Trans-Pacific Partnership and Domestic Environmental Protection: Seeking an Alternative Standard of Review in Investor-State Dispute Settlement

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Trans-Pacific Partnership ("TPP") is a free trade agreement that has been negotiated between twelve Pacific Rim countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.[1] On October 3, 2015, these twelve nations finished TPP negotiations to lower trade barriers to goods and services and set commercial rules for two-fifths of the global economy.[2]

The environmental impact of the TPP, however, will be broad and extensive. The Environmental Chapter of TPP has already suffered wide criticism because of its "toothless" provisions.[3] More alarmingly, TPP also includes an Investor-State Dispute Settlement ("ISDS") mechanism, under which a private foreign investor could bring its host government before an *ad hoc* private arbitration panel on the ground that the government has mistreated the investor.[4] Admittedly, this is an important mechanism to protect foreign investors' legitimate interest from governmental intervention. However, as a recent case, *Bilcon of Delaware, Inc. v. Canada*,[5] has demonstrated, investors could also abuse their rights under this mechanism to challenge a long-standing environmental regulatory regime.

In the *Bilcon* case, an expert panel was established under Canadian law to conduct an environmental impact assessment over a proposed "blasting"[6] project in the seabed near Nova Scotia.[7] The panel recommended rejection because it determined that the project could impose immitigable risks to local environment and community value.[8] Based on this recommendation, the Canadian government rejected the project.[9] As a result, an arbitral panel established under the North American Free Trade Agreement ("NAFTA") ruled that the Canadian government had violated the Investment Chapter of NAFTA, which means it could be liable for more than $101 million in damages requested by the investor.[10] As will be demonstrated below, the implication of this case is that a national government's ability to enforce domestic

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1. William Mauldin, *U.S. Reaches Trans-Pacific Partnership Trade Deal With 11 Pacific Nations*, Wall St. J., Oct. 5, 2015, http://www.wsj.com/articles/u-s-reaches-trade-deal-with-11-pacific-nations-1444046867.
2. *Id.* Note that on January 23, 2017, President Donald Trump signed the executive order withdrawing the U.S. from TPP participation. Discussions over TPP, however, does not subsequently become irrelevant. Some commentators have pointed out that there is a possibility that the Trump administration would consider reviving the deal later in its term. *See* Robert J. Samuelson, *The TPP Lives—Maybe*, Wash. Post, Feb. 15, 2017, https://www.washingtonpost.com/opinions/the-tpp-lives--maybe/2017/02/15/c27cdfac-f3a8-11e6-b9c9-e83fce42fb61_story.html?tid=hybrid_collaborative_2_na&utm_term=.d948d233c8b2. In any case, as will be demonstrated below, the problems posed by TPP and discussed here are prevalent in other multilateral trade deals—likely in future trade deals as well—calling for the detailed analysis offered by this Note.
3. Brian Clark Howard, *4 Ways Green Groups Say Trans-Pacific Partnership Will Hurt the Environment*, Nat'l Geographic, Jan. 18, 2014, http://news.nationalgeographic.com/news/2014/01/140117-trans-pacific-partnership-free-trade-environment-obama/; *Q&A: Trans Pacific Partnership*, Human Rights Watch (Jan. 12, 2016, 3:32 PM), https://www.hrw.org/news/2016/01/12/qa-trans-pacific-partnership.
4. Ted Bromund et al., *Straight Talk on the ISDS Provisions in the Trans-Pacific Partnership*, Heritage Found. (May 17, 2016), http://www.heritage.org/research/reports/2016/05/straight-talk-on-the-isds-provisions-in-the-trans-pacific-partnership.
5. Bilcon of Delaware, Inc. v. Canada, Case No. 2009-04, Award on Jurisdiction and Liability (Perm. Ct. Arb. 2015), http://www.pcacases.com/web/view/50.
6. Blasting is a method of retrieving oil, gas, and/or minerals from subsurface rock utilizing explosives. *See Blasting*, U.S. Dep't Interior, Off. Surface Mining Reclamation & Enf't, https://www.osmre.gov/resources/blasting.shtm (last visited Jan. 4, 2017).
7. *Bilcon of Delaware, Inc.*, Case No. 2009-04, at 1–2.
8. *Id.* at 2.
9. *Id.*
10. *Id.* at 215–16. The Permanent Court of Arbitration panel has ruled that Bilcon had established the Canadian government's breach of NAFTA Investment Chapter and had made a *prima facie* case of its losses. But the panel decided the damage issue should be deferred to the next stage of the case, in the hope that the parties would reach a settlement. *See id.*

environmental laws and regulations could be compromised by foreign investors' ability to subject the enforcement to substantial monetary damages.[11]

In Part I, this Note will first introduce the general environmental impact of free trade agreements, and will briefly introduce the *Bilcon* case to illustrate one of the scenarios where ISDS in the free trade agreements would threaten national government's environmental protection measures. Then in Part II, this Note will discuss in more details the background of ISDS and how it works. This Note will also discuss some of the criticisms against ISDS and relevant responses. The *Bilcon* case will be analyzed against this background as an example to illustrate how an arbitration tribunal would abuse the ISDS provisions and the resulting serious policy implications. In Part III, this Note will examine the prevailing standards of review in the area of public international law, including the necessity approach, good faith approach, and margin of appreciation approach. This Note will then illustrate the shortcomings of these standards. In the end, this Note will propose a scenario-specific deferential approach aiming to limit ISDS tribunals' ability to subject national governments' legitimate environmental regulations to monetary liabilities.

I. Environmental Impact of Free Trade Agreements

A. *Scale, Composition, and Technical Effect*

Although they seldom cause direct and immediate environmental impact, free trade agreements in general frequently show their influence through exacerbating market or government failure.[12] If improperly regulated, three types of effects of liberalized international trade have been long identified: scale effect, composition effect, and technique effect.[13]

"Scale effect" refers to the increased economic activities that come with the lowered barriers of international trade, including increased consumption and the accompanying production.[14] For example, if clean energy technologies remain the same, the growing need for fuel and raw material under a free trade agreement will almost inevitably create more emissions and pollution. "Composition effect" stems out of the relative advantages (or disadvantages) of different economies, which will facilitate and foster the congregation of industries in areas most favorable to their respective needs as the trade barriers lower.[15] With strengthened foreign investment protection and lowered trade costs, for example, heavy-polluting industries might have stronger incentives to relocate to less regulated, usually also less developed, economies.

"Technique effect" is relatively more ambiguous. On the one hand, since free trade agreements could create increased income for the member states' residents, their demand for higher environmental quality would pressure the governments to pass harsher environmental laws and regulations.[16] Yet on the other hand, since industries now tend to relocate to states with more favorable regulation, this could stimulate a "race to the bottom" among the governments to "water down" their environmental regulation.[17]

These effects could avail themselves under the TPP. First of all, in terms of the scale effect, if TPP were to include the "national treatment for trade in natural gas," as most commentators believe it will, it will effectively eliminate U.S. export control on liquefied natural gas ("LNG") to signatories to the agreement, "including Japan, the world's largest LNG importer."[18] This additional supply of LNG in these countries could push down LNG prices in many signatory countries, and consequently increase the demand and production of LNG. Furthermore, expanded LNG export requires a whole new set of infrastructure including new pipelines, wells, and compressors, etc.[19]

Second, in terms of composition effect, increased demand for U.S. gas could raise domestic gas price, which in turn could lead to increased demand for other fuel, such as coal.[20] Under a high-export scenario, a report prepared for Dow Chemical Inc. estimated that domestic gas price could triple by 2030.[21] Last, although few studies have explored TPP's technique effect on the U.S. environment, the Canadian government estimated that the implementation of TPP could reduce greenhouse gas emission in Canada by 376 kilo tones.[22] However, the Canadian government also estimated that the scale and composition effect could totally offset the benefit of technique effect.[23]

11. *See generally* David P. Riesenberg, *Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule*, 60 Duke L.J. 977 (2011).
12. Linda J. Allen, *The North American Agreement on Environmental Cooperation: Has It Fulfilled Its Promises and Potential? An Empirical Study of Policy Effectiveness*, 23 Colo. J. Int'l Envtl. L. & Pol'y 121, 124 (2012) (citing Charles Arden-Clarke, *The General Agreement on Tariffs and Trade, Environmental Protection, and Sustainable Development* (World Wildlife Fed'n Int'l, Discussion Paper, 1991)).
13. Per G. Fredriksson & Anna Strut, *Trade, Global Policy, and the Environment* 1–3 (World Bank, Discussion Paper No. WDP 402, 1999), http://documents.worldbank.org/curated/en/581201468277743126/Trade-global-policy-and-the-environment.
14. *Id.* at 1.
15. *Id.*; *see also* Allen, *supra* note 12, at 125.
16. Fredriksson & Strut, *supra* note 13, at 2.
17. Peter L. Lallas, *NAFTA and Evolving Approaches to Identify and Address "Indirect" Environmental Impacts of International Trade*, 5 Geo. Int'l Envtl. L. Rev. 519, 525 (1993).
18. Sierra Club, *Raw Deal: How the Trans-Pacific Partnership Could Threaten Our Climate* 5 (2013), https://www.sierraclub.org/sites/www.sierraclub.org/files/trade_downloads_raw-deal-report.pdf.
19. *Id.*
20. U.S. Energy Info. Admin., Effects of Increased Natural Gas Exports on Domestic Energy Markets 6 (2012), http://energy.gov/sites/prod/files/2013/04/f0/fe_eia_lng.pdf.
21. Ken Ditzel et al., *US Manufacturing and LNG Exports: Economic Contributions to the US Economy and Impacts on US Natural Gas Prices*, Charles River Assocs. 8–9 (2013), http://www.crai.com/sites/default/files/publications/CRA_LNG_Study.pdf.
22. *Trans-Pacific Partnership (TPP) Agreement Free Trade Negotiations: Initial Environmental Assessment*, Global Aff. Can. (Apr. 2014), http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/env-ea.aspx?lang=eng.
23. *Id.*

B. Bilcon of Delaware, Inc. v. Canada: *A Case With Worrying Outcome*

Despite the potential negative impact that free trade agreements have on the environment, a recent case, *Bilcon of Delaware, Inc. v. Canada*,[24] illustrates a more salient example of how the ISDS mechanism in free trade agreements could bring a particularly destructive effect on environmental regulations and, likely, environmental protection itself. In 2002, Bilcon of Delaware, Inc. ("Bilcon"), a U.S. corporation, planned to build a quarry and marine terminal to conduct blasting activities to extract basalt, a construction material, in Nova Scotia, Canada. As Bilcon was well aware of, the general regulatory framework in both Nova Scotia and federal Canada requires environmental assessment and governmental approval.[25] In addition, the provincial and federal government both have "sustainable development" legislation that aim to encourage economic development while promoting environmental viability.[26] Under the Canadian law, Bilcon's project would be subject to a Comprehensive Study, an extensive and rigorous form of environmental assessment, due to its large size.[27] In this case, however, Bilcon's proposal was referred to a Joint Review Panel ("JRP"), an environmental impact assessment panel consisting of three non-governmental environment experts, due to an agreement between Canada's federal Environment Minister, Stéphane Dion, and Nova Scotia Minister of Environment and Labour, Kerry Morash .[28] JRP was responsible for providing a recommendation to the government regarding whether the project should be approved.[29]

After extensive and thorough evaluation,[30] the result turned out to be very disturbing. The JRP found that the proposed blasting activity in the area could threaten many marine species, including the endangered North Atlantic Right Whale (which according to World Wildlife Fund, has fewer than 350 survivors on this planet[31]) and the Inner Bay of Fundy Atlantic Salmon (which is estimated to have fewer than 250 survivors).[32] In addition, the project faced strong opposition from local residents and businesses.[33] Eventually, the JRP concluded that the project's environmental impact would be too severe to be mitigated, causing severe damage to community "core values," and therefore the JRP recommended that the government reject this project.[34] In 2007, Canadian provincial and federal governments relied on this assessment and rejected Bilcon's project.[35]

In 2008, Bilcon filed a complaint against the Canadian government for $101 million in damages under NAFTA's Article 1102 ("National Treatment"), Article 1103 ("Most-Favored Nation Treatment"), and Article 1105 ("Minimum Standard of Treatment").[36] The damages include the expense of application for a permit to build and operate the quarry and marine terminal.[37] In addition, Bilcon claimed that it incurred expenses for basalt—a vital material for its U.S. operation—during the environmental assessment process, and requested compensation for the increased cost.[38] The core argument of Bilcon's complaint concerned the environmental assessment's conclusion that the project would endanger "community core values."[39] Bilcon contested the legitimacy of this conclusion on the basis that "this notion has no basis in the Constitution of Canada, the administrative law framework, the environmental legislation or any other relevant law."[40]

The case was adjudicated by an arbitration panel set up under NAFTA's ISDS provisions and comprised of three private arbitrators. After six years of proceedings, the arbitral panel sided with Bilcon and decided that the Canadian government violated NAFTA's Investment Chapter.[41] The panel deferred its decision on the damage issue,[42] but Canada's potential liability could be more than $101 million.[43]

II. Investor-State Dispute Settlement Mechanism

Investor-State Dispute Settlement ("ISDS") is a mechanism that aims to protect foreign investors by directly enforcing the remedies awarded to foreign individuals or corporations

24. Bilcon of Delaware, Inc. v. Canada, Case No. 2009-04, Award on Jurisdiction and Liability, at 18–19 (Perm. Ct. Arb. 2015), http://www.pcacases.com/web/view/50.
25. *Id.* at 3.
26. *Id.*
27. *Id.* at 9.
28. Env't & Labour, *Panel Named for Whites Point Quarry Review*, Nova Scotia Can. (Nov. 5, 2004, 9:05 AM), http://novascotia.ca/news/release/?id=20041105002; *see also Bilcon of Delaware, Inc.*, Case No. 2009-04, at 9.
29. *See Bilcon of Delaware, Inc.*, Case No. 2009-04, at 2.
30. *See* Joint Review Panel, Environmental Assessment of the White Point Quarry & Marine Terminal Project 3 (2007) [hereinafter JRP Report], https://www.novascotia.ca/nse/ea/whitespointquarry/WhitesPointQuarryFinalReportSummary.pdf. The Environmental Impact Statement submitted by Bilcon comprised 3000 pages. *See id.* In addition, during the 13-day public hearing session held in June 2007, JRP received 77 oral and 126 written submissions from over 100 independent participants. *See id.* Another 300 written comments on the Environmental Impact Statement were also submitted. *See id*.
31. *North Atlantic Right Whale*, World Wildlife Fund Global, http://wwf.panda.org/what_we_do/endangered_species/cetaceans/about/right_whales/north_atlantic_right_whale/ (last visited Apr. 6, 2016).
32. JRP Report, *supra* note 30, at 9.
33. *See Corporate Rights in Trade Agreements*, Sierra Club 1, https://content.sierraclub.org/creative-archive/sites/content.sierraclub.org.creative-archive/files/pdfs/0999-Trade-Bilcon-Factsheet-04_low.pdf (last visited Apr. 6, 2016).
34. JRP Report, *supra* note 30, at 4.
35. Env't & Labour, *Minister Rejects Whites Point Proposal*, Nova Scotia Can. (Nov. 20, 2007, 9:30 AM), http://novascotia.ca/news/release/?id=20071120003.
36. *NAFTA—Chapter 11—Investment: Cases Filed Against the Government of Canada*, Global Aff. Can. (Jan. 4, 2016), http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng.
37. Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement at 10, http://www.naftaclaims.com/disputes/canada/bilcon/bilcon-03.pdf; *see also* Bilcon of Delaware, Inc. v. Canada, Case No. 2009-04, Award on Jurisdiction and Liability, at 2–3 (Perm. Ct. Arb. 2015), http://www.pcacases.com/web/view/50.
38. *Bilcon of Delaware, Inc.*, Case No. 2009-04, at 6.
39. *Id.* at 147.
40. *Id.* at 109.
41. *Id.* at 215.
42. *Id.* at 219.
43. *Good News for Canada's Environmental Assessment Law: No Cash Advance for Bilcon*, Sierra Club (Sept. 20, 2016), http://www.sierraclub.ca/en/media/2016-09-20/good-news-canada's-environmental-assessment-law-no-cash-advance-bilcon.

against national governments. The potential influence of the mechanism calls for thorough and detailed analysis since it is increasingly a common practice to include an ISDS provision in free trade agreements today.[44] There are few other areas of public international law where a private party can compel a national government to defend its laws and regulations before a private tribunal to avoid a potential substantial legal liability.[45] To better understand the mechanism of ISDS, it is vital to first briefly examine its history and development.

A. The Background and Development of ISDS

Investment dispute has a long history, going back to the Middle Ages.[46] Historically, political communities routinely excluded those who came from outside the community.[47] This practice has changed due to the increase of international commercial activities.[48] By the commencement of the modern era, scholars observed that a state had the right to regulate the entry of foreigners into its territory, and once admitted into the state, foreigners were subject to local laws.[49] But the state was also under a duty to protect foreigners in the same manner as its own nationals.[50] Still, these foreigners retained their membership in their home states, and such membership extended to their property located in the host territory.[51]

As a result, the host state's injury towards a foreigner's property was also an injury towards the foreigner's home state. It was this notion that gave rise to the evolution of diplomatic protection.[52] In fulfilling diplomatic protection, the home state would make a claim against the host state, instead of individuals, for injuries incurred upon the home state's nationals.[53]

During the eighteenth and nineteenth century, states, especially western European countries, engaged in diplomatic protection over their nationals with increasing frequency.[54] In extreme situations, states used military intervention—"gunboat diplomacy"—to protect their nationals' property and personal interests, which usually gave rise to state-to-state conflicts.[55] For example, Britain intervened in Latin America a minimum of forty times through the use of force or threat of force during the nineteenth and early twentieth centuries to exert diplomatic protection.[56]

Realizing the high stakes involved in military conflicts, states began to devise joint commissions to address disputes between host states and foreign nationals. One of the first of these commissions was established between Britain and the U.S. to address the treatment of British and U.S. nationals around the time of the U.S. Revolution.[57] In the decades thereafter, states established dozens of *ad hoc* commissions to address such disputes.[58]

Shortly after World War II, the world witnessed waves of expropriation of western corporate and personal properties by newly independent nationalist countries.[59] These newly independent states insisted that existing treaties and agreements, entered into in the shadow of colonial power, become subject to reviews under national law.[60] Investors in such circumstances could only seek legal remedies in the host country's courts,[61] which were frequently ineffective and inefficient, at best.[62] Clouded by local bias, political influence, and corruption, domestic courts were mistrusted by foreign investors.[63]

Against this backdrop, states tried to establish a new multilateral framework to address these investment disputes. The first initiative was the International Trade Organization ("ITO"), which was intended to work alongside the International Monetary Fund and the World Bank.[64] It was during the negotiation of the ITO when the majority of substantive standards in modern ISDS were first introduced, such as "national treatment, most-favored-nation ("MFN") treatment, and just compensation for governmental expropriation," which will be discussed more specifically in Section B.[65] Unfortunately, the ITO was never established, mainly due to the U.S. Senate's failure to ratify it.[66] With multilateral efforts sunk, states began to develop bilateral negotiations, with German and Pakistan signing the first bilateral investment treaty in 1959.[67]

But the world finally entered the new era of using the arbitration panel as a routine method to address investor-state disputes when the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention") was adopted in the 1960s. Since the adoption of the ICSID Convention, ISDS has been getting more and more popular.[68] From 1987 to

44. Luis Ferrera Alvarez, *Free Trade Agreements and Sovereignty*, Permaculture Res. Inst. (July 6, 2015), http://permaculturenews.org/2015/07/06/free-trade-agreements-and-sovereignty/; *see also* Jeswald W. Salacuse, *Is There A Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 Fordham Int'l L.J. 138, 144 (2007).
45. *See* Salacuse, *supra* note 44, at 31.
46. *See* Andrew P. Newcombe & Luis Paradell, Law and Practice of Investment Treaties: Standards of Treatment 2 (2009).
47. *Id.* at 3.
48. Hans Neufeld, The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648–1815): A Contribution to the History of the Law of Nations 48–49 (A. W. Sijthoff ed. 1971).
49. *Id.* at 4 (citation omitted).
50. *Id.*
51. *Id.*
52. John Dugard, *Articles on Diplomatic Protection*, U.N. Audiovisual Libr. 1 (2013), http://legal.un.org/avl/pdf/ha/adp/adp_e.pdf.
53. Newcombe & Paradell, *supra* note 46, at 5.
54. *See id.*; *see also* Dugard, *supra* note 52, at 1.
55. *See* Newcombe & Paradell, *supra* note 46, at 9; *see also Fact Sheet: Investor-State Dispute Settlements*, Off. U.S. Trade Representatives, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds (last visited Apr. 6, 2016).
56. Newcombe & Paradell, *supra* note 46, at 9.
57. *Id.* at 7.
58. *Id.*
59. Simon Lester, *The Rhetoric and Reality of ISDS*, Nat'l Rev. (Nov. 10, 2015, 4:00 AM), http://www.nationalreview.com/article/426807/rhetoric-and-reality-isds-simon-lester.
60. *See* Newcombe & Paradell, *supra* note 46, at 19.
61. *Id.*
62. Tamara L. Slater, *Investor-State Arbitration and Domestic Environment Protection*, 14 Wash. U. Global Stud. L. Rev. 131, 136–37 (2015).
63. *Id.*
64. Newcombe & Paradell, *supra* note 46, at 19.
65. *Id.*
66. *Id.* at 20.
67. Roderick Abbott, *Demystifying Investor-State Dispute Settlement* 5 (ECIPE Occasional Paper, No. 5/2014, 2014).
68. Sergio Puig, *No Right Without a Remedy: Foundations of Investor-State Arbitration*, 35 U. Pa. J. Int'l L. 829, 835 (2014).

2014, there were 608 ISDS cases initiated by investors, and ninety-nine governments worldwide have been respondents to at least one ISDS claim.[69] Nearly 400 of these cases were initiated within the past ten years.[70] In the next section, this Note will examine both the substantive and procedural provisions of this mechanism.

B. How ISDS Works

Substantively, ISDS usually promises that foreign investors will be free from nationality-based discrimination, treatment that falls below a minimum fair and equitable standard, and governmental expropriation without just compensation.[71] To this end, TPP is no exception. In Article 9.4, the signatory states of TPP have declared that each of them shall give investors from another signatory state "National Treatment," or "treatment no less favourable than that it accords, in like circumstances, to its own investors. . . ."[72] In addition, in terms of minimum standard treatment, TPP guarantees "fair and equitable treatment and full protection and security" in accordance with "applicable customary international law principles."[73] Notably, the minimum standard treatment differs from the national treatment standard in that it sets up a bottom-line standard regardless of certain regulation's domestic applicability. That means, even if the host state does not grant a certain treatment to its own nationals, foreign investors would still enjoy such treatment.

Furthermore, the signatories have granted each other Most-Favored-Nation Treatment ("MFN") in Article 9.5. The MFN provisions allow investors to take advantage of the best procedural and substantive treatment contemplated in any of the signatory countries in terms of "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[74] For example, if the U.S. gives certain preferred treatment to Canadian investors in terms of registration of entities, under MFN, investors from other TPP signatories would also enjoy such treatment regardless of whether the U.S. specifically grants the same treatment to them. Finally, in Article 9.8, TPP specifically provides for the standards of expropriation and compensation.[75] Under this provision, a host state cannot expropriate or nationalize a foreign investor's assets unless it is "for a public purpose[,] in a non-discriminatory manner[,]" on prompt, adequate, and effective payment, "and in accordance with due process of law."[76]

Procedurally, TPP resembles other multinational free trade agreements as well. Section B provides that when in dispute with the host country, subject to an initial consultation and negotiation proceeding,[77] an investor can invoke the investor-state arbitration by submitting to arbitration under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings (if both the host state and the investor's home state are parties to the ICSID Convention), the ICSID Additional Facility Rules (if either the host state or the investor's home state is a party to the ICSID Convention), the United Nations Commission on International Trade Law Arbitration Rules, or any other arbitration institution or arbitral rules based on mutual agreement.[78]

Following submission of a claim, the investor and host state can each select an arbitrator, and a third, presiding arbitrator will be selected upon mutual agreement of the disputing parties.[79] The tribunal will resolve the dispute in accordance with TPP itself and applicable rules of international law.[80] When rendering rewards, Article 9.29 specifically limits the rewards to monetary damages and restitution of property, and no punitive damages are allowed.[81] A claimant who alleges breach of Section A of Chapter 9 (which provides aforesaid national treatment, minimum treatment, and MFN standards) would have to prove the damages it actually suffered and that the breach of Section A is the proximate cause of the damages.[82]

C. The Debate Over ISDS

Initially, ISDS received overwhelming praise from legal scholars,[83] who called the mechanism "a revolution."[84] Indeed, ISDS represented a new form of international dispute resolution mechanism that the world had never seen. Before ISDS evolved, the main tribunal to solve international disputes—the International Court of Justice ("ICJ")—had decided fewer than 150 cases during its more than seventy years of history, with only one case awarding monetary damages which were fully enforced, fifty-seven years after the ruling.[85] In contrast, since its first registered case in 1972, the International Center for Settlement of Investment Disputes ("ICSID") alone has decided more than 336 cases.[86] As of 2011, more than half of these cases were estimated to have awarded monetary damages, and nearly 90% of the awards were fully enforced.[87]

69. U.N. Conf. on Trade & Dev., World Investment Report 2015: Reforming International Investment Governance 112, 114 (2015) [hereinafter UNCTAD], http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245.
70. *See id.* at 27.
71. Susan D. Franck, *Predicting Outcomes in Investment Treaty Arbitration*, 65 Duke L.J. 459, 470 (2015).
72. Trans-Pacific Partnership art. 9.4, Feb. 4, 2016 [hereinafter TPP], https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.
73. *Id.* art. 9.6.
74. *Id.* art. 9.5.
75. *Id.* art. 9.8.
76. *Id.*
77. TPP, *supra* note 72, art. 9.18.
78. *Id.* art. 9.19.
79. *Id.* art. 9.22.
80. *Id.* art. 9.25. Article 9.25 also allows the tribunal to consider the domestic law of the respondent when it is relevant to the disputing matter. *Id.* at n.34.
81. *See* TPP, *supra* note 72, art. 9.29.
82. *See id.*
83. Riesenberg, *supra* note 11, at 985.
84. Joel C. Beauvais, *Regulatory Expropriations Under Nafta: Emerging Principles & Lingering Doubts*, 10 N.Y.U. Envtl. L.J. 245, 253 (2002).
85. Riesenberg, *supra* note 11, at 985.
86. Int'l Centre for Settlement of Inv. Disputes, The ICSID Caseload—Statistics 7–8 (2015), https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202015-2%20(English).pdf.
87. Riesenberg, *supra* note 11, at 580.

Since 2007, however, ISDS has suffered more and more criticism.[88] This Note will discuss the three most-frequently argued criticisms: substantive provisions have been interpreted in favor of investors, the arbitration decisions are unpredictable and inconsistent, and ISDS has indulged investors' abuse and led to a "regulatory chill" effect.

First, the pro-investor bias criticism is reflected in several concerns. Some Latin American countries argued that the arbitral panels are invariably in favor of investors because these countries "never win the cases."[89] To this end, the United Nations Conference on Trade and Development revealed in its World Investment Report 2015 that until the end of 2014, of all the cases decided by ICSID, "36[%] (144 cases) were decided in favor of the State (all claims dismissed either on jurisdictional grounds or on the merits), and 27[%] (111 cases) ended in favor of the investors (monetary compensation awarded)."[90] However, these statistics do not necessarily lead to the conclusion that the arbitrations were pro-state. The question we should ask is not how many cases the investors are actually winning. Instead, the real question that should be asked is whether the investors are winning more cases than they should. The answer cannot be ascertained by simply looking at the statistics. This touches upon the problem discussed in the next paragraph, because arbitral panels are not bound by precedents and have broad discretion to interpret domestic laws, one can hardly predict come out in a certain way simply because a similar case was decided in such way.

The second criticism, namely the unpredictability and inconsistency of arbitral decisions, is rooted in the reality of no-binding-precedent in the system of public international law.[91] Each arbitral tribunal is *ad-hoc*, and its decisions have no binding effect whatsoever on other tribunals.[92] Furthermore, although the free trade agreements all have similar ISDS provisions, this does not necessarily mean that they will be interpreted in the same way. One tribunal observed that "the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and [official records of the treaty negotiations]."[93]

Last but not least, scholars have observed that the ISDS "has gone from being a protective shield for defending investors against unfair and discriminatory treatment to a sword used by those investors to attack legitimate government regulation pursued in the public interest."[94] The case mentioned in Part I of this Note, *Bilcon v. Government of Canada*,[95] was brought under NAFTA. And since NAFTA has very similar ISDS provisions with TPP, this case illustrates similar danger imposed if TPP is ratified by Congress.

The tribunal in *Bilcon* consisted of two law professors and an ICJ judge.[96] Two of the arbitrators sided with Bilcon's argument and decided that the environmental assessment violated Bilcon's right under NAFTA's "Minimum Standard of Treatment" clause.[97] In essence, the majority's opinion focused on the "unexpected" nature of the result of the environmental assessment. It put a heavy weight on the fact that the Nova Scotian government initially extended warm and repeated welcomes to Bilcon to conduct blasting within its territory.[98] The majority felt that Bilcon, under such circumstances, had formed a legitimate expectation that the environmental assessment would not come out in a negative way. Furthermore, even though the majority recognized that social value such as "community core value" is a legitimate consideration in approving projects under Canadian environmental law,[99] it deemed the assessment report's prioritizing this consideration as lack of "legal authority or fair notice" to Bilcon.[100] Therefore, the majority concluded that it was "unjust" for Canadian government to first encourage Bilcon's investment and then put an overriding importance to the potential influence on "community core value" to veto the project.[101]

The problem with this argument, however, is that it overlooked the whole purpose of an independent and thorough environmental assessment. Local or national governments, for the purposes of economic growth, tax generation, or any other purposes, would frequently like to encourage and attract foreign investment. The reason why environmental law requires an independent assessment is precisely because it could defeat such desires when they are fundamentally inconsistent with environmental protection goals.[102] However, the majority seemed to believe, that since the Nova Scotian government wanted Bilcon's project it should, in some way, make sure the environmental assessment makes a favorable recommendation. Is it not a basic understanding that the government should not interfere with the assessment panel's decision and any environmental assessment could come out negatively?

88. *Id.*
89. Leslie Mazoch, *Chavez Takes Cool View Towards OAS, Says Latin America Better Off Without World Bank*, Huffington Post (Apr. 30, 2007, 11:09 AM), http://www.huffingtonpost.com/huff-wires/20070430/la-gen-venezuela-leftist-alternative/.
90. UNCTAD, *supra* note 69, at 116.
91. *See* European Fed'n for Inv. Law & Arbitration, *A response to the criticism against ISDS* 12 (2015), http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf.
92. *Id.*
93. Methanex Corporation v. United States of America, Final Award on Jurisdiction and Merits, 44 I.L.M. 1345, 1464 (2005).
94. Aaron Cosbey, *The Road to Hell? Investor Protections in NAFTA's Chapter 11, in* International Investment for Sustainable Development: Balancing Rights and Rewards 151 (Lyuba Zarsky ed., 2005), http://www.oas.org/dsd/Tool-kit/Documentos/ModuleIIIdoc/Cosbey%20Road%20to%20Hell%20Reading.pdf.
95. Bilcon of Delaware, Inc. v. Canada, Case No. 2009-04, Award on Jurisdiction and Liability, at 100 (Perm. Ct. Arb. 2015), http://www.pcacases.com/web/view/50.
96. *Id.* at 12.
97. *Id.* at 215.
98. *See id.* at 176–77.
99. *See id.* at 178–79.
100. *Bilcon of Delaware, Inc.*, Case No. 2009-04, at 176.
101. *See id.* at 177.
102. *See What Is Impact Assessment?*, Convention on Biological Diversity, https://www.cbd.int/impact/whatis.shtml (last visited Sept. 29, 2016).

The dissenting opinion, written by Prof. Donald McRae, deemed the decision "a remarkable step backwards in environmental protection."[103] Professor McRae stressed two disturbing consequences of this decision. First is the chilling effect of governmental environment regulation. He warned that "a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages under NAFTA . . . ."[104] Second, he cautioned that "[i]f the majority view in this case is to be accepted, then the proper application of Canadian law by an environmental review panel will be in the hands of a NAFTA . . . tribunal, importing a damages remedy that is not available under Canadian law."[105]

Despite the worrisome consequences reflected by the *Bilcon* case, some commentators, including the Office of the United States Trade Representative, argue that no matter how dangerous ISDS is, the United States is immune to such risks.[106] Indeed, during the decades after the introduction of ISDS in international treaties, investors have tried to hold the U.S. government liable seventeen times, but the U.S. has never lost a single case.[107]

This argument, however, will hardly stand if TPP is ratified in its current form. The TPP would at least double the United States' exposure to foreign investor attacks,[108] especially when we consider an effect called creeping multilateralism.[109] First of all, TPP will greatly increase the number of potential active plaintiffs against the U.S. While most other trade agreements that have an ISDS are between a developed country and a developing country, TPP is the biggest trade agreement that involves several developed countries (the U.S., Japan, Canada, Australia, and New Zealand). Investors from developed countries are far more likely to launch an ISDS attack upon U.S. regulations because they are more likely to be involved in foreign direct investment to the U.S.[110] Existing ISDS agreements have allowed 1,300 foreign corporations that own 9,500 U.S. subsidiaries to launch ISDS cases. In comparison, TPP alone would allow more than 1,000 additional corporations in TPP countries with more than 9,200 additional U.S. subsidiaries to bring claims against the U.S. government.[111] Although the U.S. has withdrawn from TPP, future trade negotiators should still consider this enhanced exposure if the contemplated deal also involves multiple developed countries.

In addition, as discussed previously, the MFN provisions will enable investors in the signatory countries to take advantage of the most pro-investor provisions that the U.S. had signed in other treaties.[112] This result, also designated as the "creeping multilateralism effect," means the potential 9,200 additional investors could invoke provisions in other treaties to which the U.S. is a party to bypass relevant unfavorable provisions in TPP itself. The potential negative effect is more salient considering TPP involves many more developed countries than any other treaties. That means the more sophisticated investors in developed countries now have more access to favorable treaties between the U.S. and developing countries to initiate arbitral attacks upon the U.S. Even worse, this would likely cause investors located in non-party countries to conduct "nationality planning," namely to change their equity structure so that they are "subsidiaries" of a signatory state corporation.[113] As a consequence, many more thousands of foreign entities could have the opportunity to bring ISDS claims against the U.S., even if their original home country is not a signatory to TPP.

III. Seeking Alternatives: A Scenario-Specific Deferential Approach

Faced with the worrying outcomes resulting from ISDS in past free trade agreements and other investment treaties, scholars have proposed several resolutions, such as reducing investors' accessibility to the ISDS,[114] adopting mandatory interpretative statements to limit the substantive rights of investors,[115] or establishing a permanent institution specifically dedicated to the review of ISDS appeals.[116] Having suffered from substantial liability incurred from the investor-state disputes under NAFTA, some governments, such as Canada and Mexico, contrived more radical procedures to restore national sovereignty: de novo review of arbitral rewards by domestic courts.[117] Some of these approaches still

103. *Bilcon of Delaware, Inc.*, Case No. 2009-04, at 19 (Prof. McRae, dissenting).
104. *Id.*
105. *Id.*
106. *Fact Sheet: Investor-State Dispute Settlements*, *supra* note 55.
107. *Id.*
108. *TPP Investment Map: New Privileges for 29,000 Companies*, Public Citizen, http://www.citizen.org/TPP-investment-map (last visited Apr. 6, 2016).
109. Todd Tucker, *Creeping Multilateralism*, Todd N. Tucker: Under Two Ceilings (Apr. 30, 2015, 10:17 AM), http://toddntucker.com/2015/04/30/creeping-multilateralism-2/.
110. Todd Tucker, *The TPP Has a Provision Many Will Love to Hate: ISDS. What Is It, and Why Does It Matter?*, Wash. Post (Oct. 6, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/06/the-tpp-has-a-provision-many-will-love-to-hate-isds-what-is-it-and-why-does-it-matter/. Until June 2015, 19 of the 22 ISDS cases that have ever been initiated under a free trade agreement against the U.S. were initiated by Canadian investors. *See generally Table of Foreign Investor-State Cases and Claims Under NAFTA and Other U.S. "Trade" Deals*, Public Citizen (Oct. 2016), http://www.citizen.org/documents/investor-state-chart.pdf.
111. *Secret TPP Investment Chapter Unveiled: It's Worse Than We Thought*, Public Citizen 2, http://www.citizen.org/documents/analysis-tpp-investment-chapter-november-2015.pdf (last visited Jan. 6, 2017).
112. *See* Tucker, *supra* note 109; *see generally* Martins Paparinskis, *MFN Clauses and International Dispute Settlement: Moving Beyond Maffezini and Plama?* 26.2 ICSID Rev. 14, 43, 49 (2011), http://icsidreview.oxfordjournals.org/content/26/2/14.extract (discussing how investors make use of MFNs to gain the procedural and substantive benefits of a nation's other, existing treaties).
113. *See* Tucker, *supra* note 109. Tucker discusses how investors can already engage in this behavior without the additional access provided by the TPP. *See id.*
114. Howard Mann & Konrad von Moltke, NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment, International Institution for Sustainable Development 57 (2016).
115. Julie Soloway, *NAFTA's Chapter 11: The Challenge of Private Party Participation*, 16 J. Int'l Arb. 1, 14 (1999); *see* Frederick M. Abbott, *The Political Economy of NAFTA Chapter 11: Equality Before the Law and the Boundaries of North American Integration,* 23 Hastings Int'l & Comp. L. Rev. 303, 308 (2000); William S. Dodge, *International Decision,* 95 Am. J. Int'l L. 186, 191–92 (2001).
116. *See* Abbott, *supra* note 115, at 308.
117. Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 Colum. J. Transnat'l L. 43, 47 (2001); *see generally* United Mexi-

have their limits. For example, some have argued against the proposed de novo review because it is an independent violation of the ISDS provisions in NAFTA and has been rejected by a Canadian court.[118]

In essence, these approaches differ on the degree of the power and authority the arbitral panels enjoy. A key aspect of this power is reflected through the standard of review the panels adopt. As noted by many scholars, the current status of the standard of review in international investment arbitration is chaotic.[119] Arbitral panels often adopt different standards of review in different cases, even when two cases have substantially similar political and legal contexts.[120] The lack of a uniform standard of review is a major source of the concern regarding the inconsistency and legitimacy of ISDS.

Therefore, this Note sides with the second proposal, namely adopting a standard of review provision for the TPP. Before discussing this Note's proposal in detail, an examination of the prevailing standards of review would better illustrate the importance of this matter.

A. The Necessity Approach

The necessity approach allows a host state to be excused from liability for its breach of treaties when such breach is "necessary" for certain legitimate purposes under the circumstances. This approach is a very stringent standard for host states. Under customary international law, a host state can only make the necessity argument when the case involves great and imminent peril.[121]

The tradition of this approach dates back to the necessity defense in international trade laws, first enumerated in Article XX and XXI of the General Agreement on Tariffs and Trade ("GATT").[122] Article XX provides that states can take measures that are "necessary to protect publicmorals" or "necessary to protect human, animal, or planet life or health."[123] Similarly, Article XXI provides that nothing in the GATT "shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . ."[124]

Article 9.10-3(d) of TPP states:

> Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
>
> (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;
>
> (ii) necessary to protect human, animal or plant life or health; or
>
> (iii) related to the conservation of living or non-living exhaustible natural resources.[125]

Customary international law has developed two different standards of review: the only means available test and the least restrictive measure test. The former one requires that the necessity defense can only be invoked if the breach (a) is the only way for the acting state to safeguard an essential interest against a grave and imminent peril, and (b) does not seriously impair an essential interest of a state toward which the obligation exists, or of the international community as a whole.[126]

This is illustrated in the first three ICSID arbitral decisions against Argentina after Argentina's 2001 economic crisis: *CMS Gas Transmission Co. v. Argentine Republic* (*CMS*);[127] *Enron Corp. Ponderosa Assets, L.P. v. Argentine Republic* (*Enron*);[128] and *Sempra Energy Int'l v. Argentine Republic* (*Sempra*).[129] In these cases, the arbitral panels ruled that if any alternative policy choice is available, even if that alternative is more costly, the necessity defense is unavailable.[130] Because a country always faces a variety of choices when it makes a policy determination, this extremely restrictive approach is unavailable for most host state breaches.

For example, in the *CMS* case, a Michigan gas company brought a claim against Argentina, who unilaterally suspended a dollar-based tariff adjustment scheme in the face of rapid devaluation of the peso and tried to use necessity as a defense.[131] Under the original adjustment scheme, Argentina should adjust the tariffs in accordance with the market exchange rate between dollar and peso every six months.[132] After 2002, when the market exchange rate had climbed to 3.6 peso/dollar due to the economic crisis, Argentina passed a so-called Emergency Law, denominating the exchange rate as 1 peso/dollar when calculating tariffs.[133] As a result, the claimant suffered huge tariffs expenses in dollar terms and

can States v. Metalclad Corporation, 2001 B.C.S.C. 664 (2001), http://www.italaw.com/documents/Metaclad-BCSCReview.pdf.

118. Brower, *supra* note 117, at 47.
119. William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*. 35 Yale J. Int'l L. 283, 297 (2010).
120. *See id.* at 297–98.
121. Luke Engan, *In Search of Necessity: Congruence, Proportionality, and the Least-Restrictive Means in Investor-State Dispute Settlement*, 43 Geo. J. Int'l L. 495, 497 (2011–2012).
122. *Id.* at 497.
123. General Agreement on Tariffs and Trade, art. XX(a)-(b), Oct. 30 1947, https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.
124. *Id.* art. XXI(b).
125. TPP, *supra* note 72, art. 9.10-3(d).
126. Engan, *supra* note 121, at 498.
127. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.
128. Enron Corp. Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007), http://www.italaw.com/documents/Enron-Award.pdf.
129. Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf.
130. Kelley Chubb, *The "State of Necessity" Defense: A Burden, Not a Blessing to International Investment Arbitration System*, 14 Cardozo L.J. Conflict Res. 531, 531–32 (2013), http://cardozojcr.com/wp-content/uploads/2013/03/CAC208.pdf.
131. *See CMS Gas Transmission Co.*, ICSID Case No. ARB/01/8, at 5, 17, 20.
132. *Id.* at 17.
133. *Id.* at 20.

sued.[134] The arbitral panel, after considering the cumulative circumstances, found that Argentina failed the test, even though it admitted Argentina indeed faced imminent and grave peril.[135]

Some scholars have argued that this is not a standard of review, but only "a narrow carve-out of general customary law rules of state responsibility."[136] More notably, the *Enron* and *Sempra* decisions were annulled in 2010 by an *ad hoc* Committee, rejecting the tribunals' narrow interpretation of the necessity defense.[137]

The second standard, the least restrictive measure test, first articulated in the *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes* by a GATT tribunal, means that a restrictive measure could be deemed "necessary" under GATT only if there were "no alternative measure consistent with the General Agreement, or less inconsistent with it, which [the respondent] could reasonably be expected to employ to achieve its health policy objectives."[138] In a later case, a GATT tribunal affirmed this approach but stressed that the measure must truly be "reasonably available" and that the respondent is not required to undertake fundamental reform of its economic policy.[139]

B. Good Faith Test

Good faith has long been a fundamental principle of international law.[140] This standard of review, contrary to the only available means standard, gives states extremely broad authority to regulate matters within their territory. Under this standard, a country's regulation and laws will be upheld by tribunals as long as the country's decisions were made with good faith and were reasonable.[141]

Early scholars have interpreted this principle to entail a "best-effort" requirement:

> The obligation to fulfill in good faith a treaty engagement requires that its stipulations be observed in their spirit as well as according to their letter, and that what has been promised be performed without evasion or subterfuge, honestly, and to the best of the ability of the party which made the promise.[142]

But more recent arbitral tribunals have interpreted the good faith principle to a more lenient "no discriminating motivation" standard. In *Gami Investments, Inc. v. Government of the United Mexican States*,[143] Gami, the U.S. investor, alleged that the expropriation of its sugar mill by Mexico government constitutes a violation of Article 1102 National Treatment of NAFTA. The tribunal looked to the administrative process of the Mexico government, mainly the motivation of its expropriation of U.S.-owned sugar mills while sparing some other mills owned by domestic and other foreign investors.[144] By stating that "Mexico perceived that mills operating in conditions of effective insolvency needed public participation in the interest of the national economy in a broad sense," the tribunal deferred to the judgment of the government because of government's legitimate motivation.[145]

This approach, though fully respecting states' authority, might render very limited review of states' behavior and therefore a limited protection of investors' rights.

C. The Margin of Appreciation Doctrine

The margin of appreciation doctrine can be defined as the "breadth of deference" that an arbitral panel would like to give to a country's legislature and regulators.[146] Tribunals use this approach, often intertwined with the proportionality principle, when they try to find a balance between the policy effect the national government is trying to achieve and the means it adopts.[147] First established by the European Court of Human Rights, it was recognized that it is "for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in [such] context[s]."[148] The reviewing body would then proceed to examine "whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient."[149]

As a middle ground between the restrictive necessity approach and the lenient good faith approach, the margin of appreciation doctrine has its advantages. Proponents of this approach argue that there is an institutional advantage, meaning that national government as an institution is better situated to interpret and enforce its domestic laws and regulations than international tribunals.[150] Under this theory, international tribunals could misunderstand or underestimate the complexity of the issue at hand, or set legal standards that are unrealistic under the circumstances.[151]

134. *Id.* at 21.
135. *Id.* at 93–94.
136. Burke-White & Staden, *supra* note 119, at 297–98.
137. *See* Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, (Sept. 28, 2007), http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf; *see also* Enron Corp. Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, (May 22, 2007), http://www.italaw.com/documents/Enron-Award.pdf.
138. *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶ 75, DS10/R-37S/200 (Oct. 5, 1990), GATT BISD (37th Supp.), at 200, 223 (1990).
139. *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.26, L/6439 (Jan. 16, 1989), GATT, BISD (36th Supp.), at 345, 389–91 (1989).
140. *See* Draft Declaration on Rights and Duties of States with commentaries, G.A. Res. 375 (IV), art. 13 (Dec. 6, 1949).
141. Burke-White & Staden, *supra* note 119, at 312.
142. *Id.* at 312 (citing *Codification of International Law*, 29 Am. J. Int'l L. 1, 981 (Supp. 1935)).
143. GAMI Investments, Inc. v. Gov't of the United Mexican States, Final Award, ¶ 24, at 10–11 (Nov. 15, 2004), http://www.italaw.com/sites/default/files/case-documents/ita0353_0.pdf.
144. *See id.* ¶ 114.
145. Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR 2 (2002).
146. Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 3 Conn. J. Int'l L. 111, 118 (1987).
147. Arai-Takahashi, *supra* note 145, at 2.
148. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) No. 24, 22 (Apr. 26, 1976).
149. *Id.* at 50.
150. Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 European J. Int'l L. 907, 918 (2005), http://www.ejil.org/pdfs/16/5/330.pdf.
151. *Id.* at 919.

D. Towards a Scenario-Specific Deferential Approach

Sadly, none of these prevailing approaches best counter the problem posed by the *Bilcon* case. These standards of review are more applicable in a government-intervention scenario, where the investors' interests are threatened by newly imposed regulation, expropriation, or other forms of intervention, because they are more or less derived from the traditional defense of necessity. However, in *Bilcon*, a well-informed governmental decision rendered under a long-standing regulatory framework was held a violation of the minimum treatment standard. The environmental assessment process was not specifically designated to the U.S. investor alone.[152] Rather, all marine mining and construction projects are subject to similar environmental assessment standards. The legitimacy and necessity of such assessment has been well discussed in domestic legislature and academia.[153] Further, environmental impact assessment is a prevailing practice in all developed countries and many developing countries.[154] The JRP conducted broad public opinion gathering and very detailed scientific analysis. Canadian provincial and federal governments adopted the assessment recommendation and rejected the project.[155]

Under these circumstances, the standard of review should distinguish a well-established regulatory framework and a reasonably made decision under that framework from those newly introduced, transformative legislations and regulations. In the later situation, margin of appreciation may be a good standard, as many scholars have argued. But for the former situation, a safe harbor approach should be adopted and the ISDS provisions should include a specific clause instructing future arbitral panels to apply this standard of view.

1. The Proposal

Therefore, this Note proposes that, to counter the threats imposed by the pro-investor interpretation, inconsistent and unpredictable arbitral decisions, and potential regulatory chill effect, TPP and future free trade agreements should include a standard of review provision in their investment chapters. Specifically, the standard of review should create a "safe harbor" that the governmental enforcement of a long-standing regulation or legislation shall not be deemed a violation of the treaty, if (1) the decision to enforce that regulation or legislation against the investor is non-discriminatory vis-à-vis other foreign and domestic investors, and (2) the enforcement is reasonably in compliance with the regulation or legislation.

The applicability of this standard should be clarified, and this turns to the question of what constitutes a "long-standing" law or regulation. One approach could be using a bright-line rule, defining the term in the text of TPP. It could be defined as any legislation or regulation passed before the initiation of the investment involved in the ISDS dispute. The rationale is if a law or regulation has been in place before the investor entered the market, it should be the investor's job to conduct due diligence and prepare for the compliance of that law or regulation. However, this could be problematic for investors if a law or regulation is adopted immediately before the investment, leaving the investor little time, if any, to update her business plans in accordance with the new rule. In addition, it could be difficult to determine exactly when an investor initiated her investment.

The other way could be to define "long-standing" as any law or regulation passed before the signatories' signing of TPP. This definition gives investors sufficient notice with regard to the host state's regulatory environment. However, this definition leaves the battlefield wide open with regard to the laws and regulations passed after the signing of TPP of which investors have actual notice.

Therefore, this Note instead proposes that when considering what constitutes "long-standing" law or regulation, a tribunal should look primarily to whether the investor had reasonable foreseeability of the law or regulation. If an investor could reasonably foresee that her investment would operate under a certain law or regulation, then her investment decision would be based, at least partly, on the risks associated with the compliance to the law or regulation. In other words, if an investor, after she reasonably foresees that she will be subject to a certain regulation, still decides to invest in the host country, she has voluntarily assumed the risk of the negative effect of that regulation.

In determining what is reasonably foreseeable, this Note proposes that an arbitral panel should look to various factors. One of them would be the timing of the passage of the regulation. Although not a determinative factor, as discussed above, timing is still very important. A regulation or law with decades of enforcement history and hundreds of cases litigating over issues emerged during its enforcement should provide adequate notice to an investor. In contrast, a newly passed regulation with vaguely worded provisions might not render reasonable certainty of how it is going to be enforced. Another factor would be whether the host government had made the legislation and regulation publicly accessible.

The burden of proving that the law or regulation falls in the "safe harbor" should be allocated to the host government, because once the "safe harbor" requirements are satisfied, the government will not be liable under TPP. The investor can rebut the government's case by establishing that it exercised due diligence. It can do this by showing that, after making reasonable efforts to investigate applicable laws and regulations, the investor was still unable to understand what regulatory requirements were in place, or that after communication and negotiation with the regulators regarding its project plan, the investor reasonably believed the plan would

152. Bilcon of Delaware, Inc. v. Canada, Case No. 2009-04, Award on Jurisdiction and Liability, at 130–31 (Perm. Ct. Arb. 2015), http://www.pcacases.com/web/view/50.

153. *See* Hiroyuki Yamamoto et al., *Development of EIA Protocol for Deep-Sea Ecosystems and Seabed Mining*, IAIA17, at 3 (2016).

154. Jennifer C. Li, *Environmental Impact Assessments in Developing Countries: An Opportunity for Greater Environmental Security?* 1–2 (U.S. Agency for Int'l Dev. & Found. for Envtl. Security & Sustainability, Working Paper No. 4, 2008), http://www.fess-global.org/workingpapers/eia.pdf.

155. *See Bilcon of Delaware, Inc.*, Case No. 2009-04, at 56.

be approved. If the investor can demonstrate these, then the government will have a weaker case.

2. The Advantages of the Proposed Standard

This "hands-off" approach has some obvious benefits. First, it avoids the possibility of inadequate investor-protection while clearly instructing the panels not to adopt overly pro-investor interpretations. Investor-state disputes arise in two different scenarios: one is like the *Bilcon* case, where the investor challenges a long-standing regulatory framework that the government automatically and thoroughly enforces; in the second type, as in most other cases referred to in this Note, the investor challenges a newly implemented governmental action that could have discriminatory impact on the investors. In the latter scenario, the investors are more likely to suffer unforeseeable losses because of the regulatory change. In the former scenario, however, the investors are less likely to suffer such losses because they should have noticed the regulation before they decided to invest in the host country and should have willingly assumed the regulatory risks by initiating the investment despite existing laws and regulations. Under such circumstances, granting national government more deference would not significantly hurt the investor because of the non-discriminatory and reasonableness limits.

Second, this approach resolves the inconsistency and regulatory chill problems of ISDS to some extent. By including a specific standard of review provision, arbitral panels would be limited to this approach in the applicable scenario, making the outcome of some arbitration cases more predictable. In addition, regulators will be more comfortable enforcing most of their domestic environmental laws and regulations without worrying about potential attacks from investors. More importantly, this solution will not allow the panels to second-guess a long-standing regulation or legislation simply because a foreign investor, suffering from the negative outcome that normally could have been rendered under that regulation or legislation, disagrees with the outcome.

Third, this approach still gives arbitral panels the authority to scrutinize governmental behavior, namely the enforcement actions. By allowing the panels to go into the issue of whether the enforcement is non-discriminatory and reasonably compliant, it makes regulators warier and more careful of their enforcement actions, and therefore better protects investors' legitimate interests.

Finally, investors can hardly bypass this approach by taking advantage of the creeping multilateralism discussed in Part II of this Note. In Article 9.5, TPP specifically provides that the MFN "does not encompass international dispute resolution procedure and mechanisms," especially the ISDS mechanism provided in Section B of Chapter 9.[156] Therefore, even if other free trade agreements the U.S. has entered into remain unchanged, this approach will effectively deter investors from abusing their rights with the TPP panels.

Admittedly, it might not be easy for the twelve countries to re-open the negotiations on the text of TPP or for Congress to require amendment before voting on it. However, the proposed language should be included in future free trade agreements so that the ISDS provisions will less likely be abused by investors to challenge national government, including the U.S. government's, legitimate environmental regulatory enforcement.

IV. Conclusion

The ISDS mechanism in TPP has the potential of seriously undermining U.S. environmental regulation. Although the U.S. has withdrawn from TPP itself, future free trade deals may well likely face the same problems posed by the ISDS mechanism contained therein. This Note examined the major problems of ISDS mechanism in light of the recent *Bilcon* case. One of the most effective ways of solving these problems is to set up a uniform standard of review for arbitral tribunals. This Note proposes that TPP and future investment treaties should adopt a scenario-specific deferential standard of review, namely governmental enforcement of a long-standing regulation or legislation shall not be deemed a violation of the treaty, if (1) the decision to enforce that regulation or legislation against the investor is non-discriminatory vis-à-vis other foreign and domestic investors, and (2) the enforcement is reasonably in compliance with the regulation or legislation. This approach can avoid some of the major problems caused by ISDS while adequately protecting investors' rights.

156. TPP, *supra* note 72, art. 9.5.