

U.S. AND CHINESE INVESTMENT TREATIES IN LATIN AMERICA: CONVERGENCE OR COMPETITION?

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I. INTRODUCTION

The economic relationship between the People's Republic of China and Latin America has strengthened significantly over the past decade.¹ Trade is the main component of this growing relationship, and the increase in trade has led to increased Chinese foreign direct investment (FDI) in the region.² More specifically, Chinese FDI has grown rapidly since the 2008 global financial crisis.³ Investment in Latin America from Chinese companies has averaged approximately \$10 billion per year since 2010—compared to a total of approximately \$6 billion during the previous 20 years⁴—and state-owned Chinese companies have made significant investments in the natural resource sectors of Latin American economies.⁵ Perhaps most importantly, Chinese FDI in Latin America is expected to grow in the coming years.⁶

This growing economic relationship between China and Latin America has come at a time when the relations between the United States and many Latin American countries are in flux. For example, backlash against U.S. international economic policies has worsened relations between the United States and

1. TAOTAO CHEN & MIGUEL PÉREZ LUDEÑA, *ECON. COMM'N FOR LATIN AM. & THE CARIBBEAN (ECLAC), CHINESE FOREIGN DIRECT INVESTMENT IN LATIN AMERICA AND THE CARIBBEAN* 17 (2013); Patricia Rey Mallén, *Latin America Increases Relations with China: What Does That Mean for the US?*, *INT'L BUS. TIMES* (June 28, 2013, 9:53 PM), <http://www.ibtimes.com/latin-america-increases-relations-china-what-does-mean-us-1317981> (noting that China-Latin America trade increased from \$13 billion in 2000 to more than \$120 billion in 2009).

2. CHEN & PÉREZ, *supra* note 1, at 12.

3. *Id.* at 7.

4. *Id.* at 5, 11.

5. *Id.* at 5.

6. *Id.*

several Latin American countries and has raised challenges for U.S. policy in the region.⁷ Some have questioned if the so-called “Washington Consensus”⁸ of economic policy prescriptions has ended in Latin America and if this marks the rise of a Chinese model of state-centered economic development in its place.⁹

Overall, growing investment in Latin America is one example of how China’s economic growth is changing the global economy. The pace of this growth in investment, especially in recent years, warrants inquiry into how, or if, China’s growing FDI in Latin America is influencing international investment law and if it is converging with U.S. and international practices or if it represents a competitive alternative. This assessment is especially important to the United States given its historical economic influence in the region.¹⁰

7. Hugo Chavez in Venezuela, Nestor Kirchner and Cristina Fernandez Kirchner in Argentina, Evo Morales in Bolivia, and Rafael Correa in Ecuador gained power partly due to a backlash against the influence of the U.S. economic policies of privatization and export-led growth. Carmen G. Gonzalez, *China’s Engagement with Latin America: Partnership or Plunder?*, in NATURAL RESOURCES AND THE GREEN ECONOMY, 37, 40–45 (Elena Blanco & Jona Razzaque eds., 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029417; see also MARK P. SULLIVAN, CONG. RESEARCH SERV., R42956, LATIN AMERICA AND THE CARIBBEAN: KEY ISSUES FOR THE 113TH CONGRESS, 17, 23–24 (2013).

8. The “Washington Consensus” is a policy consensus between the International Monetary Fund, the World Bank, and the U.S. Treasury based on the idea that developing countries should follow free-market policies based on fiscal austerity, privatization, and market liberalization. *Washington Consensus*, WORLD HEALTH ORG. <http://www.who.int/trade/glossary/story094> (last visited Mar. 21, 2015); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 16, 53 (2003).

9. See, e.g., Kevin Gallagher, *The End of the “Washington Consensus”*, GUARDIAN (Mar. 7, 2011, 11:38 PM), <http://www.theguardian.com/commentisfree/cifamerica/2011/mar/07/china-usa-juxtaposing-Chinese-and-American-investment-in-Latin-America>; Nancy Birdsall & Francis Fukuyama, *The Post-Washington Consensus: Development After the Crisis*, FOREIGN AFF., <http://www.foreignaffairs.com/articles/67456/nancy-birdsall-and-francis-fukuyama/the-post-washington-consensus> (last visited Apr. 23, 2015) (suggesting that emerging markets are replacing the United States and Europe as the leaders of innovative social policy); Mel Gurtov, *Changing Policies and Perspectives*, in CHINA, THE DEVELOPING WORLD, AND THE NEW GLOBAL DYNAMIC, 13, 21 (Lowell Dittmer & George T. Yu eds., 2010).

10. See, e.g., JON BRANDT ET AL., AM. UNIV. SCH. OF INT’L SERV., CHINESE ENGAGEMENT IN LATIN AMERICA AND THE CARIBBEAN: IMPLICATIONS FOR US FOREIGN POLICY 19 (2012) (“The United States has been one of the most important players in Latin America over the past century.”). But see Jörn Dosch & David S. G. Goodman, *China and Latin America: Complementarity, Competition, and Globalisation*, 41 J. CURRENT CHINESE AFF. 1, 3–9 (2012) (stating that China’s presence in Latin America

This Comment will compare U.S. and Chinese economic policies in Latin America by focusing on U.S. and Chinese investment treaties with Mexico, Chile, Colombia, and Peru, the countries of the Pacific Alliance, an organization that aims to promote free trade and investment with a focus toward the Asia-Pacific region.¹¹ Part II will discuss the background of recent relations between Latin America and China. Part III will discuss U.S. bilateral investment treaties (BITs) and the investment provisions of free trade agreements (FTAs) with Mexico, Chile, Colombia, and Peru. Part IV will discuss Chinese BITs and the investment provisions of Chinese FTAs with these same countries. Part V will discuss the larger effects for the global economy from the interaction between the United States, China, and Latin America. It will also discuss possible changes to U.S. investment policy in response to China's growing investment in Latin America. Part VI will conclude the Comment.

II. A NEW ERA OF CHINESE AND LATIN AMERICAN RELATIONS

China's increased investment in Latin America is part of its strategy of economic and diplomatic engagement with developing countries.¹² Increased investment in natural resources and infrastructure as well as increased diplomatic activity have accompanied this strategy.¹³ This section will discuss this economic and political engagement. It will first introduce the Pacific Alliance and its economic significance to Latin America. It will then briefly discuss China's increased political engagement in Latin America, Chinese FDI in the region, changes in Latin

could be a serious threat to Latin America's exports); Gonzalo Sebastián Paz, *China, United States and Hegemonic Challenge in Latin America: An Overview and Some Lessons from Previous Instances of Hegemonic Challenge in the Region*, CHINA Q., Mar. 2012, at 18, 32 (discussing how the United States has reacted to China's growing presence in Latin America).

11. *The Pacific Alliance and Its Objectives*, PAC. ALLIANCE, <http://alianzapacifico.net/en/home-eng/the-pacific-alliance-and-its-objectives> (last visited Feb. 16, 2015).

12. Nicola Phillips, *China and Latin America: Development Challenges and Geopolitical Dilemmas*, in CHINA, THE DEVELOPING WORLD, AND THE NEW GLOBAL DYNAMIC 177, 177–78 (Lowell Dittmer & George T. Yu eds., 2010).

13. BRANDT ET AL., *supra* note 10, at 17; Dosch & Goodman, *supra* note 10, at 3, 7–9; *see also* Paz, *supra* note 10, at 32 (noting that an institutional dialogue has begun between China and the United States regarding China's involvement in Latin America, a region historically considered to be part of the United States' sphere of interest).

American approaches to investment treaties, and the different approaches that both the United States and China take in pursuing economic partners.

A. *The Pacific Alliance*

The Pacific Alliance was formed to promote economic integration of member countries and to negotiate FTAs as a group with Asian countries, the United States, and the European Union.¹⁴ The alliance's pursuit of trade and investment with Asian counterparts, including China, is viewed as part of the expanding relations between developing countries known as "South-South cooperation."¹⁵ It is also a result of the desire for Latin American countries to diversify their economic relations while lessening their economic dependence on the United States.¹⁶

As a group, Mexico, Chile, Colombia, and Peru represent a significant share of Latin America's economy.¹⁷ These countries provide a way to compare U.S. and Chinese investment

14. The member countries agreed in September 2013 to liberalize 92% of their countries' trade. Manuela Badawy, *Latin America's Pacific Alliance Liberalizes Trade*, REUTERS (Sept. 25, 2013, 5:04 PM), <http://www.reuters.com/article/2013/09/25/trade-latinamerica-idUSL2N0HL27620130925>; *Lima Declaration Seals the Pacific Alliance of Peru, Chile, Colombia and Mexico*, MERCOPRESS (Apr. 29, 2011, 5:06 AM), <http://en.mercopress.com/2011/04/29/lima-declaration-seals-the-pacific-alliance-of-peru-chile-colombia-and-mexico> [hereinafter *Lima Declaration*]; M. ANGELES VILLARREAL, CONG. RESEARCH SERV., R43748, THE PACIFIC ALLIANCE: A TRADE INTEGRATION INITIATIVE IN LATIN AMERICA 3–4 (2014).

15. The United Nations defines South-South cooperation as "a broad framework for collaboration among countries of the South in the political, economic, social, cultural, environmental and technical domains." *What Is SSC?*, UN OFF. FOR S.-S. COOPERATION, http://ssc.undp.org/content/ssc/about/what_is_ssc.html (last visited Feb. 28, 2014).

16. For example, the U.S. Congress delayed approval of Colombia's free trade agreement with the United States, and Mexico's highly integrated economic relationship with the United States led it to follow the United States in the recent recession. *Lima Declaration*, *supra* note 14.

17. SCOTIABANK, LATIN AMERICA REGIONAL OUTLOOK 3–4, 10 (2015). The four countries represent 36% of Latin America's population (204 million), 35% of regional GDP (\$1.7 trillion), and approximately 50% of Latin America's share in global trade (\$1.045 trillion). Socorro Ramirez, *Regionalism: The Pacific Alliance*, AMS. Q., <http://www.americasquarterly.org/content/regionalism-pacific-alliance> (last visited March 23, 2015). The Pacific Alliance as a total received \$71 billion in foreign direct investment (FDI) in 2012, making it the world's seventh-largest FDI recipient for that year. Badawy, *supra* note 14.

approaches to the region directly, as they have strong economic relations with the United States and are increasing their economic relations with China. The differences within this group also contribute to this comparison. Mexico and Colombia are significant oil exporters and are more economically connected to the United States.¹⁸ Mexico is a member of the North American Free Trade Agreement (NAFTA),¹⁹ and Colombia has strong political ties to the United States.²⁰ The economies of Peru and Chile rely on exports of natural resources, mainly copper, and are more economically connected to China.²¹

B. China's Policy Toward Latin America

China has pursued stronger diplomatic and cultural ties to Latin America by expanding diplomatic missions, sending trade delegations to Latin American countries, and promoting Chinese tourism and educational opportunities in the region.²² In 2008, China issued its "Policy Paper on Latin America and the Caribbean," which discussed the emergence of a multi-polar world with increased economic globalization.²³ The paper emphasized

18. See *Mexico*, U.S. ENERGY INFO. ADMIN. 2 (Apr. 24, 2014), http://www.eia.gov/beta/international/analysis_includes/countries_long/Mexico/mexico.pdf (stating that Mexico's "largest trading partner is the United States, which is the destination for most of its crude oil exports and the source of most of its refined product imports"); see also *Colombia*, U.S. ENERGY INFO. ADMIN. 3 (May 27, 2015), http://www.eia.gov/beta/international/analysis_includes/countries_long/Colombia/colombia.pdf (last updated May 27, 2015) (stating that the United States was the top destination for Colombia's 2012 oil exports).

19. See North American Free Trade Agreement, U.S.-Can.-Mex., chs. 10-22, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

20. See generally *U.S. Relations with Mexico*, U.S. DEP'T STATE (Sept. 10, 2014), <http://www.state.gov/r/pa/ei/bgn/35749.htm> (explaining extensively the background and current relations between the United States and Mexico). U.S.-Colombia relations date to 1822 and include economic agreements, cooperation in antinarcotics trafficking programs, and cooperation in security. *U.S. Relations with Colombia*, U.S. DEP'T STATE (Nov. 19, 2013), <http://www.state.gov/r/pa/ei/bgn/35754.htm>.

21. Sara Potter, *Latin American Economic Outlook Restrained by Weak Commodity Prices*, FACTSET (Apr. 10, 2014), <http://www.factset.com/insight/2014/4/econ-insight-latin-america>.

22. Gonzalez, *supra* note 7, at 38.

23. *China's Policy Paper on Latin America and the Caribbean*, CENT. PEOPLE'S GOV'T OF CHINA, http://www.gov.cn/english/official/2008-11/05/content_1140347.htm (last visited Apr. 12, 2015).

the importance of Latin American and Caribbean countries to the developing world and noted their importance to regional and international affairs.²⁴

China's stated policy toward the region includes its desire "to build and develop a comprehensive and cooperative partnership"²⁵ and its efforts to strengthen cooperation between China and Latin American countries in both politics and economics.²⁶ Related to international investment, China's description of cooperation in international affairs included the aim to "make the international political and economic order more fair and equitable" and to "uphold the legitimate rights and interests of developing countries."²⁷

China also stated that it will work with Latin American countries "to expand and balance two-way trade and improve the trade structure to achieve common development," and that it supports investment "to promote the economic and social development of both sides."²⁸ China also emphasized South-South cooperation.²⁹ This includes "bringing about a more just and equitable multilateral trading regime" as well as increasing influence in "decision-making for developing countries in international trade and financial affairs."³⁰

C. Chinese FDI in Latin America

In addition to political engagement, China's 2008 policy paper marked the beginning of a new era of increased Chinese FDI in Latin America and in the developing world generally. China became one of the world's three largest sources of foreign investment in 2012, when FDI from China reached more than \$87 billion for that year.³¹ China's FDI has gone primarily to developing countries, as \$378.14 billion of China's total FDI of

24. *Id.*

25. *Id.*

26. China outlined six areas of political cooperation with Latin American countries and fourteen areas of economic cooperation. *Id.*

27. *Id.*

28. CENT. PEOPLE'S GOV'T OF CHINA, *supra* note 23.

29. *Id.*

30. *Id.*

31. CHEN & PÉREZ, *supra* note 1, at 7.

\$531.94 billion has been invested in developing countries, according to the Economic Commission for Latin America and the Caribbean (ECLAC).³²

Chinese FDI in Latin America reached \$13 billion in 2010 and has since grown to average approximately \$10 billion per year.³³ Estimates put total FDI from China into Latin America at \$80 billion as of the end of 2013.³⁴ Despite this growth, Chinese investment in the region has not kept pace with its growing trade relationship, as trade with China in 2010 represented 11% of regional trade but FDI from China represented only 1% of FDI into the region.³⁵ This gap could indicate the potential for more Chinese FDI in Latin America, as an increase in trade is likely to bring an increase in investment in the form of facilities to manufacture or assemble goods from China.³⁶ Adding to this potential is the possibility, by one estimate, that China's total outbound FDI will reach \$1 trillion during the next ten years.³⁷ While China's FDI in Latin America is small compared to that of the United States,³⁸ it has the potential to overtake U.S. investment.³⁹

China has also made loans to Latin American countries to secure access to natural resources.⁴⁰ China is estimated to have provided approximately \$75 billion in loans to countries in the

32. *Id.*

33. *Id.* at 5, 11.

34. *China Diversifies Investment in Latin America*, CHINA DAILY (Feb. 28, 2014, 11:30 AM), http://www.chinadaily.com.cn/business/2014-02/28/content_17312834.htm. Notably, this investment is not reciprocated, as there is little Latin American investment in China. CHEN & PÉREZ, *supra* note 1, at 17.

35. BRANDT ET AL., *supra* note 10, at 7.

36. CHEN & PÉREZ, *supra* note 1, at 12.

37. BRANDT ET AL., *supra* note 10, at 8.

38. CHEN & PÉREZ, *supra* note 1, at 11 (noting that U.S. FDI is 25% of total FDI in Latin America since 2010, while Chinese and other Asian FDI is only 7% of the total).

39. Enrique Dussel Peters, *Chinese FDI in Latin America: Does Ownership Matter?* 8 (Working Grp. on Dev. & Env't in the Ams., Discussion Paper No. 33, 2012), available at <http://ase.tufts.edu/gdae/Pubs/rp/DP33DusselNov12.pdf> (explaining how China's difficulties in maintaining export growth, its estimated reserves of more than \$3 trillion in 2011, and the recent appreciation of its currency make FDI and foreign asset purchases more likely).

40. KEVIN P. GALLAGHER ET AL., INTER-AM. DIALOGUE, THE NEW BANKS IN TOWN: CHINESE FINANCE IN LATIN AMERICA 17 (2012).

region since 2005, and in 2010 alone it provided \$37 billion in loans.⁴¹ These loan commitments have been greater than those from the World Bank, the Inter-American Development Bank, and the Export-Import Bank of the United States combined.⁴²

These financial commitments in Latin America are part of China's strategy of engaging developing regions, and Latin America fits into this strategy as a source of natural resources.⁴³ Most Chinese mining investments in Latin America are in Peru, and Colombia has received Chinese investment in its oil industry.⁴⁴ Chile and Mexico have not had significant Chinese investment,⁴⁵ but that is likely to change. China views Chile, a significant producer of natural resources, as a strategic complement to its manufacturing economy and views Mexico as a potential source of oil.⁴⁶

D. U.S. and Chinese Approaches to Foreign Investment Policy

Along with increased investment in Latin America, China has actively pursued FTAs and BITs with Latin American countries. China's approach to deciding which countries to pursue as economic partners differs significantly from the U.S. approach. The United States considers domestic politics, economic policy, partner country commitments to trade liberalization, and foreign policy.⁴⁷ Other considerations include a country's commitment to the rule of law, benefits to the broader U.S. trade liberalization strategy, compatibility with U.S. interests, and support from

41. *Id.* at 5–7; see also Gonzalez, *supra* note 7, at 38 (calculating sizeable Chinese investments in Latin America).

42. See GALLAGHER ET AL., *supra* note 40, at 5–7 (comparing Chinese investments to those of the World Bank, U.S. Ex-Im, and IDB); see also Gonzalez, *supra* note 7, at 38 (elaborating on China's competition with the World Bank and the Inter-American Development Bank).

43. Phillips, *supra* note 12, at 196; see also Gonzalez, *supra* note 7, at 38 (explaining Chinese interest in long-term contracts for natural resources).

44. CHEN & PÉREZ, *supra* note 1, at 11, 14.

45. *Id.* at 11.

46. Dan Wei, *China's Regional Trade Agreements: Implications and Comments*, 6 MANCHESTER J. INT'L ECON. L. 81, 100 (2009); Zhu Zhe et al., *China, Mexico Boost Relations*, CHINA DAILY (June 5, 2013, 11:33 PM), http://www.chinadaily.com.cn/china/2013xivisit/2013-06/05/content_16573196.htm.

47. Jun Zhao & Timothy Webster, *Taking Stock: China's First Decade of Free Trade*, 33 U. PA. J. INT'L L. 65, 91–92 (2011).

Congress and domestic industries.⁴⁸ These factors primarily reflect U.S. strategic, foreign policy and foreign economic development goals.⁴⁹

China's approach is to pursue partner countries that are rich in natural resources.⁵⁰ As part of its foreign policy principle of "non-interference," China places less importance than does the United States on the domestic politics of a partner country.⁵¹ This means that China gives less consideration to a partner country's human rights, political system, environmental protection, or commitment to international trade.⁵² Chinese officials have stated that a good political and diplomatic relationship with China is the most important factor in selecting partner countries, followed by complementary economic structures, a domestic market that could also serve as a trade hub, the common desire to join China in an FTA, and a strong economy.⁵³

In describing the investment approaches of the United States and China in Latin America, it is important to note briefly how countries in the region approach trade and investment agreements and how this approach has evolved over the past decades. In 1965, the majority of Latin American countries, led by Chile, opposed the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which created the International Centre for Settlement of Investment Disputes (ICSID), an independent forum for international investment arbitration established by the World Bank.⁵⁴ The opposition to international investment arbitration came from the history of disputes in Latin America between states and foreign

48. U.S. GEN. ACCOUNTING OFFICE, GAO-04-233, INTERNATIONAL TRADE: INTENSIFYING FREE TRADE NEGOTIATING AGENDA CALLS FOR BETTER ALLOCATION OF STAFF AND RESOURCES 9–10, (2004).

49. *Id.* at 2.

50. Zhao & Webster, *supra* note 47, at 84.

51. *Id.* at 92.

52. *Id.*

53. *Id.* at 92–93, 95.

54. Rodrigo Polanco Lazo, *Legal Framework of Foreign Investment in Chile*, 18 L. & BUS. REV. AMS. 203, 221, 226–27 (2012); Christoph Schreuer, *International Centre for Settlement of Investment Disputes (ICSID)*, UNIVERSITÄT WIEN ¶ 2, http://www.univie.ac.at/intlaw/wordpress/pdf/100_icsid_epil.pdf (last visited Mar. 1, 2015).

investors that often resulted in military interventions.⁵⁵ As part of this opposition, many Latin American countries adopted the Calvo Doctrine, which asserted state sovereignty, rejected special privileges for foreign investors, and required local laws to be used to settle disputes with foreigners.⁵⁶

After the Latin American debt crisis of the 1980s, Latin American countries were forced to fund development through FDI rather than through commercial loans.⁵⁷ To attract foreign investment, many countries abandoned the Calvo Doctrine and adopted BITs with strong investor protections.⁵⁸ Many countries also ended their industrial development strategy of replacing foreign imports with production from protected domestic industries and adopted free market economic reforms.⁵⁹ During that time, several Latin American countries, including Chile and Peru, signed the ICSID Convention, marking the end of the Calvo Doctrine and the beginning of a growing acceptance of international arbitration in settling investment disputes.⁶⁰ Latin American countries also developed their own BIT models to establish a stronger position in treaty negotiations.⁶¹

III. U.S. INVESTMENT TREATIES WITH PACIFIC ALLIANCE COUNTRIES

As the source of a significant amount of investment in foreign countries, the United States began its BIT program in the 1980s as part of an effort to protect existing U.S. foreign investments

55. Gonzalez, *supra* note 7, at 65.

56. *Id.*; see also Lazo, *supra* note 54, at 226–27 (offering further clarification of the Calvo Doctrine).

57. Gonzalez, *supra* note 7, at 66.

58. *Id.*; Lazo, *supra* note 54, at 220; Gonzalo Biggs, *The Latin American Treatment of International Arbitration and Foreign Investments and the Chile-U.S. Free Trade Agreement*, 19 ICSID REV.—FOREIGN INVESTMENT L.J. 61, 72 (2004).

59. Gonzalez, *supra* note 7, at 40; Biggs, *supra* note 58, at 72; Lazo, *supra* note 54, at 220.

60. Lazo, *supra* note 54, at 221; see also Jonathan C. Hamilton, *Three Decades of Latin American Commercial Arbitration*, 30 U. PA. J. INT'L L. 1099, 1111–13 (2009) (documenting the increasing endorsement of arbitration procedures by legal regimes in both Peru and Chile).

61. Damon Vis-Dunbar, *Analysis: Latin America's New Model Bilateral Investment Treaties*, INVESTMENT TREATY NEWS (July 17, 2008) <http://www.iisd.org/itn/2008/07/17/in-depth-latin-america-s-new-model-bilateral-investment-treaties>.

and to promote investment in BIT partner countries.⁶² U.S. officials designed BITs to provide investor protection in areas in which they viewed customary international law⁶³ as inadequate.⁶⁴ The United States relied on model BITs in negotiations, as this allowed it to gain leverage by focusing on particular areas of interest rather than on negotiating every aspect of a treaty.⁶⁵ This section will discuss the U.S. model BIT approach to investment treaties and how it has influenced the investment provisions of FTAs with Mexico, Chile, Peru, and Colombia.

A. U.S. Model BIT

The stated goal of the U.S. BIT program is to protect private investment, develop market-oriented domestic policies in host countries, and “support the development of international law standards consistent with these objectives.”⁶⁶ The U.S. model BIT provides six “core benefits” to protect investors and liberalize investment.⁶⁷ These benefits are: a minimum standard of treatment for investors and their investments; limits on expropriation; the free transfer of investment-related funds; limits on performance requirements; the right of an investor to choose its management; and the right to arbitration of investor-state disputes.⁶⁸

The provisions related to investor-state arbitration, standard of treatment, and expropriation provide a common framework for

62. Karen Halverson Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT'L L. & COM. REG. 151, 156–57 (2012).

63. The International Committee of the Red Cross defines customary international law as “made up of rules that come from ‘a general practice accepted as law’ and that exist independent of treaty law.” *Customary International Humanitarian Law*, INT'L COMMITTEE RED CROSS (Oct. 29, 2010) <https://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm>.

64. Cross, *supra* note 62, at 157–58.

65. See C. O'Neal Taylor, *Of Free Trade Agreements and Models*, 19 IND. INT'L & COMP. L. REV. 569, 595–96 (2009) (noting the relative advantages of the American model FTA).

66. *Bilateral Investment Treaties*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties> (last visited Feb. 26, 2015).

67. *Id.*

68. *Id.*

analyzing the differences between U.S. and Chinese investment policy. They are explained briefly:

- *Investor-state arbitration*: Investors have the right to have a dispute with the host government heard before an international arbitration tribunal without first having to use the host country's domestic courts.⁶⁹ This provision is unique under international law as it provides a private right of action for investors against a host state.⁷⁰ Most other treaties allow only governments to bring a case against another government.⁷¹ Because of this private right of action, investor-state arbitration is often considered the most important investor protection in a BIT.⁷²
- *Standard of treatment*: Both investors and their investments receive “the better of national treatment or most-favored-nation treatment for the full life-cycle of investment—from establishment or acquisition, through management, operation, and expansion, to disposition.”⁷³ National treatment requires that a country treat a foreign investor and its investment the same as it treats domestic investors.⁷⁴ Most-favored-nation treatment requires that a country treat a foreign investor the same as it treats other foreign investors.⁷⁵
- *Expropriation*: Generally, expropriations are allowed only if they fulfill a public purpose, are non-discriminatory, there is “prompt, adequate, and effective compensation,”⁷⁶

69. *Id.*; U.S. Dep't of State, U.S. Model Bilateral Investment Treaty, at art. 24 (2004), available at <http://www.state.gov/documents/organization/117601.pdf> [hereinafter 2004 Model BIT].

70. Cross, *supra* note 62, at 160.

71. SIMON LESTER, CATO, LIBERALIZATION OR LITIGATION? TIME TO RETHINK THE INTERNATIONAL INVESTMENT REGIME 4 (2013).

72. Cross, *supra* note 62, at 160.

73. OFF. U.S. TRADE REPRESENTATIVE, *supra* note 66.

74. SICE DICTIONARY OF TRADE TERMS, http://www.sice.oas.org/dictionary/IN_e.asp (last visited Feb. 27, 2015).

75. *Id.*

76. OFF. U.S. TRADE REPRESENTATIVE, *supra* note 66; 2004 Model BIT, *supra* note 69, art. 6.

and they are done in accordance with due process of law and minimum treatment standards.⁷⁷

While the United States has negotiated almost fifty BITs since the 1980s,⁷⁸ since 1994, when NAFTA became law, it has incorporated BITs into FTAs. Following NAFTA, the United States made some fundamental changes to its model investment treaty in its trade agreement with Chile (2004) and further changes to the model were reflected in the trade agreements with Peru (2009) and Colombia (2012). A discussion of the evolution of the investment provisions in these trade agreements beginning with NAFTA provides a basis for comparing the evolution of Chinese investment treaties in the region.

B. NAFTA

Mexico depends on the United States as a market for its exports as well as a source of FDI, and NAFTA was conceived as a means to further integrate the North American economies.⁷⁹ Notably, NAFTA was the first FTA to include comprehensive investment protections, and its Chapter 11 on investments was based on the U.S. model BIT.⁸⁰

77. *Id.*

78. *United States Bilateral Investment Treaties*, U.S. DEPT STATE, <http://www.state.gov/e/eb/afd/bit/117402.htm> (last visited Feb. 26, 2015).

79. Roberto Hernández Hernández, *Economic Liberalization and Trade Relations Between Mexico and China*, 41 J. CURRENT CHINESE AFF. 50, 62–63 (2012). The U.S. and Mexican economies are highly integrated through the maquiladora program under which Mexican companies temporarily imports goods for assembly or manufacture and then export. The companies receive preferential treatment for duties and taxes. See Gerard Morales et al., *An Overview of the Maquiladora Program*, U.S. DEPT OF LABOR, <https://web.archive.org/web/20131220084235/http://www.dol.gov/ilab/media/reports/nao/maquilad.htm> (last visited Feb. 25, 2015) (accessed by searching for Maquiladora Program in the Internet Archive index).

80. See NAFTA, *supra* note 19, art. 1102–03, 1105–07, 1109–10. See also Taylor, *supra* note 65, at 591–92; Andrew P. Tuck, *The “Fair and Equitable Treatment” Standard Pursuant to the Investment Provisions of the U.S. Free Trade Agreements with Peru, Colombia and Panama*, 16 L. & BUS. REV. AM. 385, 387–89 (2010); *Bilateral Investment Treaties and Related Agreements*, U.S. DEPT STATE, <http://www.state.gov/e/eb/afd/bit/index.htm> (last visited Feb. 26, 2015); Kristen Bondietti, *Inconsistencies in Treatment of Foreign Investment in Trade Agreements 1* (Australia’s Open Inv. Future Paper 5, 2008), available at https://www.ipa.org.au/library/publication/1229471497_document_bondietti_paper.pdf.

NAFTA represented a significant advancement in the liberalization of international investment.⁸¹ Its definition of an investor as one “that seeks to make, is making or has made an investment” gives investors rights in the so-called “pre-establishment” phase in which investors are merely considering making an investment.⁸² This provision is noteworthy, as customary international law provides investment protection only after the investment has been established.⁸³ Most significantly, it gives an investor rights in this “pre-establishment” phase and takes away a host-state’s right to regulate what FDI it admits into its territory.⁸⁴

Despite this substantial increase in investment liberalization, the investor-state arbitration provision has proven to be the most controversial investor protection in NAFTA, and disputes have centered around its standard of treatment “in accordance with international law”⁸⁵ and its prohibition of expropriation whether “directly or indirectly.”⁸⁶

1. *Investor-State Arbitration*

NAFTA’s investor-state arbitration provision allows for arbitration using the ICSID Convention, the ICSID Arbitration Facility Rules, and the rules of the United Nations Commission on International Trade Law (“UNCITRAL”).⁸⁷ Before NAFTA, the United States used investor-state arbitration in BITs with “capital importing” countries, which are lesser-developed countries that depend on foreign investment for economic growth.

81. Bondietti, *supra* note 80, at 1.

82. NAFTA, *supra* note 19, art. 1139.

83. Axel Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China Following the Global Trend Towards Comprehensive Agreements?* 5 (German Dev. Inst. Discussion Paper 7, 2013).

84. *Id.*

85. NAFTA, *supra* note 19, art. 1105; *see infra* notes 90–101 and accompanying text (discussing cases that considered the “in accordance with international law” standard of treatment).

86. NAFTA, *supra* note 19, art. 1110(1); *see infra* notes 102–11 and accompanying text (discussing cases that considered the prohibition on direct or indirect expropriation).

87. *See* NAFTA, *supra* note 19, art. 1115–38 (allowing disputes to be submitted under the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules); Cross, *supra* note 62, at 160.

With NAFTA, however, the United States now had an investor-state arbitration provision with a “capital exporting” and developed country in Canada.⁸⁸ Since its inception, the majority of NAFTA disputes have been between the United States and Canada, and Canadian investment disputes against the United States made the United States a host-nation respondent in investor-state arbitration for the first time.⁸⁹

2. *Standard of Treatment*

NAFTA’s Article 1104 on the standard of treatment states that investors and investments receive the better of national treatment under Article 1102 or the most-favored-nation treatment under Article 1103.⁹⁰ Articles 1102 and 1103 also include the phrase “in like circumstances,” which arbitral tribunals have interpreted as a limit to the application of these clauses.⁹¹ Article 1105 states that the minimum standard of treatment shall be “in accordance with international law, including fair and equitable treatment and full protection and security.”⁹²

The interpretation of the “fair and equitable treatment” standard of Article 1105 led to several major investment disputes.⁹³ NAFTA does not define “fair and equitable treatment,” and this ambiguity led to disagreements about the scope and definition of the term “international law.”⁹⁴ Some interpreted

88. Tuck, *supra* note 80, at 388.

89. *Id.*

90. NAFTA, *supra* note 19, art. 1102–04.

91. *Id.* art. 1102(1)–(3), 1103(1)–(2); see Berger, *supra* note 83, at 19 (explaining that the trend of including the phrase “in like circumstances” was started by the NAFTA countries to limit the application of the two clauses).

92. NAFTA, *supra* note 19, art. 1105(1).

93. *Id.* (“Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”); see Tuck, *supra* note 80, at 389 (stating that after a series of arbitral decisions, the scope of “fair and equitable treatment” remains undetermined).

94. Tuck, *supra* note 80, at 389; Cross, *supra* note 62, at 159. Some arbitral tribunals interpreted the term “international law” to be broader in scope than “customary international law,” with “customary international law” as the minimum of the fair and equitable treatment standard and Article 1105 setting a higher standard of treatment. Tuck, *supra* note 80, at 389; Cross, *supra* note 62, at 159. However, the Canadian Statement on Implementation of NAFTA stated that Article 1105(1) provides for minimum

the term “international law” broadly to require only that foreign investors show that any treatment under dispute was in violation of a treaty or other international agreement, while others interpreted it as the narrower customary international law, which excludes treaties and other agreements.⁹⁵

NAFTA Chapter 11 arbitral tribunals interpreted the “fair and equitable treatment” standard in several cases that turned on this interpretation of customary international law.⁹⁶ Inconsistent interpretations from these cases, however, led the NAFTA Free Trade Commission to issue a Chapter 11 interpretation of Article 1105 that narrowed investor protection and the scope of “fair and equitable treatment” by stating that customary international law was the minimum standard for “fair and equitable treatment” and “full protection and security.”⁹⁷ In keeping with this narrower scope, the interpretation also stated that a breach of another NAFTA provision or another international agreement is not necessarily a breach of Article 1105.⁹⁸

While inconsistent arbitral interpretations led the Free Trade Commission to issue an interpretation, the cases of

treatment “based on long-standing principles of customary international law.” Tuck, *supra* note 80, at 389.

95. Tuck, *supra* note 80, at 389.

96. See *S.D. Myers, Inc. v. Canada*, 40 I.L.M. 1408, 1422 (NAFTA Arb. Trib. 2001) (interpreting fair and equitable treatment to include the requirements of due process, economic rights, obligations of good faith, and natural justice); *Pope & Talbot, Inc. v. Canada*, 41 I.L.M. 1347, 1357 (NAFTA Arb. Trib. 2002) (interpreting the fair and equitable treatment standard to be independent of the minimum standard of treatment that is required by international law); *Mondev Int’l Ltd. v. United States*, 42 I.L.M. 85, 100 (NAFTA Arb. Trib. 2003) (interpreting the fair and equitable treatment standard as prohibiting a provision in a receivership giving local shareholders preference to shareholders from other NAFTA states); *Glamis Gold Ltd. v. United States*, 48 I.L.M. 1038, 1060 (NAFTA Arb. Trib. 2009) (“The Tribunal therefore holds that there is an obligation of each of the NAFTA State Parties inherent in the fair and equitable treatment standard of Article 1105 that they do not treat investors of another State in a manifestly arbitrary manner.”).

97. Tuck, *supra* note 80, at 393.

98. *Id.* at 393–94 (stating that this provision was written in response to the holding in *S.D. Myers*); see also Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT’L L. & POL’Y 157, 187–88 (2005) (discussing how being named as the respondent in Chapter 11 cases prompted the United States to clarify that the “fair and equitable treatment” is the international minimum standard under customary international law).

*Methanex v. United States*⁹⁹ and *Loewen v. United States*,¹⁰⁰ both of which directly challenged U.S. domestic laws and judicial procedures, had a great effect on future U.S. investment policy. While the United States prevailed in both cases, the negative U.S. reaction to them led to limits on investor protection in subsequent treaties.¹⁰¹

3. Expropriation

NAFTA Article 1110 prohibits treaty parties from “directly or indirectly” nationalizing or expropriating an investment or taking “a measure tantamount to nationalization or expropriation of such an investment.”¹⁰² While this provision includes exceptions when the expropriation is non-discriminatory, for a public purpose, and with due process and compensation, the idea that a regulation that reduces the value of investment results in “indirect expropriation” has proven controversial and led to a debate over the definition of the term.¹⁰³

The cases of *Metalclad v. United Mexican States*,¹⁰⁴ *Pope & Talbot v. Canada*,¹⁰⁵ and *S.D. Myers v. Canada*¹⁰⁶ provided some

99. See generally *Methanex Corp. v. United States*, 44 I.L.M. 1345 (2005) (describing a case in which a Canadian producer and marketer of methanol alleged that California’s ban of methyl tertiary butyl ether (MTBE) for public health reasons was “unfair and inequitable treatment” that was intentionally discriminatory to foreign investors and was “tantamount to expropriation”).

100. See generally *Loewen Group, Inc. v. United States*, 42 I.L.M. 811 (2003) (describing a case in which a Canadian funeral homes operator brought a claim against the United States after alleging that a Mississippi state court trial was intentionally prejudiced).

101. In *Methanex v. United States*, the tribunal applied the Free Trade Commission’s narrow interpretation of “fair and equitable treatment” in holding that the ban was a permissible regulation that did not violate Article 1105. Tuck, *supra* note 80, at 400. In *Loewen v. United States*, the tribunal noted that the Mississippi court decision violated the “fair and equitable treatment” standard but stated that Loewen must exhaust local legal remedies before a NAFTA Chapter 11 tribunal can find a violation of international law. Tuck, *supra* note 80, at 401–02.

102. NAFTA, *supra* note 19, art. 1110(1).

103. *Id.* art. 1110(1)(a)–(d); Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STAN. ENVTL. L.J. 3, 40 (2004).

104. *Metalclad v. United Mexican States* involved a controversy over federal and municipal permitting for COTERIN, the Mexican subsidiary of Metalclad, a U.S. corporation, to build and operate a hazardous waste transfer station and landfill. Porterfield, *supra* note 103, at 45–47. The tribunal held that a refusal to approve a

guidance on the definition of indirect expropriation. However, there remained confusion as to the extent that the value of an investment must be diminished to constitute this type of expropriation.¹⁰⁷ The tribunal in *S.D. Myers* clarified the ambiguous term “tantamount to expropriation” and found that “tantamount” meant “equivalent,” which required the arbitral tribunal to go beyond “technical or facial considerations” to consider “the real interests involved and the purpose and effect of the government measure.”¹⁰⁸

Following these arbitral decisions were concerns in the United States that investor-state arbitration under NAFTA would be used to challenge regulatory actions related to public health and the environment as well as decisions on expropriation that do not meet the standard of the Fifth Amendment of the U.S.

construction permit resulted in indirect expropriation of Metalclad’s investment in COTERIN. The “investment” that was expropriated was Metalclad’s interest in operating the hazardous waste facility on the property. *Id.* at 47. See generally *Metalclad v. United Mexican States*, Case No. ARB(AF)/97/1, Award (NAFTA Arb. Trib. 2000).

105. In *Pope & Talbot v. Canada*, a U.S. corporation with a Canadian subsidiary claimed that Canada’s agreement to limit the export of softwood lumber into the United States expropriated its investment under Article 1110 by “depriv[ing] the Investment of its ordinary ability to alienate its product to its traditional and natural market.” Porterfield, *supra* note 103, at 48 (discussing *Pope & Talbot*, 41 I.L.M 1347 and quoting *Pope & Talbot, Inc. v. Canada*, Interim Award by the United Nations Commission on International Trade Law, para. 81 (UNCITRAL/NAFTA Arb. Trib.) (June 26, 2000)). The tribunal rejected the expropriation claim but noted that the company’s “access to the U.S. market is a property interest subject to protection under Article 1110.” *Id.* at 48–49.

106. In *S.D. Myers v. Canada*, a U.S. corporation claimed that Canada’s temporary ban on PCBs exports expropriated its investment in Canada. Porterfield, *supra* note 103, at 49 (discussing *S.D. Myers v. Canada*, Partial Award by the United Nations Commission on International Trade Law, paras. 93, 279–88 (UNCITRAL/NAFTA Arb. Trib.), Doc. 742416:01 (Nov. 13, 2000) [hereinafter Partial Award]). The tribunal held that while the ban violated national treatment and minimum treatment standards under NAFTA, it was not expropriation. *Id.* at 49–50.

107. Porterfield, *supra* note 103, at 59–60. The *Pope & Talbot* tribunal caused confusion as to whether a regulatory action must destroy the entire value of an investment before being considered expropriation or whether it must cause only “substantial deprivation.” Some have read the *Metalclad* and *Pope & Talbot* tribunal decisions as an interpretation that regulatory measures that have the effect of decreasing the value of an asset may entitle an investor to compensation. *Id.* at 59–60.

108. Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 86 (2002).

Constitution.¹⁰⁹ Overall, these decisions were taken to mean that foreign investors in the United States had greater substantive and procedural rights under NAFTA than under U.S. law.¹¹⁰ In response to this interpretation of the effect of these decisions, drafters of the Bipartisan Trade Promotion Authority (TPA) Act of 2002 included in its principal negotiating objectives for the United States a statement specifically denying greater rights for foreign investors in the United States.¹¹¹

C. U.S.-Chile Free Trade Agreement

Although Chile was invited to apply for NAFTA membership in 1994, formal negotiations for a free trade agreement did not begin until 2002, and the principal negotiation objectives of the TPA Act of 2002 influenced the agreement's investment chapter.¹¹² These negotiating objectives sought to limit NAFTA-style investor protections by developing standards for expropriation "consistent with United States legal principles and practice"¹¹³ as well as by making investor-state arbitration procedures more transparent.¹¹⁴ As a result, the investment provisions in the U.S.-Chile FTA, which went into effect in 2004, builds on those in NAFTA but clarifies such provisions as

109. Tuck, *supra* note 80, at 398.

110. Porterfield, *supra* note 103, at 44.

111. Bipartisan Trade Promoting Act of 2002, 19 U.S.C. § 3802 (2012) (stating that one of the principal negotiating objectives is "ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States and to secure for investors important rights comparable to those that would be available under United States legal principles and practice"); Porterfield, *supra* note 103, at 41, 44.

112. Biggs, *supra* note 58, at 73; Cross, *supra* note 62, at 184–85.

113. 19 U.S.C. § 3802(3)(D) (2012).

114. Cross, *supra* note 62, at 183–84. The Trade Promotion Authority Act states that "[r]ecognizing that United States law on the whole provides a high level of protection for investment, consistent with or greater than the level required by international law, the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice . . ." 19 U.S.C. § 3802(3) (2012); Tuck, *supra* note 80, at 402–03, 406.

investor-state arbitration, the minimum standard of treatment, and expropriation.¹¹⁵

1. *Investor-State Arbitration*

The U.S.-Chile FTA makes some significant changes to the investor-state arbitration system that began under NAFTA. Notably, the FTA parties can bring claims for breaches of an investment authorization, an investment agreement, or under Annex 10-F, which covers Chile's Foreign Investment Statute Decree Law 600, a statute designed to provide legal certainty to foreign investors in Chile.¹¹⁶ The investor-state arbitration provision also expands the possible dispute settlement mechanisms from the limited number set forth in NAFTA by adding "any other arbitration institution or under any other arbitration rules."¹¹⁷ In a significant change from earlier arbitration provisions, the FTA also gives the arbitral tribunal the authority "to accept and consider amicus curiae submissions from a person or entity that is not a disputing party."¹¹⁸ Adding another feature not found in NAFTA, the U.S.-Chile FTA allows for the possibility of appealing tribunal decisions.¹¹⁹ It also adds an article on transparency, which requires the respondent to make public the documents of the proceedings and requires the proceedings to be held in public.¹²⁰ This transparency requirement was first iterated in the negotiating objectives of the 2002 TPA Act.¹²¹

115. Biggs, *supra* note 58, at 85; Press Release, Office of the U.S. Trade Representative, U.S. and Chile to Sign Free Trade Agreement in Miami (May 2003), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2003/may/us-and-chile-sign-free-trade-agreement-miami>.

116. Free Trade Agreement, U.S.-Chile, art. 10.15 (1)(b)(i), June 6, 2003 [hereinafter U.S.-Chile FTA]; see also Biggs, *supra* note 58, at 83; *Chile Legal Framework*, LATIN AM. TRADE & INVESTMENT ASS'N, <http://www.latia.org./index.php/chile-legal-framework> (last visited Feb. 28, 2014).

117. Compare U.S.-Chile FTA, *supra* note 116, art. 10.15 (5)(d), with NAFTA, *supra* note 19, art. 1120(1).

118. U.S.-Chile FTA, *supra* note 116, art. 10.19(3); Biggs, *supra* note 58, at 84.

119. U.S.-Chile FTA, *supra* note 116, art. 10.19(10).

120. *Id.* art. 10.20(1)-(2).

121. 19 U.S.C. § 3802(3) (2012).

2. *Standard of Treatment*

Article 4 of the U.S.-Chile FTA incorporated as the minimum standard of treatment the customary international law standard from the NAFTA Free Trade Commission's interpretation of NAFTA Article 1105.¹²² Importantly, the agreement further clarifies customary international law in Annex 10-A as law that results "from a general and consistent practice of States that they follow from a sense of legal obligation."¹²³

3. *Expropriation*

While, like NAFTA, the U.S.-Chile FTA permits expropriation for public purposes and with appropriate compensation,¹²⁴ the agreement builds on NAFTA and clarifies the terms "expropriation" and "indirect expropriation" through Annex 10-D.¹²⁵ Annex 10-D(1) narrows investor protections by stating that Article 10.9(1) "is intended to reflect customary international law" regarding expropriation.¹²⁶ The annex also defines "indirect expropriation" as actions that have an "effect equivalent to direct expropriation without formal transfer of title or outright seizure."¹²⁷ The use of "equivalent" clarifies the definition compared to the use of the more ambiguous term "tantamount" in NAFTA.¹²⁸ The definition of "indirect expropriation" also requires a case-by-case inquiry that

122. U.S.-Chile FTA, *supra* note 116, art. 10.4(1) (stating that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security").

123. "Customary international law" generally and as specifically referenced in Article 10.4 and 10.9 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.4, 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." *Id.* Annex 10-A.

124. *Id.* art. 10.9.

125. *Id.* Annex 10-D; NAFTA, *supra* note 19, art. 1110.

126. U.S.-Chile FTA, *supra* note 116, Annex 10-D(1).

127. *Id.* Annex 10-D(4).

128. Warren H. Maruyama & Charles B. Rosenberg, *The Investment Chapter of the U.S.-Colombia FTA: New Protections for U.S. Investors*, 11 J. WORLD INVESTMENT & TRADE 409, 416 (2010).

considers several factors from the U.S. Supreme Court decision in *Penn Central Transportation Co. v. City of New York*.¹²⁹

Reflecting the reaction against *Methanex v. United States*, Annex 10-D(4)(b) states that “[e]xcept in rare circumstances, nondiscriminatory regulatory actions” that are intended “to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation.”¹³⁰ The annex, however, does not define the “rare circumstances” in which nondiscriminatory regulatory actions would amount to indirect expropriation.¹³¹

D. 2004 U.S. Model BIT

The U.S. Trade Representative developed the investment chapter of the U.S.-Chile FTA with the expectation that it would become a model for future BITs.¹³² The 2004 Model BIT embodies the evolution of U.S. investment policy since NAFTA, including the negotiation objectives of the 2002 TPA Act and the U.S.-Chile FTA.¹³³ Notably, the preamble to the 2004 Model BIT “[r]ecogniz[es] the importance” of enforcing investor rights “under national law as well as through international arbitration”¹³⁴ but in a way that protects “health, safety, and the environment, and the promotion of internationally recognized labor rights.”¹³⁵ This change demonstrates how investor protection has been curtailed in some areas related to the public interest.¹³⁶

129. *Id.*; U.S.-Chile FTA, *supra* note 116, Annex 10-B (listing the factors as: “(i) the economic impact of the government action, (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations, and (iii) the character of the government action”); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, Annex 10-B(3)(a)(i)–(iii) [hereinafter U.S.-Peru FTA]; Free Trade Agreement, U.S.-Colom., Nov. 22, 2006, Annex 10-B(3)(a)(i)–(iii) [hereinafter U.S.-Colombia FTA].

130. U.S.-Chile FTA, *supra* note 116, Annex 10-D(4)(b); Biggs, *supra* note 58, at 78.

131. Biggs, *supra* note 58, at 78.

132. Cross, *supra* note 62, at 186. The investment chapter in the U.S.-Singapore FTA also influenced the 2004 Model BIT. *Id.*

133. *Id.* at 185, 193.

134. 2004 Model BIT, *supra* note 69, pmbl.

135. *Id.*; Cross, *supra* note 62, at 190.

136. Cross, *supra* note 62, at 190–91.

Article 5 of the 2004 Model BIT also adopts customary international law for the “fair and equitable treatment” standard from Article 10.4 of the U.S.-Chile FTA, and Article 29 codifies the goals of the 2002 TPA Act to improve transparency in investor-state disputes.¹³⁷ The Model BIT, like the U.S.-Chile FTA, also limits indirect expropriation by requiring case-by-case analysis that weighs the *Penn Central* factors¹³⁸ and excluding from challenge regulation “to protect legitimate public welfare objectives, such as public health, safety, and the environment.”¹³⁹

E. U.S. FTAs with Peru and Colombia

U.S. FTA and BIT practice continued to evolve with the negotiation of FTAs with Peru and Colombia in 2006.¹⁴⁰ The basic text of the agreements came from NAFTA and included the subsequent modifications. The 2007 Bipartisan Trade Deal mandated changes during congressional consideration of the FTAs by requiring that the preamble of the Peru and Colombia FTAs include a statement that foreign investors do not receive “greater substantive rights with respect to investment protections than domestic investors under domestic law.”¹⁴¹ These changes reflected the ongoing concerns from the NAFTA cases on indirect expropriation.¹⁴²

The investment provisions of the Peru and Colombia FTAs are nearly identical. For example, Article 10.5(1) of both agreements adopts the customary international law standard of the minimum standard of treatment as seen in the U.S.-Chile FTA and that originated with the NAFTA Free Trade Commission’s interpretation of NAFTA Article 1105.¹⁴³ The agreements also

137. *Id.* at 192. Article 29(1) mandates publication of all notices, pleadings, briefs, amicus briefs, and other submissions and Article 29(2) requires the tribunal to conduct hearings open to the public. 2004 Model BIT, *supra* note 69, art. 29(1). Article 18 allows exceptions to this requirement for information a party determines is contrary to its essential security if disclosed. *Id.*; *see also* Cross, *supra* note 62, at 193.

138. *See Penn Cent. Transp. Co.*, 438 U.S. at 124.

139. 2004 Model BIT, *supra* note 69, Annex B; Cross, *supra* note 62, at 191.

140. *See generally* U.S.-Peru FTA, *supra* note 129; U.S.-Colom. FTA, *supra* note 129.

141. U.S.-Peru FTA, *supra* note 129, pmbl.; U.S.-Colombia FTA, *supra* note 129, pmbl.; *see also* Tuck, *supra* note 80, at 385 n.2, 405–07.

142. Tuck, *supra* note 80, at 405–07.

143. U.S.-Peru FTA, *supra* note 129, art. 10.5(1); U.S.-Colombia FTA, *supra* note

include the Annex 10-A on customary international law from the U.S.-Chile FTA, and Annex 10-B of the FTAs include the same clarification on expropriation that originated in Annex 10-D of the U.S.-Chile FTA.¹⁴⁴ The uniform adoption of these provisions demonstrates how investment protections have been refined in some areas in response to NAFTA arbitration.¹⁴⁵

IV. CHINESE INVESTMENT TREATIES WITH PACIFIC ALLIANCE COUNTRIES

China's investment policy has evolved with the country's economic development. During the 1980s and 1990s, China received more FDI than it invested in other countries, making it a capital-importing country.¹⁴⁶ It resisted investor-state dispute settlement provisions during this time, as it would most likely have been a respondent in a dispute.¹⁴⁷ China's BITs through the 1980s and 1990s either did not allow for arbitration of investor-state disputes or limited arbitration to disputes "involving the amount of compensation for expropriation."¹⁴⁸ It maintained this policy even after it signed the ICSID Convention in 1990.¹⁴⁹ Limiting the scope of arbitration was designed to preserve China's sovereignty and minimize legal actions.¹⁵⁰

As China became a significant capital exporter and developed its strategy to promote FDI abroad, its BIT policy began to include standard investor protections, such as fair and equitable treatment, most-favored-nation, and national treatment, as well

129, art. 10.5(1); U.S.-Chile FTA, *supra* note 116, art. 10.4(1)–(2); *see also* Tuck, *supra* note 80, at 393, 397.

144. U.S.-Peru FTA, *supra* note 129, Annex 10-A, B; U.S.-Colombia FTA, *supra* note 129, Annex 10-A, B.; *see also* Tuck, *supra* note 80, at 397.

145. Tuck, *supra* note 80, at 385.

146. Cross, *supra* note 62, at 213–14; Berger, *supra* note 83, at 8.

147. Berger, *supra* note 83, at 8; Cross, *supra* note 62, at 213.

148. Cross, *supra* note 62 at 213; *see also* Berger, *supra* note 83, at 7 (asserting that the first generation of Chinese BITs had ISDS only concerning the amount of compensation for expropriation).

149. Ko-Yung Tung & Rafael Cox-Alomar, *The New Generation of China BITs in Light of Tza Yap Shum v. Republic of Peru*, 17 AM. REV. INT'L ARB. 461, 463–64 (2006); Cross, *supra* note 62, at 213.

150. Berger, *supra* note 83, at 8.

as broader dispute settlement clauses.¹⁵¹ Over time, China also began to use less restrictive national treatment standards.¹⁵² Prior to 2000, its BITs with developing countries did not include national treatment provisions at all.¹⁵³ After 2000, however, China began to refer to national treatment in its BITs, as the concept became increasingly accepted in Chinese law.¹⁵⁴

In contrast to the U.S. model BIT approach, China is flexible in its approach to investment treaty negotiations, and it often adopts aspects of the model treaties of its counterparts.¹⁵⁵ As a result of this strategy, China has adopted from its Latin American counterparts some of the investor provisions that developed under NAFTA.¹⁵⁶ To analyze the different outcomes that this negotiating strategy produces, this section will discuss early Chinese investment agreements with Chile and Peru and the development of later agreements with Mexico, Peru, Colombia, and Chile.¹⁵⁷

A. *China's 1995 Investment Agreements with Chile and Peru*

China signed BITs with Chile and Peru in 1994 and both went into effect in 1995.¹⁵⁸ These BITs are nearly identical and should be discussed together. They also provide a basis from which to analyze developments in subsequent Chinese investment treaties.

Article 3(1) of both the Peru-China BIT and the Chile-China BIT states that investments “shall be accorded fair and equitable treatment.”¹⁵⁹ While neither of China's 1995 BITs with Chile and

151. *See id.*; *see also* Cross, *supra* note 62, at 214 (explaining how one of the factors behind China's willingness to liberalize its BIT regime was a new policy promoting OFDI).

152. Berger, *supra* note 83, at 9.

153. *Id.*

154. *Id.* at 9–10.

155. *Id.* at 2, 11–12.

156. *See id.* at 2 (arguing that China adopts partner countries' approaches).

157. *Full List of Bilateral Investment Agreements Concluded, 1 June 2013*, UN CONF. ON TRADE & DEV., http://unctad.org/sections/dite_pccb/docs/bits_china.pdf (last visited Feb. 28, 2015) [hereinafter *China's Bilateral Investment Agreements as of 2013*].

158. *Id.*

159. Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments, Peru-China, art. 3(1), Sept. 6, 1994 [hereinafter

Peru include the term “national treatment,” they provide for most-favored-nation treatment.¹⁶⁰ In an example of a most-favored-nation clause found in China’s older BITs, Article 3(2) of both treaties states that investor protection “shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State.”¹⁶¹ Additionally, the agreements limit this treatment to later stages in which an investment has already been established.¹⁶²

The expropriation provisions in Article 4 of both the Chile and Peru BITs reflect U.S. standards by limiting expropriation to cases in which it is done for the “public or national interest,” with domestic legal procedure, in a non-discriminatory manner, and with compensation for the investor.¹⁶³

The Chile and Peru BITs, like older Chinese BITs, have a limited investor-state dispute mechanism.¹⁶⁴ The investor-state dispute provision does not provide compulsory arbitration but requires that the parties first try to settle a dispute through negotiations and allows either party to submit the dispute to a host-state court if the parties do not settle the dispute within six months.¹⁶⁵ Importantly, the treaty allows compulsory international arbitration at the ICSID only for determining damages from

Peru-China BIT]; Agreement between the Government of the Republic of Chile and the Government of the People’s Republic of China Concerning the Encouragement and the Reciprocal Protection of Investment, Chile-China, art. 3(1), Mar. 23, 1994, [hereinafter Chile-China BIT].

160. See Berger, *supra* note 83, at 8 (stating that most Chinese BITs throughout the 1980s and 1990s guaranteed MFN treatment only).

161. Peru-China BIT, *supra* note 159, art. 3(2); Chile-China BIT, *supra* note 159, art. 3(2); see also Tung & Cox-Alomar, *supra* note 149, at 463 (stating that most Chinese BITs contain most-favored-nation clauses similar to the one in Article 3(2) of the Peru-China BIT).

162. Peru-China BIT, *supra* note 159; Chile-China BIT, *supra* note 159.

163. Compare Chile-China BIT, *supra* note 159, art. 4, and Peru-China BIT, *supra* note 159, art. 4, with 2004 Model BIT, *supra* note 69. The Chile-China BIT and the Peru-China BIT differ slightly in that the Chile-China BIT includes the phrase “for the public or national interest” while the Peru-China BIT states “for the public interest.” Compare Chile-China BIT, *supra* note 159, art. 4, with Peru-China BIT, *supra* note 159, art. 4.

164. Tung & Cox-Alomar, *supra* note 149, at 464. The investor-state arbitration provision appears in Article 8 of the Peru-China BIT and Article 9 of the Chile-China. Peru-China BIT, *supra* note 159, art. 8; Chile-China BIT, *supra* note 159, art. 9.

165. Peru-China BIT, *supra* note 159, art. 8(1)–(2); Chile-China BIT, *supra* note 159, art. 9(1)–(2).

expropriation claims.¹⁶⁶ Both treaties allow “[a]ny dispute concerning other matters”¹⁶⁷ to be submitted to international arbitration if both parties agree.¹⁶⁸ This gives the host-state a veto-like power over arbitration for disputes other than for the amount of damages, and, as one scholar wrote, reduces arbitration to “a mere symbolic nature.”¹⁶⁹

The case of *Tza Yap Shum v. Republic of Peru*, the first investment arbitration case under a Chinese BIT, demonstrates the controversy over the limited scope of the investor-state dispute resolution provision and provides an example of an interpretation of the standard of treatment and expropriation clauses under an older Chinese BIT.¹⁷⁰ In that case, a Chinese investor with a 90% share in a Peruvian fishmeal exporter requested arbitration claiming that audit determinations and interim measures by Peru’s tax authority were an unjustified indirect expropriation of his investment and a violation of the Peru-China BIT.¹⁷¹ Peru responded that the BIT limits investor-state arbitration to disputes over the amount of compensation for expropriation and that the arbitral tribunal did not have jurisdiction over the claim.¹⁷² Peru argued that its domestic courts have jurisdiction to determine if expropriation had occurred.¹⁷³ The arbitral tribunal, however, interpreted the scope of the dispute settlement provision as including not only the

166. Peru-China BIT, *supra* note 159, art. 8(3); Chile-China BIT, *supra* note 159, art. 9(3); Tung & Cox-Alomar, *supra* note 149, at 465.

167. Peru-China BIT, *supra* note 159, art. 8(3); Chile-China BIT, *supra* note 159, art. 9(3).

168. Peru-China BIT, *supra* note 159, art. 8(3); Chile-China BIT, *supra* note 159, art. 9(3). One difference is that the Peru-China BIT allows such disputes to be submitted to ICSID arbitration only if both parties agree, while the Chile-China BIT states that the dispute may be submitted to “an ad-hoc arbitral tribunal.” Peru-China BIT, *supra* note 159, art. 8(3); Chile-China BIT, *supra* note 159, art. 9(3). The Chile-China BIT also contains several provisions discussing how the ad-hoc arbitral tribunals should operate. Chile-China BIT, *supra* note 159, art. 9(4)–(10).

169. Berger, *supra* note 83, at 8; Tung & Cox-Alomar, *supra* note 149, at 465.

170. Tung & Cox-Alomar, *supra* note 149, at 465.

171. *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Summary of Award, 3–4 (July 7, 2011); Cross, *supra* note 62, at 214.

172. Cross, *supra* note 62, at 214–15.

173. Gordon Smith, *Chinese Bilateral Investment Treaties: Restrictions on International Arbitration*, 76 ARB. 58, 62 (2010).

determination of the amount of compensation for expropriation but also the determination as to whether an expropriation had occurred.¹⁷⁴ The tribunal also found that the Peru tax authority's interim measures against the company interfered with its operations and were applied in an arbitrary manner that constituted indirect expropriation.¹⁷⁵

The Chinese investor tried to gain the benefit of Peru's other investment treaties by arguing that because Peru had signed other BITs that do not limit the jurisdiction of the arbitral tribunal, he should receive the benefit of the BIT's most-favored-nation provision under Article 3(2) and thereby the broader scope of its dispute settlement provision.¹⁷⁶ Nonetheless, the tribunal interpreted the investor-state clause as requiring that the dispute simply include the amount of compensation and not that it involve determining the amount of compensation only.¹⁷⁷ The tribunal, however, limited the scope of the most-favored-nation clause by stating that it does not "override" the investor-state arbitration clause.¹⁷⁸ The tribunal was also concerned that Peru's interpretation that a domestic court must decide if expropriation had occurred would effectively mean that an investor would never have access to arbitration.¹⁷⁹ This decision was criticized for not interpreting the most-favored-nation clause as protecting against discrimination among the parties to the treaty and for differentiating its application between general and specific provisions of the treaty.¹⁸⁰

B. The "NAFTA-isation" of China's Investment Agreements

China's investment policy in Latin America continued into the 2000s with BITs with Mexico and Colombia and FTAs with Peru

174. *Id.*

175. *Tza Yap Shum*, Summary of Award, *supra* note 171, at 5; Cross, *supra* note 62, at 215.

176. Cross, *supra* note 62, at 215 n.350.

177. Smith, *supra* note 173.

178. Cross, *supra* note 62, at 215.

179. Smith, *supra* note 173.

180. See, e.g., Andrew Newcombe, *Another Misapplication of MFN? Tza Yap Shum v. The Republic of Peru*, KLUWER ARB. BLOG (Oct. 21, 2009), <http://kluwerarbitrationblog.com/blog/2009/10/21/another-misapplication-of-mfn-tza-yap-shum-v-the-republic-of-peru> (asserting the criticism mentioned above).

and Chile that included investment provisions. In what some have called the “NAFTA-isation”¹⁸¹ of Chinese investment policy, China’s FTAs with investment provisions conformed to global trends, most notably the adoption of customary international law that arguably started with NAFTA.¹⁸²

1. *Mexico-China BIT (2008)*

China signed its BIT with Mexico in July 2008 and it went into effect in June 2009.¹⁸³ The BIT with Mexico, a NAFTA country, is significant in that China’s strategy of flexibility in negotiations with its counterpart countries resulted in its adoption of investment provisions similar to those in NAFTA.

The China-Mexico BIT includes a standard of treatment similar to that in China’s earlier BITs with Chile and Peru.¹⁸⁴ However, Article 3 also includes so-called “grandfathered” national treatment, as it prefaces the national treatment clause by stating that it applies “[w]ithout prejudice to its laws and regulations at the time the investment is made.”¹⁸⁵ This provides an example of the qualified national treatment standard that China has included in its BITs with developing countries that some scholars say limits it to a “best-efforts” clause.¹⁸⁶

However, the BIT also shows China’s increasing adoption of NAFTA standards.¹⁸⁷ The BIT used the term “in like circumstances,” a term first used in NAFTA, to narrow the scope of the most-favored-nation and national treatment clauses.¹⁸⁸ Article 5 also states that “fair and equitable treatment” and “full

181. Berger, *supra* note 83, at 2, 17.

182. *Id.* The China-Peru FTA followed the 2008 China-New Zealand FTA, which was China’s first agreement with comprehensive investor rights and referred to “commonly accepted rules of international law” in its fair and equitable treatment clause. *Id.* at 17–18.

183. *China’s Bilateral Investment Agreements as of 2013*, *supra* note 157.

184. See Agreement between the Government of the United Mexican States and the Government of the People’s Republic of China on the Promotion and Reciprocal Protection of Investments, Mex.-China, art. 3–5, July 11, 2008 [hereinafter Mexico-China BIT].

185. *Id.* art. 3(1).

186. Berger, *supra* note 83, at 9–10.

187. *Id.* at 19.

188. *Id.* at 10–11, 19; Mexico-China BIT, *supra* note 184, art. 3(1)–(2), 4(1)–(2); NAFTA, *supra* note 19, art. 1102(1)–(3), 1103(1)–(2).

protection and security” are provided “in accordance with international law.”¹⁸⁹ However, in a notable change from earlier BITs, the Mexico-China BIT invokes customary international law by referring to “the international law minimum standard of treatment of aliens as evidence of State practice and *opinio juris*.”¹⁹⁰ This is similar to the NAFTA Free Trade Commission’s interpretation of Article 1105, which stated that customary international law is the minimum standard and that “fair and equitable treatment” and “full protection and security” do not require a higher standard.¹⁹¹

The expropriation provision in Article 7 mirrors NAFTA in that expropriation is allowed only if it is for a public purpose, is non-discriminatory, is in accordance with due process, and provides investor compensation.¹⁹² Article 7 even uses the ambiguous phrase “tantamount to expropriation,” which was used in NAFTA and was replaced by “equivalent to expropriation” in subsequent treaties.¹⁹³

In what is perhaps the most significant change from China’s earlier BITs, Article 13 of the China-Mexico BIT provides a detailed description of investor-state arbitration.¹⁹⁴ While the earlier Chile and Peru BITs limited ICSID arbitration to the amount of compensation, the China-Mexico BIT allows for international arbitration for the breach of any investor protection in the treaty.¹⁹⁵

2. *China-Peru FTA (2010)*

The China-Peru FTA was signed in 2009¹⁹⁶ and went into force in 2010.¹⁹⁷ China’s 2009 FTA with Peru was its first Latin

189. Mexico-China BIT, *supra* note 184, art. 5(1).

190. *Id.* art. 5(2).

191. Tuck, *supra* note 80, at 393.

192. Mexico-China BIT, *supra* note 184, art. 7(1)–(2).

193. *Id.* art. 7(1)–(2). *See also* NAFTA, *supra* note 19, art. 1110(1) (using the term “tantamount”); Maruyama & Rosenberg, *supra* note 128.

194. Mexico-China BIT, *supra* note 184, art. 13.

195. *Compare* Chile-China BIT, *supra* note 159, art. 9(3), *and* Peru-China BIT, *supra* note 159, art. 8(3), *with* Mexico-China BIT, *supra* note 184, art. 13(1)–(2) (indicating that a claim can be submitted for arbitration under ICSID, UNCITRAL, or other arbitration rules to which the parties agree).

196. Free Trade Agreement, China-Peru, Apr. 28, 2009 [hereinafter China-Peru

American FTA that included an investment chapter, and the investment chapter is similar to the BIT with Mexico.¹⁹⁸ The expropriation provision is nearly identical to the earlier Peru-China BIT and the investor-state provision is largely the same as that in the Mexico-China BIT.¹⁹⁹ Adopting the standard first set in the Mexico-China BIT, its investor-state arbitration provision allows arbitration for any dispute.²⁰⁰

Similar to the BIT with Mexico, a grandfather clause limits national treatment, as Article 130 states that national treatment does not apply to existing non-conforming measures.²⁰¹ Like the Mexico-China BIT, Article 129 on national treatment and Article 131 on the most-favored-nation treatment also use the NAFTA term “in like circumstances” to narrow the scope of interpretation.²⁰² Article 131 is the same as the Mexico BIT except that it adds the term “establishment” in the list of covered investment activities.²⁰³ China resisted granting most-favored-nation treatment to the pre-establishment phase as seen in NAFTA.²⁰⁴ As a limit on investor-state arbitration, Article 131 does not allow most-favored-nation treatment to be applied in dispute settlement mechanisms.²⁰⁵

FTA].

197. *China-Peru FTA Entered into Force on March 1*, CHINA FTA NETWORK (Mar. 1, 2010, 1:02 PM), http://fta.mofcom.gov.cn/enarticle/enperu/enperunews/201003/2241_1.html.

198. *Compare* China-Peru FTA, *supra* note 196, ch. 10, *with* Mexico-China BIT, *supra* note 184 (evidencing that Peru is one of only four of China’s FTAs that include a comprehensive investment chapter). Pakistan, New Zealand, and ASEAN are the others. Berger, *supra* note 83, at 30.

199. Expropriation is allowed only for the “public interest,” with domestic legal procedure, nondiscriminatory, and with compensation for the investor. China-Peru FTA, *supra* note 196, art. 133. *Compare* Peru-China BIT, *supra* note 159, art. 4, *and* China-Peru FTA, *supra* note 196, art. 133, *with* Mexico-China BIT, *supra* note 184, art. 7(1)–(2).

200. China-Peru FTA, *supra* note 196, art. 138.

201. *Id.* art. 129–30; Berger, *supra* note 83, at 21.

202. Berger, *supra* note 83, at 10–11, 19. *Compare* China-Peru FTA, *supra* note 196, art. 129(1)–(2), art. 131(1)–(2), *and* Mexico-China BIT, *supra* note 184, art. 3(1)–(2), 4(1)–(2), *with* NAFTA, *supra* note 19, art. 1102(1)–(3), 1103(1)–(2).

203. Berger, *supra* note 83, at 11 n.21.

204. *Id.* at 27.

205. China-Peru FTA, *supra* note 196, art. 131 n.13.

China accepted as a basis for the negotiations Peru's model text, which included the term "customary international law" in the "fair and equitable treatment" and "full protection and security" provisions of Article 132.²⁰⁶ Article 132(2)(b) also limits the scope of the application of the minimum standard to customary international law by stating that "a breach of another provision of this Agreement or another international agreement" does not constitute a breach of the minimum standard of treatment.²⁰⁷

While China referred to "State practice and *opinio juris*" in its BIT with Mexico,²⁰⁸ the China-Peru FTA had a more explicit adoption of the concept and was the first Chinese treaty to include the term "customary international law."²⁰⁹ Reportedly, Chinese officials were reluctant to refer explicitly to customary international law in the fair and equitable treatment clause of the BIT with Mexico due to their unfamiliarity with the concept.²¹⁰ However, they became more willing to accept a direct reference to customary international law in the later FTA with Peru.²¹¹

3. *Colombia-China BIT (2012) and China-Chile FTA (2012)*

China signed its BIT with Colombia in November 2008 and it went into force in July 2013.²¹² It shares many of the same characteristics as the BIT with Mexico and the FTA with Peru regarding national treatment, most-favored-nation, and expropriation.²¹³

206. *Id.* art. 132; Berger, *supra* note 83, at 21.

207. China-Peru FTA, *supra* note 196, art. 132(2)(b); Berger, *supra* note 83, at 18–19.

208. Mexico-China BIT, *supra* note 184, art. 5(2)

209. Berger, *supra* note 83, at 19, 21; *see* China-Peru FTA, *supra* note 196, art. 132(1), (2)(a), (2)(c).

210. Berger, *supra* note 83, at 19 n.37.

211. *Id.*

212. *China's Bilateral Investment Agreements as of 2013*, *supra* note 157; Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the People's Republic of China, China-Colom., Nov. 22, 2008 [hereinafter China-Colombia BIT].

213. Berger, *supra* note 83, at 21. Article 3 on "treatment of investment" is based on Article 3 on national treatment and Article 4 on most-favored-nation in the China-Mexico BIT. *Compare* China-Colombia BIT, *supra* note 212, art. 3, *with* Mexico-China

The Colombia-China BIT in Article 2 continues China's inclusion of a minimum standard of treatment and China's growing acceptance of customary international law by stating that customary international law is the minimum standard of treatment for "fair and equitable treatment" and "full protection and security."²¹⁴ In addition, the investor-state arbitration provision under Article 9 is similar to the provision in the China-Peru FTA in that it allows arbitration for any dispute.²¹⁵ Notably, in what is likely a concession to Colombia, it extends the time required to attempt to settle a dispute before going to arbitration from six months to nine months.²¹⁶ This change increases the probability of settling the dispute outside of arbitration and gives the state an opportunity to formulate a stronger defense.

The China-Chile FTA also follows trends begun in prior agreements. Although it was signed in 2005, the original agreement included only a short discussion on cooperation to promote investment and stated that the parties "will negotiate trade in services and investment after the conclusion of the negotiations of this Agreement."²¹⁷ After nearly seven years of negotiations, Chile and China agreed in 2012 on a supplementary investment chapter for the China-Chile FTA, which terminated the 1995 Chile-China BIT.²¹⁸ The investment chapter reflected

BIT, *supra* note 184, arts. 3–4. Article 3 also includes a "grandfather" provision by stating that it applies "[w]ithout prejudice to its laws at the time the investment is made." China-Colombia BIT, *supra* note 212, art. 3. Article 3 also uses the NAFTA term "in like circumstances" to narrow the scope of interpretation of the most-favored-nation clause and the national treatment clause. *Compare id.* art. 3(1)–(3), with NAFTA, *supra* note 19, arts. 1102(1)–(3), 1103(1)–(2). *See also* Berger, *supra* note 83, at 10–11. Article 4 on expropriation and compensation mirrors the same provision in the China-Peru FTA. *Compare* China-Colombia BIT, *supra* note 212, art. 4, with Peru-China FTA, *supra* note 159, art. 133.

214. Berger, *supra* note 83, at 10; China-Colombia BIT, *supra* note 212, art. 2(4)(a) ("The concepts of 'fair and equitable treatment' and 'full protection and security' do not require additional treatment to that required under the minimum standard of treatment of aliens in accordance with the standard of customary international law.").

215. China-Colombia BIT, *supra* note 212, art. 9(2).

216. *Id.* art. 9(4).

217. Free Trade Agreement, China-Chile, art. 112, 120, Nov. 17, 2005, [hereinafter China-Chile FTA]; Berger, *supra* note 83, at 5, 13–14.

218. *Interpretation of Supplementary Agreement on Investment of China-Chile Free Trade Agreement by an Official from the Department of Treaty and Law of MOFCOM*, MINISTRY OF COM. CHINA (Sept. 14, 2012, 1:18 PM), <http://english.mofcom.gov.cn/article/>

changes to Chinese investment policy since 2005, as the provisions for national treatment, investor-state arbitration, and expropriation are the same as in the prior agreements.²¹⁹

The China-Chile FTA limits national treatment to stages after the establishment of an investment.²²⁰ Like the Peru-China FTA, it does not give most-favored-nation treatment to dispute mechanisms.²²¹ The FTA also invokes customary international law as the minimum standard of treatment.²²² It further limits the minimum standard of treatment by stating that “a breach of other articles of this Agreement, or articles of other agreement, does not establish that there has been a breach of this Article.”²²³

Overall, the growing adoption of investment provisions first seen in NAFTA and the acceptance of the term “customary international law” show China’s flexibility in using the model texts of its counterparties. However, China’s unwillingness to agree to full investment liberalization by granting most-favored-nation treatment to the pre-establishment phase could indicate that its adoption of NAFTA-like provisions likely comes more

policyrelease/Cocoon/201209/20120908359906.shtml; Supplementary Agreement on Investments, China-Chile, Annex D, Sept. 9, 2012 [hereinafter China-Chile Supplementary Agreement].

219. Article 3 on national treatment is similar to the Mexico-China BIT and the China-Peru FTA. *Compare* China-Chile Supplementary Agreement, *supra* note 217, art. 3, with Mexico-China BIT, *supra* note 184, art. 3, and China-Peru FTA, *supra* note 196, art. 129. Article 3 on national treatment and Article 5 on the most-favored-nation treatment use the NAFTA term “in like circumstances” to narrow the interpretation of these clauses. *Compare* China-Chile Supplementary Agreement, *supra* note 218, arts. 3(1)–(2), 5(1)–(2), with NAFTA, *supra* note 19, arts. 1102(1)–(3), 1103(1)–(2). *See also* Berger, *supra* note 83, at 10–11. Article 8 on expropriation and compensation is essentially the same as the Chile-China BIT and largely the same as the provision in the China-Peru FTA and Colombia-China BIT. Annex A further defines expropriation and sets out factors to determine indirect expropriation. China-Chile Supplementary Agreement, *supra* note 218, Annex A. It notes that “non-discriminatory regulatory actions” to protect public health, safety, and the environment, do not constitute indirect expropriations. *Id.*

220. China-Chile Supplementary Agreement, *supra* note 218, art. 3.

221. *Compare id.* art. 5, n.7, with China-Peru FTA, *supra* note 196, art. 131(2) n.13.

222. *See* China-Chile Supplementary Agreement, *supra* note 218, art. 6 n.8 (“[Article 6] prescribes the minimum standard of treatment of aliens, in accordance with international custom, as evidenced as a general practice accepted as law as the minimum standard of treatment to be afforded to investments of investors of the other Party.”).

223. *Id.* art. 6(3); *see* Berger, *supra* note 83, at 18–19 (noting that China used similar language in an agreement with New Zealand to limit and define minimum standard of treatment).

from its willingness to accommodate its counterpart in order to further its own interests rather than from a strategic change in its investment policy.²²⁴

V. A PACIFIC TRIANGLE

There are competing views as to what China's increased investment and increased number of investment agreements in Latin America means to the United States. While some view China's growing involvement in Latin America as a challenge to the United States, others view U.S. and Chinese interests in the region as aligned.²²⁵

A. *Chinese and U.S. Interests in Latin America*

Underlying the view that China represents a challenge to the United States in Latin America is the idea that China's growing economic power in the region brings with it increased influence that could be used to oppose U.S. interests and policies in the region.²²⁶ For example, U.S. trade agreements with Latin American countries often require cooperation on human rights, environmental issues, or on U.S. national security concerns.²²⁷ By contrast, trade relations with China are seen as less restrictive, and some argue that they could become an alternative to the U.S. approach.²²⁸

224. Berger, *supra* note 83, at 14, 21, 27.

225. See, e.g., Paz, *supra* note 10 (discussing that the United States has traditionally treated states that the United States perceives as challenging its dominance in Latin America as threatening). *But see, e.g.*, Peter Hakim, *China and the U.S. in Latin America: Who Wins?*, INTER-AM. DIALOGUE (July 30, 2013), <http://www.thedialogue.org/page.cfm?pageID=32&pubID=3362> (attributing a lack of conflict in Latin America between the United States and China to each country's interest in seeing a prosperous Latin America).

226. See, e.g., Paz, *supra* note 10 (explaining that the United States acts defensively when it perceives a threat to its interests in Latin America); see also Juan Vega, *China's Economic and Political Clout Grows in Latin America at the Expense of U.S. Interests*, 14 MINN. J. GLOBAL TRADE 377, 396–99 (2005) (noting China's threat to U.S. interests in Latin America and discussing that threat in context of oil and human rights); see also Dosch & Goodman, *supra* note 10, at 3–4 (noting, for example, that China is using trade, investment, and development aid to balance out U.S. power in Latin America).

227. BRANDT ET AL., *supra* note 10, at 4; Vega, *supra* note 226, at 401.

228. Vega, *supra* note 226, at 401–02.

Others argue that, while the United States and China could compete for markets and investments in Latin America, the two are not regional rivals.²²⁹ Under this view, Latin America is only a part of China's global energy strategy and China has no geopolitical goals in the region.²³⁰

Notably, the United States and China are economically intertwined in Latin America. Economic relations with the United States are a significant factor in Latin American economies, and continued economic growth in Latin America provides growing markets for Chinese goods.²³¹ Similarly, China's demand for natural resources has stimulated growth in Latin American economies and this growth has, in turn, increased Latin American demand for U.S. exports.²³² In addition, Chinese bank financing for Latin American infrastructure benefits the United States by improving Latin American export and import capabilities.²³³ For these reasons, the United States should welcome China's increased economic activity in the region.²³⁴

Although U.S. investment in Latin America is much greater than Chinese investment in the region, recent U.S. investment has waned, as U.S. companies have focused overseas investment in Asian emerging markets, especially in China.²³⁵ Given this trend, Chinese investment in Latin America could be seen as a needed replacement for U.S. investment that can contribute to economic development.²³⁶ However, China's focus on the region as a source of natural resources brings risks. For example, the effect of Chinese demand on natural resource prices can impact terms of trade for Latin American economies and make their exports of other goods less competitive.²³⁷ There are similar concerns that China's demand for natural resources could lead to significant

229. See, e.g., Hakim, *supra* note 225 (noting the mutually beneficial effect of each country's involvement in the region in spite of some market competition).

230. Phillips, *supra* note 12, at 177.

231. Hakim, *supra* note 225.

232. *E.g., id.*

233. *Id.*; BRANDT ET AL., *supra* note 10, at 11.

234. Hakim, *supra* note 225.

235. Phillips, *supra* note 12, at 194.

236. *Id.*

237. CHEN & PÉREZ, *supra* note 1, at 13; see also BRANDT ET AL., *supra* note 10, at 1 (noting that the region is dependent on stable commodity prices).

environmental damage and limit the region to being primarily an exporter of natural resources, thereby slowing Latin America's economic development.²³⁸ There is also the possibility that Latin American countries could grow to resent Chinese investment as a dominant force in their economies.²³⁹

The United States remains the main economic partner and source of investment for many Latin American countries.²⁴⁰ Latin American governments, however, will likely look to China for the FDI needed to improve economic growth and will likely pursue more diversified Chinese investments in their economies to promote overall economic development.²⁴¹ The economies of China and many Latin American countries could also become more complementary, as Latin America's large and growing middle class could become an increasingly significant market for Chinese goods as well as a stable destination for investment in industries other than natural resources.²⁴²

Overall, the attraction to China for Latin America is that China offers increased economic opportunities.²⁴³ Part of this economic opportunity, as demonstrated by the goals of the Pacific Alliance, is trade and investment across the Asia-Pacific region.²⁴⁴

B. Possible Changes to U.S. Policy

While China is not necessarily a strategic threat to the United States in Latin America, given that Chinese economic influence in Latin America is likely to increase, U.S. policymakers should consider several changes to U.S. investment policies to promote cooperation from Latin American countries on human

238. Gonzalez, *supra* note 7, at 54–55, 70–78.

239. *See id.* at 53–54 (describing how China controls large industries in several Latin American countries, including, for example, Peru's largest iron mine).

240. Phillips, *supra* note 12, at 194.

241. CHEN & PÉREZ, *supra* note 1, at 5, 17.

242. *Id.* at 17.

243. BRANDT ET AL., *supra* note 10, at 17; Dosch & Goodman, *supra* note 10, at 11–12.

244. *See* Ramírez, *supra* note 17 (stating that the goal of the Pacific Alliance is to deepen cooperation among members with the purpose of forging closer relations with the Asia-Pacific region).

rights, labor, environmental issues, or U.S. national security concerns.

The United States could attempt to organize and integrate its FTAs with Pacific Alliance countries into one group.²⁴⁵ This integration could be based around common investment-treaty standards not only for investment protections but also for labor and the environment.²⁴⁶ The United States should give higher priority to economic development in order to pursue the more expansive goals of regional growth and stability. This would require future U.S. trade and investment agreements to allow partner countries the regulatory space needed to devise their own development policies without the threat of claims of indirect expropriation.²⁴⁷ This can be accomplished through more explicit exceptions for development policies as well as for environmental and labor regulations.²⁴⁸

These changes would also require adjustments to the current investor-state arbitration system. There are longstanding concerns that investor-state arbitration infringes on the ability of developing countries to regulate their economies, and there are concerns that the fear of an investor-state dispute can discourage governments from regulating or, at least, influence the way in which they regulate in areas related to the public interest.²⁴⁹

To develop a fairer investment protection regime, the United States should consider adopting in future trade and investment agreements a state-to-state investment dispute system similar to the World Trade Organization's state-to-state trade dispute

245. See, e.g., BRANDT ET AL., *supra* note 10, at 4.

246. *Id.* at 7.

247. See generally *Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making*, UNITED NATIONS CONF. ON TRADE & DEV., http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf (last visited Apr. 27, 2015) (discussing growing need for trade policies that promote growth and sustainable development by giving host countries sufficient domestic policy space and ensuring consistent application of rules of law and dispute resolution).

248. See Gus Van Harten, *Reforming the NAFTA Investment Regime*, in THE PARDEE CTR., *THE FUTURE OF NORTH AMERICAN TRADE POLICY: LESSONS FROM NAFTA* 43, 48–50 (2009) (noting that the principle of sustainable development should guide NAFTA reforms that include providing exception to the treaty that allow for legitimate regulation).

249. *Id.* at 45; LESTER, *supra* note 71, at 3–4, 6.

system.²⁵⁰ This could help mitigate controversy by avoiding some of the private challenges to government regulations on claims of indirect expropriation.

The changing global economy has in some ways made the current investor-state dispute system in U.S. treaties outdated. The system was developed when unstable governments in developing countries posed increased risks to U.S. investments.²⁵¹ These risks, however, decreased in many countries as their economies developed and their legal systems matured.²⁵² For example, the countries of the Pacific Alliance pose much lower investor risk when compared to Venezuela or Argentina.²⁵³ Additionally, multi-national corporations with global operations and limited national allegiance are changing the balance of power in investment treaty law from one between capital-importing and capital-exporting countries to one between private capital and public interests.²⁵⁴ Multi-national corporations can also use investor-state arbitration to an unfair advantage over smaller, domestic companies.²⁵⁵

While renegotiating past BITs and FTAs could prove overly burdensome, the United States could consider these changes during the current negotiations for the Trans-Pacific Partnership, a multi-party trade and investment agreement that includes Chile and Peru,²⁵⁶ and could one day include China.²⁵⁷ Developing

250. LESTER, *supra* note 71, at 11.

251. *Id.* at 10.

252. *Id.*

253. See, e.g., SCOTIABANK, *supra* note 17, at 6, 8 (discussing the political risks in investing in Venezuela and Argentina).

254. See, e.g., Wenhua Shan, *From "North-South Divide" to "Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 NW. J. INT'L L. & BUS. 631, 659-64 (2007) (noting the shift and positing contributing factors).

255. LESTER, *supra* note 71, at 9.

256. *Trans-Pacific Partnership (TPP)*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/tpp> (last visited Mar. 3, 2014); see also Kevin Gallagher & Timothy Wise, *The False Promise of Obama's Trade Deals*, GUARDIAN (Sept. 8, 2011, 4:52 PM), <http://www.theguardian.com/commentisfree/cifamerica/2011/sep/08/obama-trade-deals> (stating that U.S. negotiators have promoted investor-state arbitration in the treaty).

257. Frank Ching, *China Flirts with Joining the TPP*, CHINA POST (Jan. 1, 2014, 12:15 AM), <http://www.chinapost.com.tw/commentary/the-china-post/frank-ching/2014/01/01/397231/China-flirts.htm>; Geoffrey Garrett, *Freer Trade with China Is Win-Win for*

a major trade and investment agreement with investment provisions designed to promote economic development and labor and environmental standards could ensure that the United States continues to set the global standard for investment agreements.

VI. CONCLUSION

The United States has pursued its investment policy in Latin America to develop legal standards to protect private investment and pursue economic growth. China has pursued investment in Latin America primarily to gain access to natural resources and raw materials for state-owned companies while placing less emphasis on international legal standards. In doing so, China has been flexible in treaty negotiations and has adopted some of the international legal standards that the United States promotes in Latin America. As a result, there has been some, although limited, convergence of Chinese investment treaties with U.S. standards.

While Chinese FDI brings significant benefits to Latin American countries, China's focus on natural resources could undermine economic development in the region. China's reduced emphasis on such issues as labor or environmental protection could also endanger economic stability. In response, the United States should consider changes to its international investment policy in order to continue to influence the development of international investment standards.

Everyone, U.S. NEWS (Jan. 23, 2014, 4:00 PM), <http://www.usnews.com/opinion/articles/2014/01/23/bring-china-into-the-trans-pacific-partnership-trade-talks>.