the American worker's bargaining power by strengthening United States corporations' ability to lower workers' wages by easing a corporation's ability to move operations to Mexico.[106] NAFTA reduced the costs associated with foreign direct

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[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *See* Gibson, *supra* note 96.

[103] *See* Rosa L. DeLauro, et. al., *Renegotiation of the North American Free Trade Agreement*, REGULATIONS.GOV, *available at* https://www.regulations.gov/document?D=USTR-2017-0006-1396 (last viewed Feb. 24, 2018).

[104] *See id.*

[105] Rosa L. DeLauro, et. al., *Renegotiation of the North American Free Trade Agreement*, REGULATIONS.GOV, *available at* https://www.regulations.gov/document?D=USTR-2017-0006-1396 (last viewed Feb. 24, 2018).

[106] Jeff Faux, *NAFTA's Impact on American Workers*, ECONOMIC POLICY INSTITUTE (Dec. 9, 2013, 4:00 PM), http://www.epi.org/blog/naftas-impact-workers/.

investment, allowing American companies to move their manufacturing to either Canada or Mexico, while still being able to sell their products effortlessly within the United States.[107] NAFTA also gave United States companies the upper hand in wage negotiations, effectively permitting these companies to threaten moving their production out of the United States to reduce labor costs.[108] The ISDS provisions of Chapter 11 shield these new benefits that hurt American workers, because it further reduces these costs by allowing foreign investors to directly sue the Signatory States for objectionable regulatory regimes.[109]

B. *ISDS Alternatives: A Balanced-Approach to America First*

While there are many who believe ISDS is harmful to the United States economy, the issue remains: If the Signatory States remove the dispute resolution mechanism in NAFTA, what will replace it?[110] One alternative, worth the attention of the Signatory States, is Canada's proposal to base the new ISDS provision off their Canada-European Union Comprehensive Economic and Trade Agreement.[111] CETA is a novel approach to deal with the ISDS issues, because CETA sets up a permanent arbitral tribunal for investment disputes.[112] CETA resembles NAFTA in many respects, including its inclusion of substantive protections for investors, direct claims against signatory parties, and expropriation protection.[113] However, CETA also provides additional safeguards in the dispute resolution process by creating an appeals process, a permanent tribunal with dedicated arbitrators, and the requirement for mediation.[114]

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[107] *See id.*

[108] *See id.*

[109] *See* NAFTA, *supra* note 7, at *1.

[110] *See* 230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) from NAFTA and Other Pacts, CITIZEN (Oct. 25, 2017), *available at* https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf.

[111] Behsudi, *supra* note 90.

[112] *See The EU Succeeds in Establishing a Permanent Investment Court in its Trade Treatises With Canada and Vietnam*, DECHERT LLP INTERNATIONAL ARBITRATION GROUP, *available at* https://www.dechert.com/content/dam/dechert/uploads/documents/The_EU_succeeds_in_establishing_a_permanent_investment_court_in_its_trade_treaties_with_Canada_and_Vietnam_-_Dechert_-_03242016.pdf.

[113] *See The EU Succeeds in Establishing a Permanent Investment Court in its Trade Treatises With Canada and Vietnam*, DECHERT LLP INTERNATIONAL ARBITRATION GROUP, *available at* https://www.dechert.com/content/dam/dechert/uploads/documents/The_EU_succeeds_in_establishing_a_permanent_investment_court_in_its_trade_treaties_with_Canada_and_Vietnam_-_Dechert_-_03242016.pdf.

[114] *See id.*

CETA has established a robust dispute resolution process. CETA established a permanent arbitral tribunal for the resolution of investment disputes,[115] which consists consists of fifteen arbitrators – five from Canada, five from the European Union, and five arbitrators without a designated county affiliation.[116] A CETA joint committee selects the arbitrators to five-year terms with a one-time option to renew their term.[117] Arbitrators can finish any claims they started during their term, if the arbitration takes longer than their term.[118] The President of the Tribunal decides which three arbitrators from the pool will hear the cases.[119] Alternatively, the parties can agree that a dispute can be heard by one arbitrator.[120] CETA further establishes an Appellate Tribunal to review awards within ninety days of the final decision.[121] If a claimant decides an appeal is warranted, they have 90 days, from the date of the decision, to initiate the appeal or else the decision becomes permanent.[122] Finally, CETA requires mediation and negotiation, a 180-day cooling off period, disallowance of claims to proceed concurrently in a State's court system and the arbitral tribunal, and transparency regarding the award.[123] Much like NAFTA's current Chapter 11, CETA allows the claimant to elect which rules to use in the arbitration, such as the UNCITRAL or ICSID rules.[124]

This CETA dispute resolution system could be a substantial compromise between the two competing interests of State sovereignty, workers' interests, and the interests of corporations in the NAFTA renegotiation debate. Indeed, Canada and the European Union noted that the CETA's ISDS provisions were designed to protect a nation's ability to freely regulate industry within their counties, while retaining the benefits of free trade agreements.[125] They also noted that CETA was a departure from the status quo of ISDS provisions.[126]

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[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* at 3.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 4.

[123] *Id.* at 5.

[124] *See id.* at 3.

[125] David A. Gantz, *The CETA Ratification Saga: The Demise of ISDS In EU Trade Agreements?*, 49 LOY. U. CHI. L.J. 361, 365-66 (2017).

[126] *Id.*

Some argue that CETA will merely add delays to a system that is intended to be fast and efficient.[127] While this is a valid concern due to the added procedural protections, other provisions found within CETA help expedite the arbitral process.[128] One such provision is that the final award must be rendered within twenty-four months, and if the time limit needs to be extended, the tribunal must set out a statement of reasons for the delay.[129] NAFTA does not appear to have a similar provision. The dispute resolution mechanism laid out in CETA would raise some of the costs on foreign investors in North America, while simultaneously retaining the substantive protections for which United States corporations are fighting. The administrative costs on companies pursuing foreign direct investment are increased by adding procedural safeguards for the Signatory States through the addition of an appellate procedure, removing the *ad hoc* nature of current ISDS tribunals with a semi-permanent tribunal, and maintaining the substantive protections for corporations.

Additionally, the CETA system allows for lawyers well-versed in international law and who have experience in the types of interntional investment issues typically presented at NAFTA tribunals to be appointed to the semi-permanent tribunal.[130] The system would lead to more consistent results,[131] and as a byproduct of due process, the revised ISDS provision would create a more palatable result for the Signatory States, foreign investors, and citizens of the United States, Mexico, and Canada. The appellate review process is a significant departure from the ISDS provision in NAFTA and many other arbitration agreements.[132] CETA allows for the review of both errors of law and errors of fact.[133]

VI. CONCLUSION

The ISDS dispute resolution mechanism outlined in NAFTA merits revision. As exemplified in *Mobil v. Canada*, the ISDS provision facilitates investors ability to

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[127] *The EU Succeeds in Establishing a Permanent Investment Court in its Trade Treatises With Canada and Vietnam*, DECHERT LLP INTERNATIONAL ARBITRATION GROUP, *available at* https://www.dechert.com/content/dam/dechert/uploads/documents/The_EU_succeeds_in_establishing_a_permanent_investment_court_in_its_trade_treaties_with_Canada_and_Vietnam_-_Dechert_-_03242016.pdf.

[128] *See id.*

[129] *Id.*

[130] Gantz, *supra* note 131, at 366.

[131] *The EU Succeeds in Establishing a Permanent Investment Court in its Trade Treatises With Canada and Vietnam*, DECHERT LLP INTERNATIONAL ARBITRATION GROUP, *available at* https://www.dechert.com/content/dam/dechert/uploads/documents/The_EU_succeeds_in_establishing_a_permanent_investment_court_in_its_trade_treaties_with_Canada_and_Vietnam_-_Dechert_-_03242016.pdf.

[132] Gantz, *supra* note 131, at 367.

[133] *Id.*

circumvent a State's regulatory scheme and infringe on a State's sovereignty.[134] At the same time, ISDS critics point to the negative repercussions to the American workers, even though corporations and the economy have benefited from NAFTA in general and the ISDS provision in specific.[135] President Trump and the United States Congress still have an opportunity to bridge the divide by adopting a balanced-approach to President Trump's America First approach, modeling a new dispute resolution provision in NAFTA after CETA.[136]

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[134] *See supra* Section IV.

[135] *See supra* Section V.A.

[136] *See supra* Section V.B.