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**For Public Meeting of the Administration Review of the U.S. Model Bilateral
Investment Treaty Program
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I'd like to thank the administration for the opportunity to testify on an important topic today: the model used for U.S. bilateral investment treaties (BITs) and investment provisions in trade agreements.

This is a perfect time for bold reforms in this area, as President Obama and 72 members of Congress in the last two elections campaigned and won on fair trade and investment policy, defeating those who advocated the status quo. It is also a bipartisan issue, as quotes from GOP and Democrats alike in my written testimony indicate. And the global recession and financial crisis have demonstrated the need for well-regulated capital and investment markets that focus on expanding broadly shared prosperity and productive capacity, rather than promoting speculative frenzies.

There are several alternative reforms to the Model BIT and the related model employed in the investment chapter of U.S. trade agreements that merit the administration's consideration.

One option is to eliminate the BIT program altogether – and exclude the similar rules in FTAs. After all, both BITs and the homologous portions of our "Free Trade Agreements" (FTAs) promote predatory actions overseas and conflict with pro-public interest policies both at home and abroad. The record of NAFTA, for instance, is clear in this regard. Under NAFTA, around \$69 million has been paid out by governments in corporate challenges against toxic-substance bans, logging rules, operating permits for a toxic-waste site, and more. And cases brought under the U.S.-Argentina BIT and CAFTA are also troubling.

Indeed, the public is asking: as our domestic infrastructure is literally collapsing under our feet, why is the U.S. government promoting policies which incentivize investment abroad rather than directing it to crucial needs here at home?

From the perspective of developing countries, our BITs and FTAs also undermine development finance needs. Very few countries that have successfully developed have done so without a government and business sector that prioritized the domestic market. But the implementation of the U.S.-Peru FTA, for instance, rolled back the percentage of the capital base in Peru's privatized pension funds that was required to be invested in the domestic market. This not only threatens to

expose Peruvian retirees to the considerable volatility and asset price declines we've seen in developed country markets over the last few years, it also undermines a much needed source of domestic capital.

A second set of discrete reforms is worthy of the administration's consideration, including clarifications to the Model BIT and FTA investment chapters that would provide greater certainty for investors and regulators. For instance, countries will be better able to ensure that prudential financial measures do not subject them to opportunistic claims to investor compensation by replacing Article 20 of the model BIT with the following:

Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services it employs for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system. For greater clarity, Section B and C do not apply to measures under this Article.

Due to time limitations, I include other discrete reforms in my written comments.

Finally, a useful model in between my first two suggested changes is provided by the investment-related provisions of the Trade Reform, Accountability, Development and Employment Act (or TRADE Act, H.R. 3012), which is co-sponsored by 116 members of Congress, nearly half of the House Democratic Caucus, with half of the committee and subcommittee chairs. This legislation lays out a positive trade and investment expansion agenda, including requirements on what must be and not be in future agreements in order to obtain the benefits of trade and investment expansion under terms that also garner broad support because they provide broad benefits to many Americans.

A GAO study of current trade agreements contemplated in Section 3 of the TRADE Act would estimate the wage impact and the jobs supported and displaced by current trade and investment flows under trade pacts. It would also study the impact of investment and other provisions on access of consumers to essential services.

Section 4 of the TRADE Act lays out a new model for investment provisions which would promote investment by providing investor protections against discriminatory regulations and provide government-to-government dispute resolution for expropriation. Meanwhile, this new model would eliminate some of the policy uncertainties of current trade and investment pacts by clarifying the appropriate substantive and procedural rights for all parties, and would allow for prudential financial measures to preserve stability.

Thanks again to the administration for the opportunity to testify, and my written testimony includes more detail on both the problems and fixes to the Model BIT, and trade agreement investment rules.

Public Citizen Supports the Obama and Bipartisan Calls for Fair Investment Reforms

1. The record of NAFTA demonstrates why removing harmful investment provisions from international agreements is in the interest of the United States and its trading partners.

NAFTA's investor protections were among the most controversial aspects of the pact, and an expanded version of these was also included in later trade and investment agreements. These pacts grant foreign investors a private right of action to enforce their trade-agreement foreign-investor rights. Through these, they can challenge government policies in international tribunals at the World Bank and United Nations and demand host-government compensation for policies that they consider to have impaired their new trade-agreement rights. This includes compensation for lost profits when government regulatory policy undermines their "expectation of gain or profit."¹ The special foreign-investor privileges eliminate the uncertainty and costs of having to use "host" country courts to settle many common disputes. Thus, effectively, these investment rules facilitate the relocation of investment offshore to low-wage venues by eliminating many of the costs and risks of such relocation for U.S. investors and firms.

Specifically, BITs and the investment chapters in the North American Free Trade Agreement (NAFTA), the Central America Free Trade Agreement (CAFTA) and various NAFTA-style FTAs set a "minimum standard of treatment" that signatories must provide foreign investors,² prohibit foreign investors from being treated less favorably than domestic investors,³ ban common performance requirements on foreign investors (such as domestic-content laws),⁴ and forbid limits on capital movements, such as currency controls.⁵ Additionally, these pacts provide foreign investors operating in the United States with greater compensation rights for extended categories of "expropriation" or "takings" than U.S. companies have under domestic law, including for "indirect takings" or measures "tantamount to" or "equivalent to" a takings.⁶ These trade-pact investor rules contain no sovereign-immunity shield for governments, a radical departure from longstanding U.S. law

During the debate surrounding the 2002 grant of Fast Track authority, dozens of groups and organizations representing state and local legislative and judicial officials weighed in, demanding that Fast Track contain provisions to ensure that foreign investors would not be granted "greater rights" in trade-agreement investment chapters than U.S. firms have under the U.S. Constitution. These groups include the Conference of Chief Justices, National Association of Attorneys General, U.S. Conference of Mayors, National Association of Counties, National Association of Towns and Townships, National League of Cities, and National Conference of State Legislatures.⁷ The next trade agreements negotiated did contain some improvements with regard to the transparency of trade-tribunal operations, but unfortunately failed to meet the demands by state and local officials and others – again providing foreign investors greater rights than the U.S. Constitution provides to U.S. businesses and citizens.

Further, the pacts established under the 2002 Fast Track expanded on the definition of investment relative to NAFTA, adding investor-state enforcement for "the assumption of risk," "expectation of gain or profit," "futures, options, and other derivatives," "intellectual property rights," "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law," and written agreements "with respect to natural resources or other assets that a national authority controls."

Moreover, under CAFTA, there are fewer restrictions on the types of equity participation in an enterprise that are defined as “investment” for the purposes of the investment chapter, relative to NAFTA.

During the time-period which Fast Track was operational from 2002-2007, the Bush administration sought to expand NAFTA-style investor rights to new countries via bilateral and regional trade agreements, including the U.S.-Chile FTA, U.S.-Singapore FTA, U.S.-Morocco, CAFTA, U.S.-Oman FTA, U.S.-Peru FTA, and proposed agreements with Panama, Colombia, and Korea. USTR also has pushed to put these extraordinary foreign-investor privileges into the WTO, but the majority of WTO member countries have flatly refused. Indeed, among countries that rejected U.S. FTAs explicitly because of the foreign investor protection model are: South Africa and the other countries of the Southern African Customs Union, Thailand, Bolivia, Thailand, Ecuador and Malaysia. The raft of new agreements that were completed with the foreign-investor privileges are sure to spawn new cases and new liability for U.S. taxpayers, who must foot the bill if foreign investors succeed in challenging state or federal laws – as well as face the consequences of not having vital environmental health, safety and zoning policies enforced.

Public Citizen has uncovered 59 of these claims filed thus far by corporate interests and investors under NAFTA’s Chapter 11. While only a small number of these cases have been finalized, the track record of cases and claims demonstrate an array of attacks on public policies and normal regulatory activity at all levels of government. The cases have a common theme: they seek compensation for government actions that would not be subject to such demands under U.S. law, and claim violations of property rights established in NAFTA that extend well beyond the robust property rights the U.S. Supreme Court has interpreted are provided by the U.S. Constitution.

Under NAFTA, around \$69 million has been paid out by governments in corporate challenges against toxic-substance bans, logging rules, operating permits for a toxic-waste site, and more.⁸ I include further information on both concluded and pending NAFTA investor-state cases through the middle of 2009.

2. We support President Barack Obama’s campaign pledges to overhaul the investment provisions of U.S. trade agreements.

President Obama campaigned on a whole series of specific trade-reform commitments. Whether he will meet his pledges to the American people will be tested by whether the Obama administration continues with more Bush NAFTA-style BITs and FTAs, such as the Panama FTA, or conducts the promised repair of the existing trade agreements and develops a new policy that, as President Obama said, benefits the many, not only a few special interests. Specifically, President Obama pledged to remedy the following investment provisions that the Model BIT and the Panama FTA replicate:

- Obama answered “yes” to the question: “Will you commit to renegotiate NAFTA to eliminate its investor rules that allow private enforcement by foreign investors of these investor privileges in foreign tribunals and that give foreign investors greater rights than are provided by the U.S. Constitution as interpreted by our Supreme Court thus promoting offshoring?”⁹

- He also said: “While NAFTA gave broad rights to investors, it paid only lip service to the rights of labor and the importance of environmental protection. We should amend NAFTA to make clear that fair laws and regulations written to protect citizens in any of the three countries cannot be overridden simply at the request of foreign investors.”¹⁰

Similar language was included in the Democratic Party platform, which stated: “We will not negotiate free trade agreements that stop the government from protecting the environment, food safety or the health of its citizens, give greater rights to foreign investors than to U.S. investors, require the privatization of our vital public services, or prevent developing country governments from adopting humanitarian licensing policies to improve access to life-saving medications. We will stand firm against agreements that fail to live up to these important benchmarks.”¹¹

Campaigning on these themes stretched beyond the presidential races, to congressional races in both chambers of Congress, from Florida to New Mexico, from Colorado to New York. Indeed, successful candidates in the 2006 and 2008 races ran on a resounding platform of fundamental overhaul of U.S. trade and economic policies. In the two cycles, there was a combined shift of 72 members in the fair-trade composition of Congress.¹²

Concerns with trade-pact investment provisions have long stretched across party lines and throughout the Democratic Caucus, as shown by these quotes from the debate around the Central America Free Trade Agreement (CAFTA). Conservatives, such as former Rep. Butch Otter, now the Republican governor of Idaho, expressed concern with FTA investment provisions, saying: “I’d like to draw your attention to the fact that CAFTA contains 1,000 pages of international law establishing, among other things, property rights for foreign investors that may impose restrictions on U.S. land-use policy. Chapter 10 of CAFTA outlines a system under which foreign investors operating in the United States are granted greater property rights than U.S. law provides for our own citizens! Mr. Speaker, that’s not encouraging free trade. That’s giving away our natural resources and our national sovereignty.”¹³

Meanwhile, New Democrat Coalition member Rep. Jane Harman (D-Calif.) and other representatives said:

“We wanted to draw your attention to... the threat that the investor rights rules in the Central America-Dominican Republic Free Trade Agreement (CAFTA) pose to important state and local laws and regulations that protect the environment and public health. Like Chapter 11 of NAFTA, the investor rights provisions of CAFTA give foreign corporations the power to demand payment from the U.S. when public interest protections affect a company’s commercial interests... The State of California has now joined state and local government groups in saying that U.S. trade negotiators failed to heed the lessons of NAFTA in their negotiation of the investor rights rules in CAFTA. We hope you will join us in opposing CAFTA.”¹⁴

The concern about these expansive foreign investor rights and their private enforcement across party and caucus lines is logical, since NAFTA-Model BIT-style foreign investor provisions can undermine areas of concern across the entire political spectrum in Congress and the country.

3. In order for President Obama to fulfill these commitments, a set of specific changes must be made to current and prospective trade and investment agreements.

The Model BIT and the Investment chapters of the Panama, Colombia, and Korea FTAs need the fundamental changes listed below in order to deliver on President Obama's campaign commitments. These changes are also necessary to meet the concerns raised by the AFL-CIO, Change to Win, Public Citizen, and other groups in 2007, when Democratic congressional trade committee leaders and the White House discussed renegotiating aspects of the four Bush-negotiated agreements. (Indeed, this section of the testimony closely tracks the documents describing necessary fixes to the FTA investment chapters submitted by many environmental, consumer, and labor organizations at that time.) These changes are also necessary for ensuring pacts meet the 2002 Trade Promotion Authority standard of not providing foreign investors with greater rights than those provided to domestic firms/investors by the U.S. Constitution. (The Articles below refer to the Panama FTA and the Model BIT, but similar if not identical articles can be found in each agreement, meaning similar if not identical changes are needed in the Colombia and Korea FTAs as well.)

1. To conform with U.S. taking laws, the Panama FTA's definition of investment at Article 10.29 must be bifurcated so that the current expansive definition does not apply to claims for compensation for expropriation under Article 10.7(1). (In the Model BIT, these provisions are at Article 1 and 6.1 respectively.) The current definition covers all provisions of the investment agreements and extends beyond the commitment of capital or the acquisition of real property or other tangible assets. To comply with U.S. takings law, the highly subjective standards used to define an investment subject to compensation – including expectation of gain or profit, or the assumption of risk – must be removed, as such actions are not considered forms of property under U.S. law regarding expropriation claims. **To bring the FTA (and BIT) standard into compliance with U.S. property rights takings law, Article 10.29 (and BIT Article 1) must be amended to strike the categories of property that extend beyond commitment of capital or the acquisition of real property or other tangible assets.**¹⁵ The expectation of gain or profit, or the assumption of risk should *not* qualify as investment as it does in the Panama FTA, the Model BIT and the other past and current Bush FTAs. Finally, the renegotiated definition must establish that a mere *pledge* of capital does not establish an investment, but rather “investment” must be defined to include the actual physical presence of capital.

2. The Panama FTA and Model BIT must be amended to explicitly state that the minimum standard of treatment grants no new substantive rights and no greater due process rights than what U.S. citizens currently possess under the due process clause of the U.S. Constitution. Currently, the “fair and equitable” language, if viewed as an independent standard, would invite an investment tribunal to apply its own view of what is “fair” or “equitable,” unbounded by any limits in U.S. law. Moreover, those terms are inherently subjective. The Annex that was added to CAFTA and included in recent FTAs and the Model BIT – which seeks to define “the minimum standard of treatment” that is guaranteed to foreign investors – fails to accomplish Congress' goal of foreclosing arbitral panels' discretion to read new substantive rights into this standard unbounded by U.S. law limits. This can be remedied by replacing the Panama FTA's circular Annex 10-A language¹⁶ with the following: “The Parties confirm their shared understanding that the minimum

standard of treatment, defined at Article 10.5 as ‘fair and equitable treatment,’ grants no new substantive rights and no greater due process rights than what U.S. citizens currently possess under the due process clause of the United States Constitution.” **In the Model BIT Annex A, the new text would read: “The Parties confirm their shared understanding that the minimum standard of treatment, defined at Article 5 as ‘fair and equitable treatment,’ grants no new substantive rights and no greater due process rights than what U.S. citizens currently possess under the due process clause of the United States Constitution.”**

3. U.S. takings jurisprudence permits compensation for direct takings of real property, but only allows compensation in the rarest of situations when government action does not involve an actual expropriation, but some lesser interference with property rights. Democrats successfully defeated a 1990s push to establish “regulatory takings” compensation in U.S. law so as to preclude demands for compensation arising from the costs of complying with environmental, land-use and other regulations. To conform with the no-greater-rights standard, the FTAs and Model BIT must permit compensation only for direct takings and indirect takings that meet the extremely narrow U.S. law standard of a complete and permanent destruction of all value of the entirety of a property. (The holding in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).) **This problem can be remedied by adding the following clause to the Panama FTA’s Annex 10-B(4) and the Model BIT’s Annex B(4): “government actions that merely diminish the property’s value but do not destroy all value of the entire property permanently is not an indirect expropriation.”**

4. To be consistent with U.S. law (i.e. not provide greater rights) investor-state compensation should be available only for instances of direct expropriation of a foreign investors’ *tangible* property. Further, there should be *no*, not “rare,” circumstances when non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, constitute an indirect expropriation. An Annex added to recent FTAs in response to Congress’ concerns that trade-agreement investment rules provide compensation for regulatory takings actually creates a new conflict with U.S. property rights law. Under U.S. law, there are *no* circumstances when non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives that do not extinguish all value of a property would be subject to compensation. The Panama FTA’s Annex 10-B(4)(b) and the Model BIT’s Annex B(4)(b) states that only in “rare circumstances” can such policies be the basis for compensation. **This can be remedied by striking the words “either” and “or indirectly” in the FTA’s Article 10.7(1) and the Model BIT’s Article 6.1, striking “or intangible” from the FTA’s Annex 10-B(2) and the Model BIT’s Annex B(2), and striking “Except in rare circumstances” from FTA Annex 10-B(4)(b) and Model BIT Annex B(4)(b), and (as noted) adding the following clause to FTA Annex 10-B(4) and Model BIT Annex B(4): “government actions that merely diminish the property’s value but do not destroy all value of the entire property permanently is not an indirect expropriation.”**

5. One of the most controversial provisions of BITs and the investment chapters is the investor-state dispute resolution mechanism. As we have seen under NAFTA, the investor-state mechanism has been used to challenge legitimate public-interest measures. It should be sufficient that an investor make use the domestic legal systems to bring a claim or, if not satisfied, push his/her respective government for state-state dispute settlement. The state-state approach has precedent in the U.S-Australia FTA. The above amendments limit to U.S. law the standards that

would be applied by investor-state tribunals. However, the above fixes do not remedy the core violation of the no-greater-rights standard – which is the very opportunity for a foreign investor operating within the United States to seek remedy before an investor-state tribunal, while U.S. investors and firms are limited to seeking remedy in U.S. courts. **To remedy the violation of the no-greater-rights standard, the Model BIT’s Section B (Articles 23-36) and the Panama FTA Investment Chapter’s Section B (Articles 10.15-10.27) must be stricken. Government-government enforcement action, based on the renegotiated terms described above, would provide recourse for actual acts of direct expropriation, while safeguarding legitimate public-interest laws from challenge and ensuring foreign investors are not provided greater rights than domestic investors operating domestically.**

6. We are deeply concerned that the provisions on transfers, FTA Article 10.8 and Model BIT Article 7, would limit governments’ ability to use legitimate measures designed to restrict the flow of capital in order to protect themselves from financial instability. Without adequate measures to prevent and respond to such financial instability, particularly in developing countries, broad sustainable development will remain out of reach for many developing countries. The increased frequency and severity of financial crises also hurts U.S. economic interests, as crisis-stricken countries devalue their currencies and flood the U.S. market with under-priced exports in order to recover. **Thus, FTA Article 10.8 and Model BIT Article 7 should be amended to provide for reasonable capital controls.**

In conclusion, recent attempts to change aspects of the NAFTA investor template – including language inserted into the 2002 Fast Track (which resulted in the yet-more-expansive CAFTA investor terms), the Model BIT, or the May 10, 2007 agreement between the Bush administration and certain members of Congress (which did not change a word of the FTAs’ investment chapters), – did not address these issues. In particular, the May 10 deal’s insertion of non-binding preambular language to the FTAs is galling. As a matter of law, the actual binding provisions of the FTAs’ investment chapters described above trump the non-binding preambular language which bizarrely states that “foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement” – even though in fact that is precisely what the agreement’s binding legal text does. No arbitral tribunal is bound to the FTA’s hortatory preambular language. Rather, future cases would be decided on the actual agreement text, which as noted above is severely flawed. That no changes were made to the investment chapter is a point about which the Bush administration bragged in its fact sheets on the May 2007 deal.¹⁷ Only by changing the binding language through renegotiation can the problems discussed above be remedied.

APPENDIX I: MORE DETAIL ON NAFTA INVESTOR-STATE CASES¹⁸

CASES IN WHICH INVESTORS OBTAINED PAYMENT FOR CHALLENGES OF PUBLIC-INTEREST AND OTHER LAWS

Corporation or Investor v. Country	Venue	Damages Sought	Status of Case	Issue
Ethyl v. Canada April 14, 1997*	UNCITRAL	\$201 million	Settled; Ethyl win, \$13 million	U.S. chemical company challenged Canadian environmental ban of gasoline additive MMT. July 1998: Canada loses NAFTA jurisdictional ruling, reverses ban, pays \$13 million in damages and legal fees to Ethyl.
S.D. Myers v. Canada July 22, 1998* Oct. 30, 1998**	UNCITRAL	\$20 million	S.D. Myers win, \$5 million	U.S. waste treatment company challenged temporary Canadian ban of PCB exports that complied with multilateral environmental treaty on toxic-waste trade. November 2000: Tribunal dismissed S.D. Myers claim of expropriation, but upheld claims of discrimination and determined that the discrimination violation also qualified as a violation of the "minimum standard of treatment" foreign investors must be provided under NAFTA. Panel also stated that a foreign firm's "market share" in another country could be considered a NAFTA-protected investment. February 2001: Canada petitioned to have the NAFTA tribunal decision overturned in a Canadian Federal Court. January 2004: The Canadian federal court dismissed the case, finding that any jurisdictional claims were barred from being raised since they had not been raised in the NAFTA claim. The federal court judge also ruled that upholding the tribunal award would not violate Canadian "public policy" as Canada had argued.
Pope & Talbot Dec. 24, 1999* March 25, 1999**	UNCITRAL	\$381 million	P&T win, \$621,000	U.S. timber company challenged Canadian implementation of 1996 U.S.-Canada Softwood Lumber Agreement. April 2001: Tribunal dismissed claims of expropriation and discrimination, but held that the rude behavior of the Canadian government officials seeking to verify firm's compliance with lumber agreement constituted a violation of the "minimum standard of treatment" required by NAFTA for foreign investors. Panel also stated that a foreign firm's "market access" in another country could be considered a NAFTA-protected investment.
Metalclad v. Mexico Dec. 30, 1996* Jan. 2, 1997**	ICSID	\$90 million	Metalclad win, \$15.6 million	U.S. firm challenged Mexican municipality's refusal to grant construction permit for toxic waste facility unless the firm cleaned up existing toxic waste problems that had resulted in the facility being closed when it was owned by a Mexican firm from which Metalclad acquired the facility. Metalclad also challenged establishment of an ecological preserve on the site by a Mexican state government. August 2000: Tribunal ruled that the denial of the construction permit and the creation of an

				<p>ecological reserve are tantamount to an “indirect” expropriation and that Mexico violated NAFTA’s “minimum standard of treatment” guaranteed foreign investors, because the firm was not granted a “clear and predictable” regulatory environment.</p> <p>October 2000: Mexican government challenged the NAFTA ruling in Canadian court alleging arbitral error. A Canadian judge ruled that the tribunal erred in part by importing transparency requirements from NAFTA Chapter 18 into NAFTA Chapter 11 and reduced the award by \$1 million. In 2004, the Mexican federal government’s effort to hold the involved state government financially responsible for the award failed in the Mexican Supreme Court.</p>
Karpa v. Mexico Feb. 16, 1998* Apr. 7, 1999**	ICSID	\$50 million	Karpa win, \$1.5 million	<p>U.S. cigarette exporter challenged denial of export tax rebate by Mexican government.</p> <p>December 2002: Tribunal rejected an expropriation claim, but upheld a claim of discrimination after the Mexican government failed to provide evidence that the firm was being treated similarly to Mexican firms in “like circumstances.”</p> <p>December 2003: Canadian judge dismissed Mexico’s effort to set aside award.</p>
ADM/Tate & Lyle v. Mexico Oct. 14, 2003* Aug. 4, 2004**	ICSID	\$100 million	ADM win, \$33.5 million	<p>U.S. company producing high fructose corn syrup sought compensation against Mexican government for imposition of a tax on beverages made with HFCS, but not Mexican cane sugar. Mexico argued that the tax was legitimate because the U.S. had failed to open its market sufficiently to Mexican cane sugar exports under NAFTA.</p> <p>November 2007: NAFTA tribunal ruled that the HFSC tax was discriminatory and a NAFTA-illegal performance requirement, but did not find it was an expropriation. This issue was also litigated in the WTO, which issued a ruling against Mexico and in favor of the U.S. in 2006.</p>
Corn Products International v. Mexico Jan. 28, 2003* Oct. 21, 2003**	ICSID	\$325 million	Corn Products win, amount pending	<p>U.S. company producing high fructose corn syrup (HFCS), a soft drink sweetener, sought compensation from Mexican government for imposition of a tax on beverages sweetened with HFCS, but not Mexican cane sugar.</p> <p>April 2009: January 2008 award finally become public. Tribunal ruled for CPI on the merits then began a monetary damages assessment. Panel dismissed most claims but found that Mexico violated the national treatment rule by “fail[ing] to accord CPI, and its investment, treatment no less favourable than that it accorded to its own investors in like circumstances, namely the Mexican sugar producers who were competing for the market in sweeteners for soft drinks.”</p>

CASES IN WHICH THE U.S. “DODGED THE BULLET” ON PROCEDURAL GROUNDS

There have been five cases against the United States that have made it to arbitration; these were dismissed on largely procedural grounds.

1. **Loewen case:** In 1998, a Canadian funeral conglomerate, Loewen, used NAFTA's investor-state system to challenge Mississippi's rules of civil procedure and the amount of a jury award related to a case in which a Mississippi firm had sued Loewen in a private contract dispute in state court. A World Bank tribunal issued a chilling ruling in this NAFTA case, finding for Loewen on the merits.¹⁹ The ruling made clear that few domestic court decisions are immune to a rehearing in a NAFTA investor-state tribunal. However, the tribunal dismissed the case before the penalty phase thanks to a remarkable fluke: lawyers involved with the firm's bankruptcy proceedings reincorporated Loewen as a U.S. firm, thus destroying its ability to obtain compensation as a "foreign" investor.
2. **Mondev case:** In 1999, a Canadian real estate developer challenged Massachusetts Supreme Court ruling regarding local government sovereign immunity and land-use policy. In October 2002, the claim was dismissed on procedural grounds. The tribunal found that the majority of Mondev's claims, including its expropriation claim, were time-barred because the dispute on which the claim was based predated NAFTA.
3. **Methanex:** In 1999, a Canadian corporation that produced methanol, a component chemical of the gasoline additive MTBE, challenged California phase-out of the additive, which was contaminating drinking water sources around the state. In August 2005, the claim was dismissed on procedural grounds. The tribunal ruled that it had no jurisdiction to determine Methanex's claims because California's MTBE ban did not have a sufficient connection to the firm's methanol production to qualify Methanex for protection under NAFTA's investment chapter. Tribunal orders Methanex to pay U.S. \$3 million in legal fees. The tribunal permitted NGOs to submit amici briefs and Methanex allowed hearings to be open to the public.
4. **ADF:** In 2000, a Canadian steel contractor challenged U.S. Buy America law related to a Virginia highway construction contract. In January 2003, the claim dismissed on procedural grounds. The tribunal found that the basis of the claim constituted "government procurement" and therefore was not covered under NAFTA Article 1108. Starting with CAFTA, FTA investment chapters have included foreign-investor protections for aspects of government procurement activities.
5. **Glamis:** In 2003, a Canadian mining firm brought a NAFTA suit over a California law that requires reclamation of open-pit, cyanide heap-leach mining sites, claiming that this constituted an indirect expropriation and a denial of the minimum standard of treatment.²⁰ Earlier this year, a tribunal ruled against Glamis on the grounds that – with a high price for gold, among other factors – the economic impact of the regulations did not reach a high enough dollar amount to constitute an indirect expropriation. Notably, the tribunal did not dispute the notion that such environmental measures, if they had resulted in a more significant economic impact due to a lower price of gold, might constitute an indirect expropriation. (The minimum standard of treatment claim was dismissed because Glamis was taking issue with the cumulative impact of a wide range of smaller government actions that could not be adequately connected to one another.) Notably, the tribunal still required U.S. taxpayers to assume a third of the arbitral costs, and it is not clear if Californian taxpayers (at a time of state budget implosion) will be compensated for the substantial time they had to dedicate to assist the federal government in its defense of the state law.²¹ Further, the tribunal allowed Glamis to be considered a foreign investor under NAFTA even though it had used a U.S. subsidiary to obtain the mining claim in question – a claim on U.S. federal land only available to U.S. citizens.

PENDING CASES AGAINST UNITED STATES CLOSEST TO COMPLETION

1. **Tobacco Settlement:** Aspects of the state tobacco settlements, which have resulted in a dramatic drop in the rate of teenage smoking in the United States, are being challenged by Canadian tobacco traders.²² Grand River Enterprises, is the Canadian company seeking \$340 million in damages over 1998 U.S. Tobacco Settlement, which requires tobacco companies to contribute to state escrow funds to help defray medical costs of smokers.
2. **Generic Drug:** A Canadian drug company is suing the United States under NAFTA because it was not clearly granted the right to manufacture a generic version of a Pfizer drug by the U.S. court system.²³ Apotex is a Canadian generic drug manufacturer sought to develop a generic version of the Pfizer drug Zoloft (sertraline) when the Pfizer patent expired in 2006. Due to legal uncertainty surrounding the patent, the firm sought a declaratory judgment in U.S. District Court for the Southern District of New York to clarify the patent issues and give it the “patent certainty” to be eligible for final FDA approval of its product upon the expiration of the Pfizer patent. The court declined to resolve Apotex’s claim and dismissed the case in 2004, and this decision was upheld by the federal circuit court in 2005. In 2006, the case was denied a writ of certiorari by the U.S. Supreme Court. Because the courts declined to clarify the muddled patent situation, another generic competitor got a head-start in producing the drug. Apotex challenged all three court decisions as a misapplication of U.S. law, NAFTA expropriation, discrimination and a violation of its NAFTA rights to a “minimum standard of treatment.” They are demanding \$8 million in compensation.
3. **NAFTA Trucks:** Most recently, a consortium of Mexico-domiciled trucking groups is initiating a NAFTA Chapter 11 case over the ending of the NAFTA trucks pilot program, they may be seeking billions in damages, even though very few trucks from Mexico are likely to meet U.S. standards, be appropriate for very long international hauling, and even though very few such trucks participated in the recent Bush administration cross-border trucking program beyond the border zone. The claimants say because they pay certification fees they have an investment.²⁴

After an initial wave of WTO cases and NAFTA investor-state challenges, enforcement of NAFTA and WTO non-trade policy constraints has gotten more subtle. Given that trade attacks on health and environmental laws draw terrible press and controversy and are expensive to litigate, foreign governments and investors have found that merely threatening challenges to chill initiatives rather than waiting for their passage and then formally filing against them is a cheaper and politically safer tactic.²⁵ For instance, after NAFTA threats were raised against a Canadian provincial proposal to institute a single-payer form of auto insurance, the proposal was dropped. Often these cases never come to public attention unless one party leaks the documents. Thus, while there is not a long list of formal WTO or NAFTA cases against U.S. state policies, increasingly state officials have been facing trade agreement threats against state policy initiatives. Moreover, the formal cases that have been launched are illustrative of the threats that the NAFTA-WTO model poses to normal state governmental activity and legislative prerogatives.

ENDNOTES

¹ For instance, NAFTA Article 1105.

¹ For instance, U.S.-Peru FTA Article 10.28.

² See e.g. NAFTA Article 11.5 or CAFTA Article 10.5.

³ See e.g. NAFTA Article 11.2 or CAFTA Article 10.3.

⁴ See e.g. NAFTA Article 11.9 or CAFTA Article 10.6.

⁵ See e.g. NAFTA Article 11.9 or CAFTA Article 10.8.

⁶ See e.g. NAFTA Article 11.10 and 11.39 or CAFTA Article 10.7 and 10.28.

⁷ Letters from these groups and others can be accessed at: <http://www.citizen.org/trade/subfederal/inv>.

⁸ Mary Bottari and Lori Wallach, "NAFTA Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005," Public Citizen's Global Trade Watch, February 2005.

⁹ http://www.citizenstrade.org/pdf/QuestionnairePennsylvaniaFairTradeCoalition040108FINAL_SenatorObamaResponse.pdf

¹⁰ <http://www.citizen.org/documents/TXFairTradeCoalitionObama.pdf>

¹¹ Democratic National Convention Committee, "The 2008 Democratic Party Platform: Renewing America's Progress," August 25, 2008. Available at <http://www.democrats.org/a/party/platform.html>.

¹² Todd Tucker, "Fair Trade Gets an Upgrade," Public Citizen's Global Trade Watch, November 2008.

¹³ Rep. Clement LeRoy "Butch" Otter (R-Idaho), Floor Statement on CAFTA, July 29, 2005.

¹⁴ On file with Public Citizen.

¹⁵ The Article 10.29 text would have to be modified to exclude the stricken clauses below: "investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, ~~the expectation of gain or profit, or the assumption of risk.~~ Forms that an investment may take include: ~~(a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; 7 8 (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; 9 10 and other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges."~~

¹⁶ Annex 10-A: "Customary International Law: The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens."

¹⁷ USTR suggested that "the four pending FTAs (as well as the other FTAs we have concluded in the past five years) fully achieve" the congressional requirement that no foreign investors not be accorded greater rights than U.S. investors operating in the United States. See

http://ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file146_11282.pdf

¹⁸ Key: *Indicates date Notice of Intent to File a Claim was filed, the first step in the NAFTA investor-state process, when an investor notifies a government that it intends to bring a NAFTA Chapter 11 suit against that government.

**Indicates date Notice of Arbitration was filed, the second step in the NAFTA investor-state process, when an investor notifies an arbitration body that it is ready to commence arbitration under NAFTA Chapter 11.

¹⁹ ICSID, Decision on hearing of Respondent's objection to competence and jurisdiction, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Jan. 5, 2001, Case No. ARB(AF)/98/3.

²⁰ ICSID, Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, Dec. 9, 2003.

²¹ ICSID, Award Before the Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement, *Glamis Gold Ltd. v. the Government of the United States*, June 8, 2009.

²² UNCITRAL, Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement between *Grand River Enterprises Six Nations, Ltd. et al. and Government of the United States of America*," March 11, 2004a. Available at:

<http://www.state.gov/documents/organization/30961.pdf>.

²³ UNCITRAL, Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement, *APOTEX, Inc. v. the Government of the United States*, Dec. 10, 2008.

²⁴ See Luke Engan, "Mexican Truckers File NAFTA Investor Claim; DOT Gives Proposal To NSC," *Inside U.S. Trade*, April 10, 2009. See also, *Canacar v. the United States of America*, filed April 2, 2009, p.6.

²⁵ For instance, the European Commission issues an annual list of U.S. regulatory policies at the federal, state and local levels that they consider trade barriers. On this list are many state policies with historical antecedents long preceding the WTO, such as state regulation of insurance and alcohol control states. A high-level forum called the Transatlantic Economic Council has also been developed to discuss the elimination of such "trade barriers" on both sides of the Atlantic. For the 2007 list of U.S. trade barriers see

http://ec.europa.eu/trade/issues/sectoral/mk_access/pr150207_en.htm.