A CASE FOR INVESTOR-STATE ARBITRATION UNDER THE PROPOSED TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

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INTRODUCTION

The proposed Transatlantic Trade and Investment Partnership (TTIP) between the United States (U.S.) and European Union (EU) is the most ambitious bilateral trade agreement of all time.[2] Although average tariff levels between the two partners are relatively low, various non-tariff barriers (NTBs)—often in the form of domestic regulations—continue to create obstacles for transatlantic investors.[3] The TTIP negotiations will focus on reducing NTB costs and increasing investor protection with the addition of a controversial Investor-State Dispute Settlement (ISDS)

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2 *Countries and Regions: United States*, EUROPEAN COMMISSION DICTORATE GENERAL FOR TRADE, http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/ (last visited Jan. 3, 2014).

3 *See* Joseph Francois et al., *Reducing Transatlantic Barriers to Trade and Investment*, CTR. FOR ECON. POLICY RESEARCH (MAR. 2013) AT 1, available at http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf.

mechanism that allows foreign investors to sue host states for alleged breaches of the treaty's substantive rules through private arbitration.[4]

NGOs and government officials from the EU and U.S. have expressed concern regarding investor-state arbitration under TTIP including the potential for increased litigation and the compromise of public policy.[5] As a result, opposition toward investor-state arbitration may have a detrimental effect on negotiations due to the intense political scrutiny. The European Commission ("EC" or "Commission") has faced a significant amount of pressure from public interest groups and recently announced it would hold public consultations on the proposed EU text of TTIP's ISDS mechanism.[6]

This article argues that critics' fears are exaggerated and an ISDS mechanism within TTIP would not result in increased disputes or compromised public policy. By exploring how past agreements and the increase of investor-state arbitration, provide the foundation for these concerns, this Article explains how critics fail to consider the U.S. and EU's extensive efforts to limit foreign investor protection. Additionally, the aim is to assess the unique characteristic of the US-EU partnership and how the existing investment relationship decreases the risk of increased investor-state arbitration under TTIP. The Article will also explore justification for the ISDS mechanism within agreements between developed countries and elaborate on additional steps the U.S. and EU could take to suppress remaining fears surrounding an increase in investor-state arbitration. If installed correctly, the TTIP ISDS mechanism would increase transatlantic investment by instilling confidence and reducing risk for foreign investors without forcing countries to alter public policy or national laws that protect their citizens.

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[4] Glyn Moody, *EU Mandate For TAFTA Leaked: Includes Investor-State Dispute Resolution For Intellectual Monopolies*, Tech Dirt Blog (May 31, 2013), available at http://www.techdirt.com/articles/20130530/12171523255/eu-mandate-tafta-leaked-includes-investor-state-dispute-resolution-intellectual-monopolies.shtml.

[5] European Commission Faces Serious Debate Over TTIP Investment Rules, Inside U.S. Trade (Oct. 18, 2013), https://wtonewsstand.com/index.php?option=com_ppvuser&view=login&return=aHR0cHM6Ly93dG9uZXdzc3RhbmQuY29tL2NvbXBvbmVudC9vcHRpb24sY29tX3Bwdi9JdGVtaWQsNDQ1L2lkLDI0NTAxNjMv.

[6] Press Release, Commission to Consult European Public On Provisions in EU-US Trade Deal on Investment and Investor-State Dispute Settlement, European Commission (Jan. 21, 2014), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1015.

I. The Growth of the ISDS Mechanism and Growing Concern of Litigation and Corporate Power

ISDS is a system that allows private investors to sue a host state for the alleged violation of an investment treaty concluded between the host state and the investor's country of origin. These ISDS rules are included in most of the nearly 3,000 international investment agreements (IIA)[7] and are unique in that they often allow investors to file claims with international arbitration tribunals without initiating proceedings before a national court.[8] ISDS rules are included in all of the bilateral investment treaties (BIT) between new EU Member States and the U.S and mentioned in the EC's negotiating mandate as an element the Commission intends to include within the TTIP.[9] The US 2012 Model BIT, a blueprint for US investment negotiations, also contains extensive rules on investment protection and arbitration.[10]

Investor-state arbitration by an independent tribunal was originally created to protect companies from weak court systems in developing countries.[11] However, the increased practice between global leaders has allowed corporations to gain more power in challenging host-state regulations, even in developed states. Over the last two decades,

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[7] International investment agreements can be bilateral or involve more parties. Investment-related clauses can also be included in broader agreements, notably free trade agreements.

[8] David Gaukrodger & Kathryn Gordon, *Investor – State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment (2012) at 10, *available at* http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf (presenting the results of a survey of more than 1,600 investment treaties and conclude that more than 90% of them provide for investor-state dispute settlement. In some of them, ISDS only relates to disputes over expropriation).

[9] *See* EU Draft Text On ISDS Contains Similarities, Differences To U.S. Approach, World Trade Online (Apr. 5, 2013) [hereinafter EU Draft Text on ISDS Contains Similarities, Differences To U.S. Approach], http://insidetrade.com/Inside-Trade-General/Public-Content-World-Trade-Online/eu-draft-text-on-isds-contains-similarities-differences-to-us-approach/menu-id-896.html.

[10] Shayerah Akhtar and Martin Weiss, Cong. Research Serv., RL 43052, U.S. International Investment Agreements: Issues For Congress 8 (2013) at 8, 11 [hereinafter U.S. International Investment Agreements].

[11] Christoph Schreuer, *The Dynamic Evolution of the ICSID System*, Univ.Vienna Int'l L.J. 15, 15-16 (2006) *available at* www.univie.ac.at/intlaw/wordpress/pdf/85_cspubl_86.pdf (discussing the role of private investment in economic development and the importance of developing countries revising attitudes towards FDI).

investor-state arbitration has increased from a few dozen cases in 1992 to 514 cases by the end of 2012.[12] In 2012, the number of known treaty-based ISDS cases filed under IIAs grew by nearly sixty cases.[13] This constitutes the highest number of known treaty-based disputes ever filed in one year.[14]

While the number of cases brought to arbitration is small compared to the thousands of investments that benefit both the host countries and companies investing in them, recent cases brought by investors against states have given rise to strong public concern. Recent claims have challenged the impact of policies such as environmental and labor regulations, emergency economic measures related to the 2008-2009 economic crisis, and cultural protection laws, among others. The main concern is that the current investment protection rules may be abused to prevent countries from making legitimate policy choices.

Among the cases that have caught the most public attention are the on-going cases *Vattenfall v. Germany and Philip Morris v. Australia*.[15] Vattenfall, a Swedish energy company, brought a claim against the German government (under the Energy Charter Treaty) after its decision in 2011 to speed up the phase-out of nuclear power generation.[16] Philip Morris has also challenged the government of Australia for its decision to ban brand names on cigarette packs (the 'plain packaging' measure) for reasons of public health.[17] These cases have not yet been decided and it is impossible to gauge whether either case will be successful. However, it is important to note that neither Germany nor

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[12] *Recent Developments In Investor State Dispute Settlement*, UNCTAD Int'l Centre for Settlement of Investment Dispute, (2013) at 1 [hereinafter UNCTAD Recent Developments In ISDS], *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf (The number of known treaty-based ISDS cases filed under international investment agreements grew by at least 58 in 2012.).

[13] *Id.* at 1.

[14] *Id.* at 2-3 (noting that of the 58 new cases, 37 were filed by investors from developed countries.)

[15] *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12) [hereinafter Vattenfall] and *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12. [hereinafter Philip Morris].

[16] *See id.*; *see also* The Thirteenth Amendment to the Atomic Energy Act (13. AtGAndG v. 31.07.2011, BGBl I S. 1704 (No. 43)) (beginning on August 6, 2011).

[17] *See Philip Morris, supra* note 15 (arguing that warning labels on cigarette packs and plain packaging prevent it from effectively displaying its trade mark, causing a substantial loss of market share).

Australia have been influenced or forced to make any changes to their policies as a result of the cases brought by the investors.

Fears of increased disputes and compromised public policy have compelled countless nongovernmental organizations (NGOs) to speak out against the TTIP agreement and other IIAs that include investment protection mechanisms.[18] Critics argue that the TTIP agreement would empower EU and U.S. corporations "to engage in litigious wars of attrition to limit the power of governments on both sides of the Atlantic."[19] They claim that the tremendous volume of investment between the EU and U.S. and their investors', who already frequently use investor-state arbitration, will inevitably lead to an exorbitant increase in arbitration under TTIP.[20]

It is true that U.S. and EU investors are among the most frequent users of the dispute settlement procedures and account for a growing

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[18] *See e.g.*, *Investment Rights Stifle Democracy*, Corporate Europe Observatory (last updated Apr. 26, 2011), http://corporateeurope.org/trade/2011/04/investment-rights-stifle-democracy; Matthew C. Porterfield & Christopher Byrnes, *Philip Morris v. Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?*, Investment Treaty News (Jul. 12, 2011) [hereinafter Porterfield, Byrnes], *available at* http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/.; Letter from Senator Maralyn Chase and Rep. Sharon Treat to Ambassador Ron Kirk (Jul. 5, 2012) (enclosing letter signed by state legislators from all 50 states and Puerto Rico stating strong opposition to the inclusion of ISDS provisions in the Trans-Pacific Partnership (TPP)); Letter from Transatlantic Consumer Dialogue to Ambassador Ron Kirk (Mar. 5, 2013), *available at* http://www.citizen.org/documents/TACD-TAFTA-letter-3-5-13.pdf (expressing concern for any deal that dismantles existing EU and US consumer protection); Kanaga Raja, *EU-US Deal Could Unleash a "Corporate Litigation Boom"*, Third World Economics (Jun. 2013), http://twnside.org.sg/title2/twe/2013/547/5.htm; *A Transatlantic Corporate Bill of Rights: Investor Privileges in EU-US Trade Deal Threaten Public Interest and Democracy*, Corporate Europe Observatory (Oct. 2013), *available at* http://www.tni.org/sites/www.tni.org/files/download/ttipinvestment-oct2013.pdf ("Investor-state dispute settlement under the proposed Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States would empower EU- and US-based corporations to engage in litigious wars of attrition to limit the power of governments on both sides of the Atlantic").

[19] *A Transatlantic Corporate Bill of Rights: Investor Privileges in the EU-US Trade Deal Threaten Public Interest and Democracy,* Corp. Europe Observatory (Oct. 2013) at 3, *available at* http://corporateeurope.org/sites/default/files/attachments/transatlantic-corporate-bill-of-rights-oct13.pdf.

[20] *Id.* at 1.

number of cases. Of the 514 known disputes, U.S. investors have filed 24% (123) of all cases while EU investors have filed 40%.[21] Of the 52 total cases initiated in 2012, EU investors were behind 60% of all initiations, while U.S. investors accounted for 7.7%.[22] Despite these arguments access to private investor-state arbitration under TTIP does not automatically imply that U.S. and EU investors will increase the use of investor-state arbitration or if they do, be successful.

II. Unfounded Fear of Increase in Investor Disputes and Corporate Control In EU and U.S.

The criticism aimed at the TTIP's ISDS mechanism fails to consider significant policy revisions made by the U.S. and EU to improve their individual ISDS mechanisms under existing BITs with other countries and limit foreign investor protection. These accusations are also unsupported by the low number of claims brought under existing BITs between U.S. and individual EU Member states and the low rate of success of claims brought against good governance countries such as Germany, France, the UK, and the U.S.

A. Less Favorable Post-NAFTA Investment Agreements

Interest groups that have expressed criticism of investor-state arbitration under TTIP frequently cite the 60 disputes filed under NAFTA's Chapter 11 to justify accusations that the same will result under the transatlantic agreement.[23] However, those critics fail to consider the significant changes the U.S. and EU have made in recent years in response to the number of disputes created under NAFTA.

The U.S.'s 2004 Model BIT is an example of these efforts, which developed from concerns that foreign investor protections were too broad under NAFTA and therefore foreign investors received more favorable treatment under the agreement than U.S. investors received

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[21] UNCTAD Recent Dev. In ISDS, *supra* note 12 at 4 (explaining that the number of known treaty-based ISDS cases filed under international investment agreements grew by at least 58 in 2012.).

[22] *Factsheet on Investor-State Dispute Settlement,* European Commission (Oct. 3, 2013) at 5, *available at* http://trade.ec.europa.eu/doclib/doc/2013/october/tradoc_151791.pdf.

[23] *Table of Foreign Investor-State Cases and Claims Under NAFTA and Other U.S. 'Trade' Deals,* Public Citizen (Aug. 2013), *available at* http://www.citizen.org/documents/investor-state-chart.pdf.

under U.S. law.[24] The 2004 Model contains several additions including a narrower definition of investment covered under the agreement, a narrower minimum standard of treatment, more detailed provisions on investor-state arbitration, provisions to enhance the transparency of national laws and proceedings, as well as language addressing environmental and labor standards.[25] The 2004 Model BIT was used as the basis for the U.S.'s BITs with Uruguay and Rwanda and no investor-state dispute claims have risen under those two agreements.[26] It is also relevant to note that Philip Morris, a U.S. company, decided to bring a claim against Uruguay under the Switzerland-Uruguay BIT because the U.S. BIT did not provide enough investor protection.[27]

Shortly after taking office in 2009, the Obama Administration suspended ongoing BIT negotiations to further review the scope of investor protection and ensure the Model BIT "was consistent with public interest and the Administration's overall economic agenda."[28] The 2012 Model BIT added new transparency requirements requiring parties to publish proposed regulations, explain their purpose and rationale, allow public comments, and address such comments when adopting the final regulations.[29] These new provisions could forestall a percentage of investor-state arbitrations, since the new provisions give investors an opportunity to discuss the effects of regulatory amendments and host states a chance to reevaluate proposed changes before final promulgation. The 2012 Model also expands the scope of labor and environmental obligations by an affirmative responsibility on parties to ensure they do not waive or derogate from domestic or labor laws.[30] Unless the U.S. suddenly reverses course in its treaty negotiating, the terms of the TTIP

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24 U.S. International Investment Agreements, *supra* note 10 at 9.

25 *Id.*

26 *Id.; see also Database of Treaty-Based Investor-State Dispute Settlement Cases*, UNCTAD, [hereinafter UNCTAD Treaty-Based ISDS Database], http://iiadbcases.unctad.org (including information on known treaty-based ISDS cases that are pending or concluded) (last visited on Jan. 20, 2014).

27 Porterfield, Byrnes, *supra* note 18.

28 U.S. International Investment Agreements, *supra* note 10 at 9.

29 2012 Model U.S. Bilateral Inv. Treaty, United States Trade Representative, art. 10-11 [hereinafter 2012 Model U.S. BIT] (adopted on Apr. 20, 2012), *available at* http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

30 *See id.* art. 13 (noting that the 2004 model contained a more aspirational provision, calling only for the parties to "strive to ensure").

investment chapter are likely to be less favorable to European investors than already-existing BITs.

The Commission is also working to improve investment dispute provisions by clarifying investment protection rules and improving how the dispute settlement system operates.[31] These improvements are intended to address concerns raised that investment protection rules may negatively impact states' rights to regulate.[32] The Commission has stated that all EU FTAs will confirm the parties' "right to regulate and to pursue legitimate public policy objectives such as social, environmental, security, public health and safety, and the promotion and protection of cultural diversity."[33] Additionally, the EU has introduced a code of conduct in order to deal with conflicts of interests among arbitrators that are serving on tribunals.[34]

The EU and the U.S. are also committed to a more transparent arbitration system and are exploring the creation of an appellate mechanism. It was reported that the EC's June 2012 draft text included transparency provisions similar to those included in the Obama Administration's 2012 Model that require parties' legal submissions be made public, hearings be open to the public, and non-disputing parties be allowed to submit amicus briefs.[35]

The EU's June 2012 draft text also included language describing a possible appellate mechanism for private arbitration under the agreement.[36] While no provisions requiring the consideration of an appellate mechanism are included in the U.S. model BIT, U.S. FTAs with Korea, Colombia and Panama include an annex to the investment chapter stating that the "parties will consider establishing such a mechanism for investor-state disputes three years after the FTA enters into force."[37]

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31 *Investment Protection and Investor-to-State Dispute Settlement in EU Agreements,* European Commission 2 (Nov. 26, 2013) [hereinafter Investment Protection and ISDS in EU Agreements], *available at* http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf (summarizing the importance of investment agreements and steps taken to improve the ISDS mechanism within EU investment agreements).

32 *See id.* at 1.

33 *See id.* at 7.

34 *See id.* at 9.

35 EU Draft Text on ISDS Contains Similarities, Differences To U.S. Approach, *supra* note.

36 *Id.*

37 *Id.*

Experts have also reported that a revised version of the European Commission's draft mandate includes further provisions to guard against frivolous legal claims, bringing the EU more closely in line with U.S. positions in past FTAs and investment treaties.[38] Individual EU member-state BITs have traditionally excluded these disposal mechanisms but it is similar to what the EU recently proposed during the CETA negotiations with Canada.[39] These frivolous claim provisions closely reflect text in the US Trade Act of 2002.[40] Mechanisms reflecting this principle were also included in subsequent free trade deals such as the U.S-Morocco and U.S.-Korea FTAs, and a number of U.S. BITs.[41] In the 2012 U.S. Model BIT, the ability for an arbitral tribunal to evaluate whether a claim is frivolous is also part of the procedure through which a state may preliminarily object to a complainant's claim on the basis that the tribunal does not have jurisdiction to consider it.[42]

B. Existing Investment Relationship Between U.S. and EU Members

Perhaps the most convincing argument against the risk of increased disputes and arbitration is the current investment relationship between the U.S. and individual EU member countries. The U.S. currently has BITs with eight EU members[43] in former transition economies dating back to the early and mid-1990s.[44] There have been no claims brought against the U.S. under those treaties.[45] There have been eleven claims

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[38] Stuart Trew, *Revised EU Mandate Seeks To Prevent 'Frivolous' Investor-State Claims*, Inside U.S. Trade, (May 23, 2013) [hereinafter Revised Mandate Seeks To Prevent Frivolous Claims], http://wtonewsstand.com/index.php?option=com_ppvuser&view=login&return=aHR0cDovL3d0b25ld3NzdGFuZC5jb20vY29tcG9uZW50L29wdGlvbixjb21fcHB2L0l0ZW1pZCw0NDYvaWQsMjQzNTM4OS8=.

[39] *See id.*

[40] U.S. Trade Promotion Authority Act, 19 U.S.C. §2102(b)(3)(G)(i) (2002) (stating that investment measures should include "meaningful procedures for resolving investment disputes," while also including "mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims").

[41] Revised Mandate Seeks To Prevent Frivolous Claims, *supra* note 38.

[42] 2012 U.S Model Bilateral Investment Treaty, s*upra* note Error! **Bookmark not defined., art. 28.**

[43] Bulgaria (1994); Croatia (1992); Czech Republic (1992); Estonia (1997); Lativia (1996); Lithuania (2001); Poland (1994); Romania (1994).

[44] *United States Bilateral Investment Treaties*, U.S. Department of State, http://www.state.gov/e/eb/ifd/bit/117402.htm (last visited Jan. 20, 2014).

[45] UNCTAD Treaty-Based ISDS Database, *supra* note **Error! Bookmark not defined.**

against EU members by U.S investors—however, five of those claims were brought before the responding countries became members of the EU.[46] Also, of the claims with known results, no tribunal awarded in favor of the U.S. investor[47] and no claims were brought in 2012 and 2013.[48]

When assessing the likelihood of increased litigation against developed EU members and the U.S., the track record for investor-state arbitration shows that the proportion of claims against "good governance" countries like Germany, France, and U.S. are extremely low.[49] A standard created by the World Bank, 'good governance' is associated with democracy and good civil rights, with transparency, the rule of law, and efficient public services.[50] Countries, like the U.S. and developed economies within the EU, possess a low track record for investor-state arbitration cases brought against them and possess a very high success rate in the small number of claims that are brought.[51] The U.S. has never lost an investor-state claim.[52] Also, the U.S. has been party to agreements providing for investor-state arbitration since the early 1980's, which includes about forty BITs and FTAs with about twenty-five more states.[53] The only agreement under which the U.S. has ever been sued in investor-state arbitration, and the only claimants (with one exception) has been to Canada.[54] There have been no other claims under any other investment agreement.[55]

C. Cost

Cost also provides a disincentive for bringing investor-state claims. Having more investors does not mean more claims if investors decide

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46 *Id.* (counting claims brought against Poland in 1996; Czech Republic in 1999, Estonia in 1999; Romania in 2001 and 2005).

47 *Id.*

48 *Id.*

49 Mark Kantor, *Comment on USCIB on Investor-State in the TPP,* Int'l Econ. L. and Policy Blog (May 11, 2013), http://worldtradelaw.typepad.com/ielpblog/2011/05/uscib-on-investor-state-in-the-tpp.html.

50 *What is Governance,* The World Bank, http://info.worldbank.org/governance/wgi/index.aspx#home (last visited on Jan. 20, 2014).

51 UNCTAD Treaty-Based ISDS Database, *supra* note **Error! Bookmark not defined..**

52 Int'l Econ. L. and Policy Blog, *supra* note 49

53 *Id.*

54 *Id.*

55 *Id.*

they are no more likely to succeed than those that have already sued the U.S. or an EU member state.[56] The average cost of arbitration is $8 million per party, approximately 82 percent of which is legal fees and most take several years to conclude.[57] This is partly due to the fact that many legal issues remain unsettled, meaning extensive resources must be used to develop a legal position by closely studying previous arbitral awards. Under the ICSID rules, each member of the arbitral panel can claim a daily fee of $3,000 plus expenses, while billing rates for arbitration lawyers run up to $1,000 per hour.[58] The EU's initiative to prevent frivolous claims by making the losing party pay costs will also contribute to investors' hesitation in bringing frivolous claims.[59]

Critics of TTIP and the ISDS mechanism have failed to consider the changes made within the modern trading system and the low record of disputes against the U.S. and leading EU member states. The additional measures taken by the U.S. and EU to revise investor policy as well as the incredible track record of success of the U.S. and EU good governance countries in investor-state claims will prevent companies from bringing a surge of claims against the U.S. or EU.

III. Justification for Investor-State Arbitration Within Developed Countries

The purpose of IIAs is to encourage inflows of capital and technology needed for economic growth by reducing legal and political risk.[60] Especially in developing countries, domestic resources are not enough to generate the needed growth to improve the lives of their people and

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[56] *See* Gavin Thompson, Library of the House of Commons, SN/EP/6777, Investor-State Dispute Settlement and the Transatlantic Trade and Investment Partnership 1 (2013) [hereinafter G. Thompson], *available at* http://www.parliament.uk/business/publications/research/briefing-papers/SN06777/investorstate-dispute-settlement-isds-and-the-transatlantic-trade-and-investment-partnership-ttip (responding to common questions about investor-state dispute settlement provisions).

[57] *See id.* at 4.

[58] *See id.*

[59] Investment Protection and ISDS in EU Agreements, *supra* note 31, at 8.

[60] Peter H. Chase, *The United States, European Union, and International Investment*, The German Marshall Fund of the United States Strengthening the Transatlantic Economy Blog (Jul. 2011) 1 2 [hereinafter Peter Chase], http://www.gmfus.org/wp-content/blogs.dir/1/files_mf/chase_us_eu_intlinvestment_jul111.pdf (summarizing the importance of international investment treaties within developing countries).

foreign capital is required as well.[61] These countries recognize, however, that foreigners may be wary of putting money into countries about which they know little and will do so only if they get a high enough rate of return to cover the perceived risks.[62] Investment agreements provide guarantees to help assuage investor's concerns and reduce the need for other inducements to attract foreign capital.

It is easy for one to assume that developed countries do not need further investor protection to encourage foreign direct investment (FDI) by transnational companies. However, UNCTAD's 2013 World Investment Report states that for the first time ever, developing economies absorbed more FDI in 2012 than developed countries, accounting for 52 percent of global FDI flows.[63] FDI inflows to developed economies declined by 32 percent to $561 billion—a level last seen almost 10 years ago.[64] The EU alone accounted for almost two thirds of the global FDI decline.[65] At the same time, FDI outflows from developed countries also dropped to close to 2009 levels.[66] UNCTAD forecasts FDI in 2013 to remain close to the 2012 level, with an upper range of $1.45 trillion—a level comparable to the pre-crisis average of 2005-2007.[67] The TTIP and its ISDS mechanism will contribute to economic recovery within the EU and U.S. by removing low barriers to trade and creating a more confident and predictable investing environment.

Although investors will be able to go to domestic courts within the U.S. and EU to enforce their legal rights under TTIP (and will continue to do so in most cases), the ISDS mechanism provides three purposes that domestic courts cannot. It addresses the international obligations of the host government under the agreement when steps taken legally under domestic law allegedly violate the treaty promises on discrimination,

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61 *See id.* at 2 (noting developing countries' need for foreign direct investment).

62 *See id.* (highlighting the need for incentives and investment protection for developing countries in order to attract foreign investment).

63 *World Investment Report*, UNCTAD (2013) at 30 [hereinafter 2013 World Investment Report], *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fvi.unctad.org%2Fdigital-library%2F%3Ftask%3Ddl_doc%26doc_name%3D873-world-invest&ei=MlreUqHUIKSvsQT3lYH4Bg&usg=AFQjCNEa5FFCKIghgVaxM_jtxxrF9x-uOQ&bvm=bv.59568121,d.cWc.

64 *Id.* at 13.

65 *Id.*

66 *Id.* at 9.

67 *Id.* at 12.

expropriation, or obstruction of transfer.[68] It ensures a neutral venue to hear the complaint when domestic courts may have difficulty dealing with differences between domestic and international obligation.[69] Last but not least, it depoliticizes the conflict, so the government of the investor does not have to decide whether to sue the host country, and investors need not depend on their own governments to undertake what is often a diplomatically sensitive step to protect their investments.[70] Despite the overall quality of the U.S. and EU court systems, it is not unreasonable for a foreign investor from either location to be concerned about the potential for corruption and discrimination in regulatory decisions. The existence of investor-state arbitration gives foreign investors more confidence than an independent impartial tribunal that is available to them if required for such a rare situation.

As for U.S. investors going abroad, fear that courts within developed economies like the UK, France, and Germany may be unjustified, but that is not true for all 28 EU-member states. For transitioning economies within the EU—with weaker judicial and regulatory systems and a higher level of corruption and incompetence—investor-state arbitration offers a more adequate alternative to local courts.[71] This is also one reason why developed states in the EU are so reluctant to give up their own intra-EU BITs with weaker EU-member economies despite pressure to do so from the Commission.[72]

It is also legitimate for foreigners to be concerned about whether independent and impartial regulatory and judicial treatment is always available in the U.S. For example, Transparency International-USA noted this when the TI 2012 Corruption Perceptions Index was released: "[t]he United States ranks 19th in this year's CPI, lower than many of

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68 Peter Chase, *supra* note 60, at 3-4.

69 *Id.*

70 Peter Chase, *supra* note 60, at 4.

71 *See Transition Economies: An IMF Perspective on Progress and Prospects*, International Monetary Fund (Nov. 3, 2000), http://www.imf.org/external/np/exr/ib/2000/110300.htm (listing Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, and the Ukraine as transitioning economies within the EU).

72 Luca Schico, *Member State BITs after the Treaty of Lisbon: Solid Foundation or First Victims of EU Investment Policy*, College of Europe, 17 (2012), *available at* http://aei.pitt.edu/39283/1/researchpaper_2_2012_schicho_final.pdf (describing reluctance by Member States to give up their intra-EU BITs with other EU members).

its partners in the OECD."[73] The U.S. ranking confirms that Americans believe there are continued transparency and corruption issues in local, state, and national government institutions and processes.[74] Claudia Dumas, President and CEO of Transparency International—USA also adds, "while the United States has a commendable record of enforcing its anti-bribery laws, greater efforts must be made to increase transparency and accountability in U.S. governance. This includes strengthening the ability of prosecutors to pursue undisclosed conflicts of interest by government officials."[75]

Litigation will continue to be brought in U.S. courts because of the favorable investor law such as the Administrative Procedures Act and Tucker Acts while U.S. investors will predominantly use EU member state local law. However, the ISDS mechanism will provide the adequate protection for investors in special circumstances. ISDS provides the needed guarantee to companies that their investments will be treated fairly and on an equal footing with domestic companies.

IV. Further Safeguards and Alternatives

Although the U.S. and EU have taken significant steps to create a more transparent, fair, and effective ISDS system, challenges and concerns remain regarding arbitrators' impartiality and independence, forum shopping, consistency of arbitral decisions, and a lack of a review system.[76] These challenges have prompted further debate regarding a number of alternatives the U.S. and EU have addressed and may consider when negotiating the TTIP agreement. These options include alternative dispute resolution (ADR), the creation of an appellate mechanism, tailoring the existing system through individual IIAs, and the creation of an international investment court.

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[73] *Corruption Perceptions Index*, Transparency International (2012), http://www.transparency.org/cpi2012/results (last accessed December 2, 2013.

[74] Press Release, Transparency International, Corruption still widely perceived as pervasive–Transparency and accountability are focal points for United States (Dec. 5, 2112), *available at* http://www.transparency.org/news/pressrelease/20121205_corruption_still_widely_perceived_as_pervasive.

[75] *Id.*

[76] Catherine Yannaca-Small, *Improving the System of Investor-State Dispute Settlement: An Overview*, International Investment Perspectives 183, 184 (2006) [hereinafter Improving the System of Investor-State Dispute Settlement] (introducing current concerns within the investor-state dispute settlement mechanism).

An ADR mechanism, especially evaluative mediation, is increasingly attracting more favorable support in business for reasons such as cost control, efficiency, confidentiality, preservation of relationship, informality, and flexibility.[77] Evaluative mediation is a right-based form of ADR where a third-party neutral looks at the disputing parties' positional briefs and evaluates them objectively in light of her expertise to predict how they would fare in a legally binding decision or arbitration.[78] If mediation reaches an impasse, arbitration can be resorted to as a fallback with the same person as the mediator and arbitrator or a different person as the arbitrator as the parties might agree.[79] It is also noteworthy that the settlement rate of investor-state disputes at ICSID before any final award is rendered is estimated approximately at 30-40 percent.[80] Given the high success rate, ISDS by mediation should to be explored further.

An investment appellate body at the international level could also enhance the consistency, predictability, and perceived impartiality of decisions rendered by arbitral tribunals. Consistency of jurisprudence creates predictability and enhances the legitimacy of the investment arbitration system.[81] Under the current system, however, rulings by a panel do not set a precedent for future cases, and sometime the decisions by different panels conflict.[82] An appellate mechanism could provide a more uniform and coherent means for challenging awards of traditional

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[77] Nadja Alexander, *The Mediation Meta Model: Understanding Practice Around the World,* 26 Conflict ResoL. Q. 97 (2008) (noting that attention must be paid to a mediation type that caters to the accountability of dispute resolvers [state authority or representatives] to tax payers).

[78] Munir Maniruzzman, *A Rethink of Investor-State Dispute Settlement*, Kluwer Arbitration Blog (May 30, 2013), http://kluwerarbitrationblog.com/blog/2013/05/30/a-rethink-of-investor-state-dispute-settlement/ (describing the increase in ADR's popularity within ISDS).

[79] *See id.* (noting that this process should be structured and sequential given the fact that the state party needs to get its position evaluated for public accountability purposes before it can explore an interest-based resolution of the dispute with its counter-party).

[80] Sergey A. Voitovich, *Agreed Settlement v. Unfavourable Award in Investment Arbitration*, 13 J. of World Inv. & Trade 718, 720 (2012).

[81] KatiA Yannaca-Small, Arbitration Under International Investment Agreements: A Guide to the Key Issues 629 (2010).

[82] Bill Krist, *Investor-State Dispute Settlement—Fix it, Don't Ditch It*, America's Trade Policy (Oct. 29, 2013), http://americastradepolicy.com/investor-state-dispute-settlement-fix-it-dont-ditch-it-2/#.Ut5yphb0BJU.

bases.[83] There are, of course, challenges to this model, such as the logistics of selecting members, ensuring the timely resolution of disputes and the need to have a certain number of states participate before the system would be effective.[84] However, mechanisms such as the WTO's Appellate Body provide a current model for an effective mechanism in this respect and a handful of FTAs contain provisions that contemplate the introduction of an appellate body in the future.[85] Although the EU and U.S. have discussed the idea of establishing an appellate mechanism, neither entity has taken meaningful steps to bring this potential feature to fruition. This feature in particular, if created, could resolve a great deal of controversy spurred by NGOs and other critics of TTIP and its ISDS mechanism.

In addition to the appellate mechanism, UNCTAD suggests tailoring the existing system through individual international investment agreements to promote consistency.[86] This option implies that main features of the existing system would be preserved and individual countries would apply tailored modifications by altering aspects of the ISDS system within their new investment agreements.[87] Some countries are already pursuing procedural innovations including: setting time limits for bringing claims, increasing the contracting parties' role in interpreting the treaty to avoid legal interpretations that go beyond the original intent, and establishing a mechanism for consolidation of claims.[88] The U.S. has more transparency in its ISDS mechanism through the 2012 Model BIT and the EU has included a mechanism for an early discharge of frivolous claims.[89] Coupled with the renegotiation of existing treaties and increasing regional integration, changes like these could clarify and improve law that is applicable to ISDS.

As the U.S. and the EU move forward with TTIP negotiations, it is important for both parties to seriously consider creative alternatives

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[83] *See* Improving the System of Investor-State Dispute Settlement, *supra* note 76 at 12 (outlining advantages to adopting an appellate mechanism for investment disputes).

[84] Rachel Nicolson, Hilary Birks, & Laura Bellamy, *Focus: A Different Roadmap for Investor-State Dispute Settlement?*, Allens Linklaters LLP (Jul. 23, 2013), http://www.allens.com.au/pubs/ibo/foibo23jul13.htm.

[85] *See id.*

[86] 2013 World Investment Report, *supra* note 63 at 113.

[87] *Id.*

[88] *Id*.

[89] *See* 2012 Model U.S. BIT, *supra* note 29 at art.11 and 29. *See also* Investment Protection and ISDS in EU Agreements, *supra* note 31 at 8.

because TTIP will be used as a model for future international investment law.

Conclusion

Trade between the U.S. and the EU countries now accounts for almost half of global economic output. The 28 EU-member states are by far the U.S.'s largest trading partner. If the TTIP comes to fruition, it will be the biggest trade agreement in history, potentially adding $420 billion per year to the global economy and creating over two million jobs. Despite the economic need for the TTIP agreement, negotiations have been slowed by pushback from public groups that express exaggerated fears surrounding the investor-state dispute settlement mechanism. These groups fail to consider the existing trade relationship between the EU and U.S., the measures each partner put in place to restrict investor protection, and the realistic implications of investor-state dispute resolution and those measures. If modeled after recent IIAs, the ISDS mechanism within TTIP will provide investors with added confidence of adequate protection without forcing countries to alter public policy or national laws that protect their citizens. The TTIP will remove regulatory hurdles that are now imposed by governments, increase confidence in a neutral dispute settlement venue, and serve as a model for future international trade law.