Since the promulgation of the Trade Promotion Authority (TPA) legislation in 2002, the United States has negotiated a series of Free Trade Agreement (FTA) investment chapters and Bilateral Investment Treaties (BITs) with substantially expanded provisions from prior U.S. investment treaties. Although the post-2002 versions of these BITs and FTA investment chapters, referred to together as International Investment Agreements (IIAs), contain a number of revised or clarified substantive provisions, the bulk of the changes between the newer IIAs and the older BITs in particular relate to the investor-state arbitration provisions of the agreements, building on the precedent of the North American Free Trade Agreement (NAFTA).

This article will focus on the investor-state arbitration provisions of the newest generation of U.S. IIAs, describing some of the key differences between the recent and former provisions of the U.S. agreements, as well as some key differences with some of the other approaches we see in other countries’ agreements. The agreements that will be discussed here include FTAs with Singapore, Chile, Morocco, CAFTA-DR, Oman, Peru, Panama, Colombia, and Korea, as well as the 2004 and 2012 Model BITs and the BITs with Uruguay and Rwanda.
As will be described below, the innovations in the expanded arbitration provisions under recent U.S. IIAs include:

- greater *clarity* in delineating the *scope* of matters subject to arbitration under our treaties;
- *forum selection provisions* to allow investors to utilize arbitration, national courts or tribunals, and in certain defined cases, both;
- *greater transparency* and public participation in the arbitration process;
- *greater efficiency* in conduct of arbitration; and
- a mechanism for *review* of awards.

I. Permitted scope of arbitration

The newest generation of IIAs, like previous U.S. BITs, provides for consent to investor-state arbitration to breaches of the agreements’ core substantive provisions, as well as breaches of “investment agreements” and “investment authorizations,” the latter of which are defined terms.

Under the early U.S. BITs that were negotiated in the 1980s and early 1990s, investors could submit a claim to investor-state arbitration to resolve any “investment dispute,” which included disputes involving “(a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party, (b) the interpretation or application of an investment authorization granted by [a Party’s] foreign investment authority to such national or company, or (c) an alleged breach of any right conferred or created by [the] Treaty with respect to an investment.” The terms “investment agreement” and “investment authorization” were not given any further definition in the treaty text.

The early U.S. BITs also contained the so-called “umbrella clause,” which stated that “Each party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other Party.” The umbrella clause, in the form used in these U.S. BITs or in minor variations thereof, has a long history of use in many countries’ BITs, going back to the initial conceptualization

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4 *See, e.g.*, U.S.-Panama BIT, Article VII(1). This definition of “investment dispute,” setting forth the scope of claims that could be subject of investor-state arbitration under the BITs, was uniformly followed in all U.S. BITs negotiated prior to 2002, except for the BITs with Egypt and Morocco, which did not include “investment authorizations.” However, as one of the U.S. negotiators of those agreements has noted, because the unqualified term “investment agreements” was considered to be broad enough to encompass authorizations, the deletion of the latter term was thought “to have no practical significance.” Kenneth J. Vandevelde, *United States Investment Treaties: Policy and Practice* 172–73 (1992).

5 *See, e.g.*, U.S.-Panama BIT, Article II(2).