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THE PROPOSED TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP): ISDS PROVISIONS, RECONCILIATION, AND FUTURE TRADE IMPLICATIONS

ABSTRACT

On July 8, 2013, the United States and the European Union launched talks for the Transatlantic Trade and Investment Partnership, a proposed international investment agreement. This agreement would create the world's largest free trade area and cover almost half of the entire global economic output. Other research has concluded that increasingly global trade has led to an increase in investment disputes between foreign investors and host nations and stressed the importance of investor-state dispute settlement provisions. Within an international investment agreement, investor-state dispute settlements provide investors a means of holding foreign states accountable to an international tribunal with repercussions of a binding, enforceable award of compensation.

Even with a recognized public backlash, U.S. and EU leaders have publicly stated their intention of including investor-state dispute settlement provisions in the finalized TTIP and future international investment agreements, including any future multilateral agreement on investment. A U.S. Model text includes three significant changes that will impact the adoption of investor-state dispute settlement provisions in the bilateral investment treaty: transparency; third-party involvement; and consideration for future multilateral appellate procedures. The EU Draft text and corresponding negotiating directive address the following issues: transparency, tribunal creation, enforcement of arbitration awards and potential future appellate mechanisms. This Comment provides original analysis on specific provisions regarding each of these issues and seeks to prescribe reconciliation between the U.S. and EU texts. I find that reconciliation is possible on all ISDS provisions of the proposed TTIP. Then, I conclude with a summarization of all relevant discussions.

INTRODUCTION

But I will say here and now, on this Day of Independence, that the United States will be ready for a Declaration of Interdependence, that we will be prepared to discuss with a united Europe the ways and means of forming a concrete Atlantic partnership, a mutually beneficial partnership between the new union now emerging in Europe and the old American Union founded here 175 years ago . . . All this will not be completed in a year, but let the world know it is our goal.

—*The 35th U.S. President, John F. Kennedy, 1962*¹

On July 8, 2013 the United States and the European Union launched talks for the Transatlantic Trade and Investment Partnership (TTIP),² a proposed international trade and investment agreement (IIA).³ The TTIP would create the world's largest free trade area encompassing "about 50 percent of global economic output, 30 percent of global trade and 20 percent of global foreign direct investment,"⁴ potentially boosting "U.S. and EU economic growth by more than \$100 billion a year."⁵ In addition to the economic increases that could be realized by the U.S. and the EU, more commercial interaction will inevitably lead to a greater amount of commercial disputes—an important issue at stake for the TTIP and the global economy. U.S. and EU leaders have publicly stated their intention of using negotiated ISDS provisions from the TTIP in future IIA agreements. This Comment argues that the final ISDS provisions in the TTIP are important for U.S.-EU trade, but may have future implications for a multilateral agreement on investment (MAI). The development of ISDS provisions in the TTIP has massive trade implications influencing the \$100 billion a year figure.⁶ Any influence the TTIP would have on a possible future MAI could have even more massive implications. This Comment is limited in scope to the U.S.-EU TTIP ISDS provisions. While

¹ President John F. Kennedy, Speech at Independence Hall, (July 4, 1962).

² Informal talks about a U.S.-EU Free Trade Agreement began in the 1990's, but faltered as the U.S. and the EU focused on creating agreements with emerging market states. Jack Ewing, *Trade Deal Between U.S. and Europe May Come to the Forefront*, N.Y. TIMES (Nov. 25, 2012), http://www.nytimes.com/2012/11/26/business/global/trade-deal-between-us-europe-may-pick-up-steam.html?pagewanted=all&_r=0.

³ Doug Palmer, *After Long Buildup, U.S.-EU Free Trade Talks Finally Begin*, REUTERS (July 8, 2013), www.reuters.com/assets/print?aid=USL2N0F71XS20130708. For the purposes of this paper, TTIP refers to a proposed free trade agreement between the U.S. and the EU, while an IIA describes any general international investment agreement.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

there is a great amount of scholarly work surrounding ISDS provisions, this Comment is currently the only known work centered on ISDS provisions of the TTIP. As such, this Comment will consider the development of IIAs in the U.S. and the EU, trace positions and objectives for both the U.S. and EU, and analyze how finalized ISDS provisions within a U.S.-EU IIA may be reconciled in the TTIP.

I. BACKGROUND

A. General Overview

IIAs in this Comment refer to free trade agreements (FTAs),⁷ bilateral investment treaties (BITs), and other investment instruments negotiated and concluded by member states (contracting states) to specific agreements.⁸ Before digressing into what is an IIA, it is important to note that before the advent of IIAs in the middle of the twentieth century, there were only three main ways that investors were able to gain remedy for any damages caused by overt acts of a foreign state against the investor's property or profits.⁹ As these processes became burdensome to investors, states began executing IIAs.

⁷ FTAs may be designed and written to include investment chapters that are identical to the contents of a state's active BITs. Chang-fa Lo, *A Comparison of BIT and the Investment Chapter of Free Trade Agreement from Policy Perspective*, 3 ASIAN J. WTO & INT'L HEALTH L. AND POLICY 147, 165 (2008) (discussing that in some cases a state's BIT concerning investor/investment protections is directly inserted into an FTA as one chapter concerned with investor/investment protection within the entire FTA agreement). For discussion purposes, the investment chapter of an FTA is the equivalent of a BIT. Karen Halverson Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT'L L. & COM. REG. 151, 153 (2012). Specifically, the U.S. State Department describes the similarity between the more than 40 BITs and the investment chapters of FTA that the U.S. currently has in force. Press Release, U.S. Dep't of State, United States Concludes Review of Model Bilateral Investment Treaty (Apr. 20, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/04/188198.htm>. However, it is important to note that a BIT may be replaced by an investment chapter of an FTA, but an FTA cannot be replaced with a BIT. Lo, *supra*, at 165. While international investment rules were not included in early FTAs, the similarity between investment and trade negotiation is becoming more commonplace, and parties to the IIA tend to discretionarily use the contents of a BIT within an FTA. Cross, *supra*, at 153–58.

⁸ SHAYERAHILIAS AKHTAR & MARTIN A WEISS, CONG. RESEARCH SERV., R 43052, U.S. INTERNATIONAL INVESTMENT AGREEMENTS: ISSUES FOR CONGRESS 1 (2013).

⁹ Christopher N. Camponovo, *Dispute Settlement and the OECD Multilateral Agreement On Investment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 181, 199–200 (1996). In the absence of a treaty framework providing for dispute resolution, investors have three means of obtaining redress for injuries caused by the illegal acts of a foreign nation. First, the investor could go to the local courts of the host state. *Id.* Second, the investor may submit a claim to a local court in the investor's home state. *Id.* Finally, the investor may petition for espousal, hoping the investor's home state will "bring the matter before the ICJ . . . or pursue traditional customary international law self-help remedies of retorsion, countermeasures, or suspension or termination of a treaty." *Id.* These three processes became burdensome to investors, and states began executing IIAs. *Id.*

While IIAs are discussed concurrently in this Comment, there are key distinctions between BITs and FTAs.¹⁰ A BIT is a contractual agreement between two states to govern the codification of rules and handling of investment disputes between a member state and the individuals and companies of the other member state.¹¹ An FTA is a trade arrangement between two or more countries for the purpose of providing all parties to the deal a preferential treatment in trade by removing tariffs and nontariff barriers between members of the agreement.¹² When included in an IIA, these agreements typically include two systems for dispute resolution between member states set up within the investor-state dispute settlement (ISDS) provisions: one for disputes between the member states and one for disputes between private investors from a member state against the other member state.¹³

Modern IIAs usually contain specific ISDS provisions to provide a forum ensuring host states uphold public treaties with regard to international investments for investors from a home state.¹⁴ Because investment amounts can be quite large when dealing with regulations, natural resource development and procurement, IIAs use ISDS provisions to offer a certain level of security to investors from developed countries when doing business in host states.¹⁵ It

¹⁰ Within the realm of international law, international investment treaties are unique in providing individuals recourse against another state. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 88 (2005).

¹¹ Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 137, 137 (2006).

¹² WILLIAM H. COOPER, CONG. RESEARCH SERV., RL31356, FREE TRADE AGREEMENTS: IMPACT ON U.S. TRADE AND IMPLICATIONS FOR U.S. TRADE POLICY 1–2 (2010). Specifically, Article XXIV of the General Agreement on Tariffs and Trade 1994 describes an FTA as an accord in which two or more countries agree to remove substantially all “restrictive regulations of commerce” in trade for products originating within the contracting states. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

¹³ Salacuse & Sullivan, *supra* note 10, at 87–88. While not as many FTAs are signed as BITs, FTAs also typically include similar procedures to BITs for settling disputes arising between member states to the agreement and between member states and other member states’ investors. Cooper, *supra* note 12, at 1.

¹⁴ AKHTAR & WEISS, *supra* note 8, at 1 (describing home state and host states involved in BITs and investment chapters of FTAs as creating “binding reciprocal agreements that promote and protect investors of one state (home) in the territory of another (host) by establishing a number of basic protections”). These provisions tend to be instituted by developed countries where corporations are concerned about the rule of law and access to “fair” or “just” courts in a host state. Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC’Y REV. 805, 807–08 (2008).

¹⁵ See Salacuse & Sullivan, *supra* note 10, at 83.

follows that the reasons most developed countries establish IIAs are to secure “improved market access; protection from discriminatory, expropriatory, or otherwise harmful government treatment; . . . a mechanism to pursue binding international arbitration for breaches of the treaty . . . improve investment climates, promote market-based economic reform, and strengthen the rule of law.”¹⁶ With these investment protection provisions and their prevalence,¹⁷ IIAs have become the “dominant international vehicle through which investment is regulated.”¹⁸

In early IIAs, state interests typically fell into two distinct categories: capital-exporting states and capital-importing states.¹⁹ Now, more IIAs are executed between two or more capital-exporting or developed states, whereby all parties seek strong protections for their home investors while protecting domestic sovereignty and national public interest.²⁰

B. International Investment Agreements

Before international investment law became more standardized, foreign investors relied on their home government to diplomatically resolve disputes with host states.²¹ It was a difficult process for investors to convince home states to advocate on their behalf, depending on the geopolitical ties and current diplomacy between state governments.²²

¹⁶ *United States Adopts New Model Bilateral Investment Treaty*, 106 AM. J. INT’L L. 662, 663 (2012). While IIAs typically promote trade liberalization, some also include ISDS provisions to protect member states’ domestic investors from losing investment deals to other member states’ investors with preferential treatment arrangements. Cooper, *supra* note 12, at 3.

¹⁷ AKHTAR & WEISS, *supra* note 8, at 1 (highlighting that 3,000 global BITs and 12 out of the 14 U.S. FTAs all contain investment protection provisions).

¹⁸ Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 687 (1998).

¹⁹ Cross, *supra* note 7, at 154. Further background on this is outside the scope of this Comment as it is universally accepted that both the U.S. and the EU are regarded as developed states. Capital-exporting states are more likely to be developed states, which sought to negotiate firm protections for their home investors seeking foreign direct investment (FDI); and capital-importing states, more likely to be developing states, which sought to negotiate protections of domestic sovereignty and national public interest. *See id.*

²⁰ Carrie E. Anderer, *Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty*, 35 BROOK. J. INT’L L. 851, 856–57 (2010).

²¹ Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT’L L.J. 391, 407 (2012).

²² *Id.*

1. *History of IIAs*

As a result of this dearth of investor protection, investors began lobbying their home states in the middle of the 20th century to form concession contracts with stipulations on arbitration and international choice of law.²³ However, these first international arbitration tribunals lacked the power of compulsory jurisdiction and the power to enforce decisions.²⁴ As a result, nations created and signed two important international conventions.

First, The New York Convention²⁵ bound all member states to recognize arbitration awards and to enforce both domestic and international arbitration awards for all other member states.²⁶ Consequently, the first IIA was a BIT signed in 1959 between the Federal Republic of Germany and Pakistan.²⁷

Beginning in the 1960s, the investment and commercial concerns of domestic investors losing investments to foreign government expropriation²⁸ prompted more states to negotiate and sign IIAs. These IIAs mandated national court jurisdiction over specific types of investment disputes.²⁹ These tribunals sought to provide an efficient and impartial way to resolve disputes, especially disputes affecting “international trade and investment.”³⁰ The ICSID Convention, also known as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, codified these and

²³ *Id.* at 407–08.

²⁴ *See supra* Part I.A.

²⁵ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517.

²⁶ Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 827 (2012); *see also* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 10 (1981) (“[T]he New York Convention is in essence limited to two aspects of international commercial arbitration: the enforcement of those arbitration agreements which come within its purview (Art. II(3)) and the enforcement of foreign arbitral awards (Arts. I and III-VI).”). In 1990, the Convention had 80 contracting states. Born, *supra*, at 827. In 2014, it had 150 parties. Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Comm’n on Int’l Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Oct. 31, 2013).

²⁷ Anderer, *supra* note 20, at 856.

²⁸ *Id.* at 855 (citing Rodney Neufeld, *Trade and Investment*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 636–37 (Daniel Bethlehem et al. eds., 2009) (stating that “direct expropriation involves the taking of an investment by the host State through seizure of the property or interest, or through its compulsory transfer, for example, to a state-owned enterprise or domestic investor . . . an indirect expropriation often consists of a series of government acts that has the effect of rendering the investor’s property rights useless”).

²⁹ Born, *supra* note 26, at 793.

³⁰ *Id.* at 819.

future tribunal judgments in 1965.³¹ Specifically, the ICSID creates a specific legal procedure for the arbitration of disputes, mainly commercial in nature, “arising between a contracting state and foreign investors who are nationals of another contracting state.”³² Arbitration under the rules (and enforcement benefits) of the ICSID Convention is only available if both parties to the dispute have agreed to submit to ICSID arbitration, usually through an IIA.³³ Both the New York and ICSID Conventions help create a decentralized mechanism allowing for the set of procedures used in international arbitration and the adequate enforcement of arbitration awards.³⁴

While not all countries participated in IIAs in the 1950s and 1960s, many states eventually enacted strong sovereign immunity laws during the 1980s to grant domestic courts sole jurisdiction over matters involving “commercial activities, real property, expropriatory actions, and . . . disputes in which states had waived their immunity, particularly through arbitration agreements.”³⁵ As a result of foreign states’ lost ability to consent (or not) to litigation, more states began to privately agree to resolve disputes related to commerce, finance, and individual investors by way of international commercial arbitration.³⁶ This led to international arbitration as the preferred method for resolving both state-state and investor-state disputes.³⁷

2. Purpose and Impact of Negotiating IIAs

IIAs are negotiated to balance the interests of a government’s economic autonomy versus a private investor’s rights.³⁸ IIAs are important because without an agreement in place for investor-state disputes, international tribunals have neither mandatory jurisdiction nor mandatory enforcement

³¹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270 (1965). Now under the control of the World Bank, the ICSID Convention promotes arbitration as a viable solution to international investment disputes through a written set of procedures. *Id.* As of 2012, there were 146 signatories to the Convention. Born, *supra* note 26, at 821–36.

³² Born, *supra* note 26, at 832.

³³ *Id.* Award enforcement occurs through the procedures listed in the ICSID Convention, but also provides optional enforcement mechanisms through a contracting state’s national courts. *See id.*

³⁴ *Id.* at 836.

³⁵ *Id.* at 822.

³⁶ *Id.* at 823, 826.

³⁷ *Id.* at 827.

³⁸ Sara Jamieson, *A Model Future: The Future of Foreign Direct Investment and Bilateral Investment Treaties*, 53 S. TEX. L. REV. 605, 607 (2012). IIAs determine the extent states have sovereignty to enforce jurisdiction over foreign investors within its domestic legal system. *Id.*

mechanisms.³⁹ Because of the enforceable nature of these agreements, there are both proponents⁴⁰ and critics.⁴¹

There are several procedural concerns raised about the process of international arbitration through IIAs that states seek to fix through negotiations. First, investment arbitration has been argued to be more favorable to foreign investors than domestic investors.⁴² Second, critics cite to a problem concerning a lack of transparency in the process.⁴³ Third, international arbitration, through lack of transparency and other means, may lack consistency on legal standards.⁴⁴ Fourth, critics cite the inability to provide amicus curiae briefs as an issue.⁴⁵ Fifth, the lack of appellate review of international arbitration decisions has been condemned.⁴⁶ Finally, the decisions of international arbitration can be seen as weakening domestic regulatory rights.⁴⁷ While each of these criticisms is meritorious to different stakeholders, current negotiations and agreements are seeking to reduce or eliminate their effect on arbitration judgments and awards.

³⁹ Born, *supra* note 26, at 778. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 13 (2005) (arguing that international tribunals are more akin to domestic arbitrators than courts because members can choose to ignore them and international tribunals cannot depend on enforcement); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 285–86 (1997) (finding that international dispute resolution lacks both the power to compel and the ability to coerce compliance). Many detailed analyses have debated the influence of IIA ISDS provisions on business investment. See also Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 (10) World Development 1567, 1567 (2005); Salacuse & Sullivan, *supra* note 10, at 69; Susan Rose-Ackerman & Jennifer Tobin, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 REV. INT'L ORGS. 1 (2006); Yackee, *Credible Commitment*, *supra* note 14, at 807–08. Contemporary IIAs typically require member states to formally bind themselves to arbitration in future disputes as part of their agreement. Born, *supra* note 26, at 829.

⁴⁰ K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW 105, 112 (1986).

⁴¹ *Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, CORP. EUR. OBSERVATORY (Nov. 27, 2012), available at <http://corporateurope.org/trade/2012/11/profitting-injustice>.

⁴² Born, *supra* note 26, at 842.

⁴³ *Id.* at 842–43.

⁴⁴ *Id.*; see also Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

⁴⁵ Born, *supra* note 26, at 843.

⁴⁶ *Id.*

⁴⁷ Neumayer & Spess, *supra* note 39, at 1571.

C. *Investor State Dispute Settlement Provisions*

1. *History of ISDS Provisions*

“Before WWII, most states adopted legislation providing ‘absolute immunity’” from relinquishing property in their state courts.⁴⁸ These policies forced any foreign investor with commercial disputes to rely on diplomatic negotiations by their home state as a way to resolve claims.⁴⁹ Over time, developed nations began instituting reforms to change this post-WWII absolute immunity to restrictive immunity.⁵⁰ By the 1980s, many developed and developing states enacted legislation providing their national court system “jurisdiction over disputes involving commercial activities, real property, expropriatory actions, and a limited number of other specified actions, as well as over disputes in which states had waived their immunity, particularly through arbitration agreements.”⁵¹ These arbitration agreements, almost always present in modern IIAs, mandate that arbitration awards will be recognized by parties to the agreement and provide clearly defined enforcement mechanisms.⁵² These are often under the auspices of the New York Convention and ICSID.⁵³ One example can include coercive enforcement against state property.⁵⁴

Generally, ISDS provisions are executed as a way to protect foreign investors from host state expropriation.⁵⁵ Expropriation involves a host state directly or indirectly nationalizing an investment of a foreign investor.⁵⁶ States

⁴⁸ Born, *supra* note 26, at 820.

⁴⁹ *Id.* This often was a careful balance between both states that required political capital and resulted in inaccurate remedies. *Id.*

⁵⁰ *Id.* at 821–22.

⁵¹ *Id.* at 822.

⁵² *Id.* at 837. The enforcement procedures depend on whether the conflicting parties are both members of the ICSID Convention or if enforcement procedures fall under the New York Convention. *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Guzman, *supra* note 18, at 659–60 (discussing that international investors rely on international law because foreign domestic laws can change due to future circumstances and IIAs constrain host state behavior according to international conventions).

⁵⁶ See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, art. 1110 (1993). Recent examples of expropriation disputes include: (1) a host state’s right to manage water resources of a privately held company (*Azurix Corp. v. Arg.*, ICSID Case No. ARB/01/12), a host state’s legislation prohibiting the operation of a nuclear plant (*Vattenfall AB (Swed.) v. Ger.*, ICSID Case No. ARB/12/12); and a host state’s right to protect public health at the expense of corporate branding on products (*Philip Morris Asia Lmt. v. Austl.*, UNCITRAL, PCA Case No. 2012–12). For a more ISDS provisions being discussed in

negotiate IIAs to secure investor protection of neutral international dispute arbitration by including provisions against both direct and indirect expropriation.⁵⁷

Because customary law differs on which of the two doctrines are used to determine state and investor rights and obligations, negotiations on arbitration and ISDS provisions in IIAs are difficult and center on two historical doctrines: the Hull Rule and the Calvo Doctrine.⁵⁸ IIAs became a way for countries to choose whether to bind themselves to international arbitration instead of relying on customary international law to determine which of these two doctrines shall be used.⁵⁹

International arbitration, due to states seeking to avoid either the Hull Rule or Calvo Doctrine to resolve disputes, is becoming increasingly more important to international trade.⁶⁰ As a result of IIAs providing investors both a neutral and efficient way to resolve disputes with host states,⁶¹ investor-state arbitration became the preeminent form of dispute resolution agreed upon in IIAs in the 1990s.⁶² A 2005 review of 1755 treaties found that 38% of the

current events, *see also A Transatlantic Corporate Bill of Rights*, CORP. EUR. OBSERVATORY (June 3, 2013), available at <http://corporateeurope.org/trade/2013/06/transatlantic-corporate-bill-rights>.

⁵⁷ Lo, *supra* note 7, at 152. IIAs all mandate that legal expropriation only occurs when it is: (1) done for a public purpose; (2) does not discriminate against a foreign investor; (3) involves a “prompt, adequate, and effective” payment of compensation; and (4) is in agreement with the due process of law. *Id.* Regarding payment of compensation, most IIAs require payment to also be equal to the fair market value of the expropriated investment at a time before the expropriation takes place with the value reflected before the taking and with an investor’s opportunity to freely transfer the payment to their home state. *Id.*

⁵⁸ Neumayer & Spess, *supra* note 39, at 1569–70. The Hull Rule, argued to be customary international law mostly by developed states, declares foreign investors should receive “prompt, adequate and effective compensation” when a host state expropriates investments or resources. Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT’L L. 553, 558 (1981); Ryan J. Bubb & Susan Rose-Ackerman, *BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment*, 27 INT’L REV. L. & ECON. 291, 294 (2007). Alternatively, the Calvo Doctrine argued to be customary international law by mostly developing states, conditions that foreign investors should be under the exclusive jurisdiction of host state courts with no more favorable rights than the host state’s nationals. R. Dolzer, *supra*, at 560; Bubb & Rose-Ackerman, *supra*, at 294. UN General Assembly Resolution 3171, similar to the Calvo Doctrine, declared that states should have the right to use their national legislature to determine where international disputes would be settled, how much compensation would be due to investors, and which way the compensation would be paid. G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1973), *reprinted in* 13 I.L.M. 238 (1974).

⁵⁹ Salacuse & Sullivan, *supra* note 10, at 86–87.

⁶⁰ *Id.* at 88. “[I]nternational commercial and investment arbitrations, backed by the possibility of litigation in national courts against foreign states, play a central role in contemporary international trade and investment.” Born, *supra* note 26, at 864.

⁶¹ *See* Salacuse & Sullivan, *supra* note 10.

⁶² Bubb & Rose-Ackerman, *supra* note 58, at 296.

treaties (672) have a provision for dispute resolution.⁶³ Furthermore, 20% of the total amount of treaties (367) contains a binding dispute-resolution provision,⁶⁴ with 94% of those (348) having an arbitration clause.⁶⁵ As the number of IIAs grow and investor-state arbitration becomes the default dispute resolution method within those agreements, ISDS provisions will become increasingly more important as contracting parties seek to protect their citizens investing abroad.

2. Purpose of ISDS

The ISDS provisions of IIAs allow foreign investors to initiate international arbitration claims against host states for violations investment agreement violations.⁶⁶ Specifically, ISDS provisions within an IIA offer investors a means of holding host states accountable to an international tribunal with repercussions of a binding, enforceable award of compensation.⁶⁷ This is important because investor-state dispute provisions are the only way under international law providing investors a remedy for injuries due to “trade law violations . . . without regard to the concerns and interests of their source countries.”⁶⁸ This ability for investors to bring claims against host states is one of the strongest protections an IIA affords investment because international arbitration tribunals are known for providing “lengthy, reasoned, and scholarly decisions that form part of the jurisprudence of this emerging international investment law and serve to solidify and give force” to IIA provisions.⁶⁹

Proponents of ISDS provisions argue it may be difficult for foreign investors to find adequate legal remedies through a host state for matters concerning their FDI.⁷⁰ ISDS provisions allow these foreign investors to prevent any biases in the host state’s domestic courts by filing their claims outside the jurisdiction of the host state.⁷¹ Scholarly interest in these provisions

⁶³ Born, *supra* note 26, at 861.

⁶⁴ *Id.* at 861–62.

⁶⁵ *Id.* at 862.

⁶⁶ Salacuse & Sullivan, *supra* note 10, at 88.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Stephen M. Schwebel, *The Overwhelming Merits of Bilateral Investment Agreements*, 32 SUFFOLK TRANSNAT’L L. REV. 263, 263 (2009).

⁷¹ Anderer, *supra* note 20, at 860; *see also* George M. von Mehren, Claudia T. Salmon, & Asparia A. Parautsas, *Navigating Through Investor-State Arbitrations - An Overview of Bilateral Investment Treaty Claims*, 59 DISP. RESOL. J. 69, 70 (1994).

is based on the idea that these provisions solve the “central *problématique* of host state-foreign investor relations: that the host state will opportunistically interfere with the investment’s profitability once the investment has been sunk.”⁷² Thus, negotiated ISDS provisions normally provide a set of legally enforceable rules to reduce risk due to expropriation that an investor considers before initiating any investments.⁷³ However, critics highlight three reasons ISDS provisions should have little effect on investor decisions: legal ignorance, legal pluralism, and legal ambiguity.⁷⁴ Instead, some scholars argue investors may be better served through investment insurance, rather than considering an in-depth analysis of IIA ISDS provisions.⁷⁵

3. *Substantive Effects of ISDS Provisions*

The ISDS provisions within IIAs also consider the following substantive effects on the following categories: protection from expropriation, regulation of foreign direct investment, fairness between member states, and trade creation.⁷⁶

First, expropriation provisions seek to protect foreign investors from a nation enacting domestic law aimed at directly or indirectly changing investment contracts between the nation and the foreign investor.⁷⁷ These provisions are triggered by either a change in domestic law or situations in

⁷² Yackee, *Credible Commitment*, *supra* note 14, at 807.

⁷³ von Mehren, *supra* note 71, at 72.

⁷⁴ Yackee, *Credible Commitment*, *supra* note 14, at 810. Legal ignorance is premised on the idea that foreign investors have little knowledge of both the provisions within IIAs and impact of those provisions on their investments. *Id.* Moreover, when individuals in an organization follow IIA agreements, that information may not pass through to the people making investment decisions. *Id.* Legal pluralism occurs because investments do not happen in a vacuum and states agreeing to investment are likely to treat disputes favorably to investors as they seek future investments in their territory. *Id.* at 811. Finally, legal ambiguity arises because the ISDS provisions in IIAs “consist almost entirely of highly ambiguous standards of uncertain meaning and application.” *Id.* at 812.

⁷⁵ *Id.* at 822 (“Almost all major capital-exporting states have set up state-sponsored or state-subsidized insurance programs for their foreign investors, supported by a network of investment-guarantee treaties. The United States’ Overseas Private Investment Corporation (OPIC) regularly issues millions of dollars in insurance against expropriation, currency transfer, and other ‘political’ risks. The World Bank has also recently entered the arena through its Multilateral Investment Guarantee Agency (MIGA), and as of February 2006 has issued more than 14 billion dollars’ worth of coverage. Insurance programs may actually be preferable to BITs as a risk-reducing device, as investors are guaranteed compensation from the insurer independent of the host state’s willingness or ability to pay damages.”).

⁷⁶ Gudgeon, *supra* note 40, at 110–12.

⁷⁷ *Id.* at 126.

which a nation's government retakes property for purposes outside the scope of necessity.⁷⁸

Second, IIAs provide ways for investors to invest their resources for the highest return in foreign member states to the agreement.⁷⁹ This investment, known as foreign direct investment (FDI), is considered the “lifeblood of the global economy.”⁸⁰ The prevailing theory regarding FDI and IIAs is “credible commitment.”⁸¹

Third, states now seek IIAs “to ensure the impartial adjudication of disputes through the application of the terms of the parties’ agreement, objective legal principles, and neutral procedural rules, rather than through contests of political, diplomatic, or similar pressure.”⁸²

Fourth, the difference in IIA trade negotiation typically comes in two forms: trade creation and trade diversion. First, trade creation occurs through IIAs when a country replaces a domestically produced good with a foreign good because the IIA makes the importation of the good cheaper than its production.⁸³ Second, trade diversion occurs through IIAs when a country replaces an imported good by an efficient foreign producer with an inefficient member of the IIA because the removal of tariffs and economic barriers makes it cheaper to import the inefficiently produced good from the member country.⁸⁴

⁷⁸ *Id.* at 128. Most IIAs only stipulate that foreign investors only be provided equal treatment to domestic investors for any consequences to investment caused by war or armed conflict, as opposed to treating these events as expropriation. *Id.* at 127–28 (noting that provisions in IIAs typically do not require foreign governments to compensate investors in cash, but rather just be afforded the same treatment as domestic investors).

⁷⁹ Anderer, *supra* note 20, at 861.

⁸⁰ *Id.* at 851.

⁸¹ Guzman, *supra* note 18, at 658–59. This theory highlights that a state can rationally give up its sovereignty over foreign investors if that is necessary to become or remain competitive for FDI. Yackee, *Investment Law Agency*, *supra* note 21, at 400. However, there exists a strong debate whether this theory accurately describes why states give up sovereignty for FDI and whether entering into IIAs actually provides a realized increase in FDI to a host state. *See id.*

⁸² Born, *supra* note 26, at 828.

⁸³ Cooper, *supra* note 12, at 9. An increase in economic welfare is realized because resources of member states are shifted to their most efficient uses. *Id.*

⁸⁴ *Id.* Alternatively, there are some concerns about efficient trade due to BITs and FTAs concerning trade diversion, when a party to an IIA chooses to import a less efficient good from another member state rather than a non-member state due to either the agreement or eliminated tariff. *Id.*

4. *Introduction to Specific ISDS Provisions*

IAs all contain provisions establishing the treatment of investors, mandating requirements for expropriation and nationalization of investments, codifying rules regarding financial transfers and payment between parties of different states, and providing for dispute settlement mechanisms.⁸⁵ Discussed in detail later in this Comment, IAs are typically comprised of the following eight topics: (1) scope of application; (2) conditions for the entry of foreign investment; (3) general standards of treatment of foreign investments; (4) monetary transfers; (5) operational conditions of the investment; (6) protection against expropriation and dispossession; (7) compensation for losses; and (8) investment dispute settlement, including transparency, external party involvement, and considerations for any new multilateral frameworks.⁸⁶ While each of these eight provisions found in IAs will be instrumental to finalizing the TTIP, this Comment will first focus on the history of U.S. and EU IAs and their starting-point IIA texts, the current status of TTIP negotiations, and the analysis of specific TTIP ISDS provisions to determine possible reconciliation in the context of the proposed U.S.-EU TTIP.

II. U.S. & EU IIA BACKGROUND, MODEL TEXT HISTORY, AND IMPACT ON MULTILATERAL INVESTMENT AGREEMENT DISCUSSIONS

The General Agreement on Tariffs and Trade (GATT) requires members of the World Trade Organization (WTO) to notify the WTO of any preferential trade agreements, mostly FTAs, or, in rare circumstances, customs unions.⁸⁷ As of 2008, the 200 active agreements recognized by the WTO as being in force show how the U.S. and EU have become the preeminent leaders in instituting and signing the majority of international trade agreements.⁸⁸ In this context, an examination of U.S. and EU history regarding IAs and the recent developments of model IIA texts will set the stage for how the TTIP will further strengthen the U.S. and EU as global leaders in international investment law.

⁸⁵ Gudgeon, *supra* note 40, at 112.

⁸⁶ *Id.* at 79.

⁸⁷ H. Horn, P.C. Mavroidis, & A. Sapir, *Beyond the WTO? An anatomy of EU and US preferential trade agreements*, 33 *WORLD ECON.* 1, 2 (2009).

⁸⁸ *Id.*

A. U.S. IIA Background & Model Text History

1. U.S. IIA Background

The first U.S. IIAs were known as Treaties of Friendship, Commerce, and Navigation (FCNs).⁸⁹ The U.S. State Department saw the positive effect Europe had with more modern IIAs because these only considered “essential investment-related subjects such as treatment standards, expropriation, financial transfers, and dispute settlement.”⁹⁰ Consequently, the U.S. government began considering modern IIAs in the mid-1970s after a chain of developing nations expropriated U.S. investments.⁹¹

The first U.S. modern IIAs were negotiated in the 1980s, with the U.S. concluding its first treaties with Panama in 1982, Senegal in 1983, Congo (formerly Zaire) in 1984, and Morocco in 1985.⁹² In 1992, the U.S. concluded the North American Free Trade Agreement (NAFTA)⁹³ with Canada and Mexico, greatly influencing future U.S. IIA investment chapters.⁹⁴ While early U.S. IIAs were focused mainly on the protection of U.S. investments, NAFTA was the first time the U.S. obligated itself to protect the investments of another capital-exporting state and consented to jurisdiction in front of an international arbitration tribunal against foreign investors.⁹⁵

2. U.S. Model BIT Text

The U.S. obligations under NAFTA resulted in a negative reaction by U.S. citizens after realizing the U.S. government could be held liable to foreign investors.⁹⁶ As a result, the U.S. State Department and the U.S. Office of the Trade Representative began redrafting the Model U.S. BIT, a program that began in the early 1980s and was last reworked for NAFTA.⁹⁷ In 2004, the

⁸⁹ Gudgeon, *supra* note 40, at 107–08. While some of these preliminary stage IIAs are still in effect in over 50 countries, the programs used to negotiate these agreements were largely unsuccessful with developing countries. *Id.* at 108.

⁹⁰ *Id.* at 109.

⁹¹ *Id.* at 110.

⁹² See *United States Bilateral Investment Treaties*, U.S. DEP'T OF STATE, <http://www.state.gov/e/eb/ifd/bit/117402.htm> (last visited Jan. 26, 2014).

⁹³ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

⁹⁴ Cross, *supra* note 7, at 192–93.

⁹⁵ *Id.* at 166.

⁹⁶ *Id.* at 176.

⁹⁷ John R. Crook, *United States Adopts New Model Bilateral Investment Treaty*, 106 AM. J. INT'L L. 662, 662 (2012).

U.S. adopted its 2004 Model BIT text based on previous IIA investment chapters⁹⁸ and debates in Congress over globalization and free trade issues.⁹⁹ U.S. trade policy moving forward was highlighted by Senate Finance Committee Chairman Max Baucus, who argued IIAs “achieve a balance between protecting U.S. investors abroad and defending the regulatory authority of the United States.”¹⁰⁰

In 2009, the Obama administration halted all ongoing negotiations for IIAs and created a subcommittee to review the 2004 Model BIT text.¹⁰¹ This review was done to ensure the current U.S. Model BIT adequately represented the public interest, the Obama administration’s economic plan, and the global economic developments occurring after the drafting of the 2004 Model BIT.¹⁰² After a three-year process, the U.S. State Department released the 2012 Model BIT text¹⁰³ as a starting point for present IIA agreement negotiations.¹⁰⁴ The 2012 Model BIT (“U.S. Model”) text changed provisions regarding state-owned enterprises (“SOEs”), performance mandates, environmental and labor welfare, financial services, transparency, standards for third-party stakeholder involvement, and potential ISDS framework changes.¹⁰⁵

Significantly, while the U.S. Model continues to ensure strong protection for U.S. investors, there were three important provision changes in the 2012 U.S. Model text.¹⁰⁶ First, transparency provisions were updated to require both the U.S. and other parties in future IIA agreements with the U.S. “to consult periodically regarding how to improve their transparency practices, both in the context of developing and implementing laws, regulations, and other measures

⁹⁸ Lo, *supra* note 7, at 154.

⁹⁹ Cross, *supra* note 7, at 179.

¹⁰⁰ *Id.* at 182. This shift in U.S. investment treaty policy also highlighted several negotiation objectives that are still central to U.S. IIA negotiations, such as creating standards for the fair treatment of expropriation, improving investor-state arbitration procedures, and promoting further transparency in arbitration proceedings. 19 U.S.C. § 3802(b)(3) (2002).

¹⁰¹ Press Release, U.S. Dep’t of State, Model Bilateral Investment Treaty: Fact Sheet (Apr. 20, 2012), www.state.gov/r/pa/prs/ps/2012/04/188199.htm.

¹⁰² *Id.*; AKHTAR & WEISS, *supra* note 8, at 10.

¹⁰³ 2012 U.S. Model Bilateral Investment Treaty, U.S. DEP’T OF STATE (2012), *available at* <http://www.state.gov/e/eb/ifa/bit/index.htm> [hereinafter U.S. Model].

¹⁰⁴ The U.S. State Department aimed the new draft at continuing the goals of the 2004 Model BIT text “to provide strong investor protections and preserve the government’s ability to regulate in the public interest.” Press Release, U.S. Dep’t of State, United States Concludes Review of Model Bilateral Investment Treaty (Apr. 20, 2012), <http://www.state.gov/r/pa/prs/ps/2012/04/188198.htm>.

¹⁰⁵ AKHTAR & WEISS, *supra* note 8, at 10–11 (including a brief synopsis of all changes made regarding these provisions).

¹⁰⁶ *See* Press Release, U.S. Dep’t of State, *supra* note 104.

affecting investment and in the context of investor-State dispute settlement.”¹⁰⁷ Second, the updated text strengthens each party’s requirements to publish proposed regulatory legislation along with explanations and to answer any applicable comments from interested parties.¹⁰⁸ Third, the U.S. Model updated provisions mandating that any “future multilateral appellate procedures . . . includes provisions on transparency and public participation” on equal terms to what parties already provided for in the ISDS provisions of their IIA.¹⁰⁹ These changes, along with the rest of the U.S. Model, form the starting point for U.S. TTIP negotiations on ISDS provisions.

The U.S. approached the TTIP by stating that the agreement “would include ambitious reciprocal market opening in goods, services, and investment, and would offer additional opportunities for modernizing trade rules and identifying new means of reducing the non-tariff barriers that now constitute the most significant obstacle to increased transatlantic trade.”¹¹⁰ The statement went on to highlight potential business and employment prospects while providing an expansion of both “trade and investment opportunities” for the U.S. and the EU.¹¹¹

B. EU IIA Background & Model Text History

1. EU IIA Background

The European Community, created through the European Economic Community Treaty in 1957,¹¹² is a complex legal system involving a balance between member states’ national sovereignty and a supranational legal

¹⁰⁷ AKHTAR & WEISS, *supra* note 8, at 11.

¹⁰⁸ See Press Release, U.S. Dep’t of State, *supra* note 101.

¹⁰⁹ *Id.*

¹¹⁰ *The President’s 2013 Trade Policy Agenda: Hearing Before the S. Comm. on Finance*, 113th Cong. 3 (2013) (statement of Ambassador Demetrios Marantis, Acting United States Trade Rep.).

¹¹¹ *Id.* “In the TPP and TTIP negotiations, for example, the United States is seeking new disciplines to address trade distortions and unfair competition associated with the increasing engagement of large, State-owned enterprises in international trade. The Administration is also actively combating ‘localization barriers to trade’—i.e., measures designed to protect, favor, or stimulate domestic industries, service providers, and/or intellectual property (IP) at the expense of goods, services, or IP from other countries. Localization barriers to trade have increased in the last few years, especially in some of the world’s largest and fastest growing markets.” *Id.* at 4.

¹¹² Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

system.¹¹³ After 1957, member states were still free to enter into IIAs with other states. Then, in 1994, the European Union was formally created with the Treaty on European Union.¹¹⁴ The Treaty on European Union is based on a system in which Member States retain all rights and competencies not conferred to the European Union, so as to protect national identity and territoriality, and the right of Member States to self-govern.¹¹⁵

With the enactment of the Lisbon Treaty in 2009,¹¹⁶ EU Member States conferred exclusive competence of foreign direct investment from the EU Member States to the EU, while retaining collective competence over IIAs.¹¹⁷ When the EU gained control over foreign direct investment, IIAs signed by EU Member States were not automatically terminated.¹¹⁸ There is some ambiguity as to whether the EU will force Member States to agree to terminate any individual IIA with the U.S. before a U.S.-EU agreement may be signed,¹¹⁹ because the EU does not have any formal international dispute settlement provision similar to that found in IIAs.¹²⁰ Additionally, any IIAs finalized by

¹¹³ Anderer, *supra* note 20, at 861. For a full background on the interplay between various authoritative EU decision-making bodies and their jurisdiction, see Youri Devuyst, *European Union Law and Practice in the Negotiation and Conclusion of International Trade Agreements*, 12 J. INT'L BUS. & L. 259 (2013).

¹¹⁴ *Treaty on European Union* (EU), Feb. 7, 1992, O.J. (C 191) 1 [hereinafter Treaty on EU].

¹¹⁵ *Id.*; see also Consolidated Version of the Treaty on European Union, Oct. 26, 2012, 2012/C 326/01, art. 4 & 5, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:FULL:EN:PDF> (highlighting that these provisions are still paramount, even after the Lisbon Treaty went into effect (discussed later)). With this treaty, Member States controlled treaty powers, but provided the European Union an ability to control foreign investments, and to conclude agreements with developing countries. Treaty on EU, *supra* note 114, art. 43, 48–60. However, this treaty did not provide exclusive rights to the EU to control foreign investment or finalize IIAs. *Id.* art. 181. Much of the interplay between Member States and the EU was based upon the three types of competencies: competencies held exclusively by the EU, competencies collectively controlled by both the EU and EU Member States, and competencies held exclusively by Member States but providing the EU an ability to support, coordinate or supplement those states' actions. Derrick Wyatt & Alan Ashwood, EUROPEAN UNION LAW 91–97 (5th ed. 2006). Those rights were still within the jurisdiction of EU Member States. *Id.*

¹¹⁶ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

¹¹⁷ Anderer, *supra* note 20, at 873; see also Stephen Woolcock, *The Potential Impact of the Lisbon Treaty on European Union External Trade Policy*, 8 SWEDISH INST. EUR. POL'Y ANALYSIS 1, 1 (2008).

¹¹⁸ Anderer, *supra* note 20, at 877. Under the Vienna Convention on the Law of Treaties, a treaty is only terminated one of two ways. Vienna Convention on the Law of Treaties, part V, Jan. 27, 1980, 115 U.N.T.S. 331. First, a treaty may be terminated according to its own terms. *Id.* art. 42. Second, if all parties to the old treaty conclude a new treaty regarding the same subject matter and establish that all parties shall instead be governed by the new treaty, or if the old treaty provisions are too incompatible with the new treaty that the old treaty cannot be applied. *Id.* art. 59.

¹¹⁹ Anderer, *supra* note 20, at 868–69.

¹²⁰ *Id.* at 880. Until the EU finalizes any agreement, foreign investors need to rely on bringing claims against the EU in the European Court of Justice. *Id.*; see Lorenza Mola, *Which Role for the EU in the*

the EU are binding on Member States, with the possibility of state violations being brought by the EU in the European Court of Justice.¹²¹ Finally, before the EU begins IIA negotiations, the Council of Ministers may provide guidelines and general objectives for the European Commission to be used during the negotiations,¹²² even though this is not legally binding on the European Commission.¹²³ The European Commission received the official mandate to begin negotiations with the U.S. regarding the TTIP on June 14, 2013.¹²⁴

2. *EU IIA Draft Text*

Due to the new legal framework of the Lisbon Treaty in which FDI became an exclusive competence of the European Union, heated debates ensued between the European Commission, European Council of Ministers, and the European Parliament about the initial negotiating positions for future EU IIAs.¹²⁵ In May 2012, the Directorate-General for Trade of the European Commission distributed to Member States a non-public first draft of ISDS provisions for EU investment treaties with the aim of receiving comments.¹²⁶ In June, a public draft text (“EU Draft”) was released that addresses the following issues: transparency, tribunal creation, enforcement of arbitration awards, and potential future appellate mechanisms.¹²⁷

First, the EU Draft improves transparency measures by requiring, with the exception of protected information, that a wider amount of arbitration

Development of International Investment Law? (Soc’y of Int’l Econ. Law, working paper No. 26/8, 2008), available at <http://ssrn.com/abstract=1154583>.

¹²¹ Devuyt, *supra* note 113, at 273 (citing Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47, art. 216(2)).

¹²² Devuyt, *supra* note 113, at 290.

¹²³ *Id.*

¹²⁴ Press Release, European Comm’n, Transatlantic Trade and Investment Partnership: Commissioner Karel De Gucht welcomes Member States’ green light to start negotiations (June 14, 2013), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=917>.

¹²⁵ Nathalie Bernasconi-Osterwalder, *Analysis of the European Commission’s Draft Text on Investor-State Dispute Settlement for EU Agreements*, INT’L INST. FOR SUSTAINABLE DEV. (July 19, 2012), available at www.iisd.org/itm/2012/07/19/analysis-of-the-european-commissions-draft-text-on-investor-state-dispute-settlement-for-eu-agreements/.

¹²⁶ *Id.* See also *Commission Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to which the European Union is Party*, COM (2012) 335 final (May 6, 2012) [hereinafter EU Draft].

¹²⁷ Bernasconi-Osterwalder, *supra* note 125.

documents be made public.¹²⁸ These public documents include accepted submissions by the public and other interested third parties.¹²⁹ Second, the EU Draft creates a more static field of potential arbitrators to international investment disputes.¹³⁰ The provisions specify each party to the IIA creates a list of at least five arbitrators chosen by the country, and five arbitrators “who are not nationals of either Party to act as chairperson of the tribunals.”¹³¹ With all countries party to an IIA with the EU adhering to this requirement, all contracting parties to any future EU IIA should have clarity about which arbitrators could be appointed.¹³² Third, the EU Draft states that enforcement of international arbitration awards within a territory should occur as if the judgments were those of the territory’s highest court.¹³³ Fourth, the EU Draft establishes a Committee for the Settlement of Investor-State Disputes tasked with interpreting current ISDS issues and researching the possibility of a future international arbitration appellate mechanism.¹³⁴

In addition to the previously discussed EU Draft, the European Commission’s Trade Policy Committee released initial negotiating objectives for the TTIP (“EU Directive”) in June 2013 in a private correspondence with Member States in anticipation of the proposed U.S.-EU TTIP negotiations.¹³⁵

¹²⁸ *Id.* Some member states have expressed a desire to balance public availability of documents with investor privacy rights; however, the EU Draft’s stated concern for legitimacy and governance for international arbitration mandates expansive transparency measures in all future EU IIAs. *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* Qualified arbitrators are required in the EU Draft to possess the following standards: (1) special knowledge of international public and private law; (2) independence from any organization, government, or disputing party; and (3) compliance with an agreed upon code of conduct, of which the EU offers the International Bar Association’s Guidelines on Conflicts of Interests in International Arbitration which “contains unequivocal language requiring arbitrators to be impartial, independent and free of any conflict of interest.” *Id.* See also INT’L BAR ASS’N [IBA], GUIDELINES ON CONFLICTS OF INTERESTS IN INTERNATIONAL ARBITRATION, (May 22, 2004), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918>. (approved May 22, 2004), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918>.

¹³² Bernasconi-Osterwalder, *supra* note 125.

¹³³ *Id.* This is a marked change from ICSID Convention standards, which allow for award annulment proceedings in limited cases. *Id.* Alternatively, any non-ICSID arbitration would fall under the New York Convention framework which specifies that, without any problems with arbitration procedures (tribunal makeup or behavior), awards beyond the scope of arbitration, or matters of public policy, any international arbitration award are enforceable in any other contracting state. *Id.*; see *infra* Part I.B.1.

¹³⁴ Bernasconi-Osterwalder, *supra* note 125.

¹³⁵ *Initial Position Paper of the Trade Policy Committee on Transatlantic Trade and Investment Partnership (TTIP)*, COM (2013) 238/13 (June 20, 2013), at 3 available at <http://www.bilaterals.org/IMG/pdf/tpc-ttip-non-papers-for-1st-round-negotiations-june20-2013.pdf>.

Revised initial negotiating positions were leaked to the press¹³⁶ in June by the Irish Presidency, after revisions from France and other EU Member States.¹³⁷ The EU Directive describes starting positions concerning investor treatment, investment protection, ISDS enforcement, trade policy, and financial services.¹³⁸

First, the EU Directive takes a unique stand on investor treatment by explicitly declaring any investor shall receive treatment no less favorable in host states than any of the host state's investors or companies, but inserts a clause that treatment should take into "account of the sensitive nature of certain specific sectors."¹³⁹ Second, the EU Directive has a strong stance on investment protection stating the EU objective of the TTIP should "provide for the highest possible level of legal protection and certainty for European investors in the US" and ensure a fair and equal opportunity for investors in both the U.S. and the EU.¹⁴⁰ Third, ISDS enforcement concerns include transparency, arbitrator independence, predictability, binding awards, and non-interference of state-to-state disputes with investor-state dispute settlement,¹⁴¹ while also pushing for provisions punishing frivolous claims.¹⁴²

Fourth, the EU Directive seeks to include provisions concerning how state monopolies, state owned enterprises, and other entities are granted unique

¹³⁶ *EU-US FTA (TTIP) - EU initial position papers, Revision 2* (2013), available at <http://blogs.r.ftdata.co.uk/brusselsblog/files/2013/06/TTIP-Rev-2-Mandate.pdf> [hereinafter *Revision 2*].

¹³⁷ Peter Spiegel, *France, films & foreign trade: the leaked mandate*, FINANCIAL TIMES, BRUSSELS BLOG (June 10, 2013, 7:02 PM), <http://blogs.ft.com/brusselsblog/2013/06/france-films-foreign-trade-the-leaked-mandate/>. See also *General Secretariat of the Council Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, COM (2013) (June 17, 2013), at 2 available at https://www.laquadrature.net/files/TAFTA%20_%20Mandate%20_%2020130617.pdf [hereinafter *EU Directive*].

¹³⁸ *Revision 2, supra* note 136, ¶ 22.

¹³⁹ *Id.* ¶16. See also *EU Directive, supra* note 137. There is a strong sentiment of Member States that any ISDS provisions not construe any cultural protections to certain industries as a violation of the investment agreement. Spiegel, *supra* note 137. As one example, France requires that any U.S-EU IIA not interfere with cultural subsidies to protect the French audiovisual industry (movies and/or music). See *id.*; *Revision 2, supra* note 136.

¹⁴⁰ *Revision 2, supra* note 136. See *EU Directive, supra* note 137. The EU position on investment protection is also important because it seeks to force agreement that the EU and its Member States retain the rights "to pursue legitimate public policy objectives . . . in a non-discriminatory manner" and that the TTIP should defer to EU and Member States policies regarding cultural diversity. *Id.*

¹⁴¹ *Revision 2, supra* note 136.

¹⁴² *Id.*

market rights.¹⁴³ Fifth, the EU Directive discusses the free movement of capital and financial services between the U.S.-EU.¹⁴⁴ Finally, the EU Directive urges negotiators to fully consider the creation of a U.S.-EU investment arbitration “appellate mechanism” to review awards in light of “ISDS and domestic remedies.”¹⁴⁵

After considering the background of the U.S. and EU IIAs and the positions of each regarding IIA ISDS draft texts, this Comment will now briefly examine global implications that a reconciled TTIP could have on any future multilateral investment agreement. Then, Part III will discuss general IIA provisions. Part IV will consider ongoing backlash towards the TTIP and why the U.S. and EU will likely still execute the TTIP. Then, Part V will analyze specific ISDS provisions in the potential TTIP with reconciliatory positions.

C. Potential Global Implications of the TTIP: A Future Multilateral Agreement on Investment

As will be shown, the U.S. and EU express a public desire to work together to enact similar ISDS provisions from the proposed TTIP in future IIAs with other countries, both developed and developing.¹⁴⁶ These shared objectives between the U.S. and EU highlight key ideas such as “including a commitment to open and non-discriminatory investment policies, a level competitive playing field, strong protections for investors and their investments, neutral and binding international dispute settlement, strong rules on transparency and public participation, responsible business conduct, and narrowly-tailored reviews of national security considerations.”¹⁴⁷ This idea of promoting an MAI beneficial to both the U.S. and EU goes back to the Transatlantic Agenda, in which both sides “will work together for the successful conclusion of a

¹⁴³ *Id.* See *EU Directive*, *supra* note 137. Furthering this idea, the document also wishes to find U.S.-EU agreement on an open, “unrestricted and sustainable access to raw materials” and energy. *Revision 2*, *supra* note 136.

¹⁴⁴ *Id.* The EU seeks to include clauses allowing the complete liberalization of both “current payments and capital movements,” showing a desire to eliminate any restrictions on monetary transfers between foreign investors and their home states as a result of the TTIP. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Press Release, U.S. Dep’t of State, United States, European Union Reaffirm Commitment to Open, Transparent, and Non-Discriminatory Investment Policies (Apr. 10, 2012) [hereinafter *Investment Policies*].

¹⁴⁷ *Id.*

Multilateral Agreement on Investment . . . that espouses strong principles on international investment liberalisation and protection.”¹⁴⁸

The concept of the multilateral agreement on investment (MAI) first appeared in the 1960s; however, in 1995, the Organisation for Economic Co-operation and Development (OECD) again attempted to negotiate a MAI to adopt a global standard on international foreign investment.¹⁴⁹ This agreement failed for two reasons.¹⁵⁰ First, initial MAI negotiations only included developed states creating a document “more protective of foreign investment” than IIAs, with developing states having little ability to influence final parameters.¹⁵¹ Second, certain negotiating parties were unwilling to slacken investment liberalization with regards to specific national industries.¹⁵² Failing to find agreement, the OECD declared the MAI dead in 1998.¹⁵³ In some respects, the prevalence of IIAs also contributed to the 1998 MAI failure, as an MAI would need to afford investor protections at least as strong as IIAs currently in place.¹⁵⁴ Though the WTO established a working group in the late 1990s to discuss a different version of a MAI,¹⁵⁵ the WTO stopped another attempt to create a multilateral investment agreement in 2004.¹⁵⁶

However, it is beyond the scope of this Comment whether the TTIP would actually change the notion that an MAI is possible on a global scale.¹⁵⁷ The conclusion of the potential TTIP begs two questions. As most states already have IIAs with either or both the U.S. and EU, would a multilateral investment agreement based on a reconciled draft of a U.S. and EU IIA become the *modus operandi* moving forward? Assuming the TTIP has strong foreign investor protections, reduced transaction costs, and incorporates up to forty percent of

¹⁴⁸ The New Transatlantic Agenda, 1995 US-EU Summit in Madrid (Dec. 5, 1995), available at http://eeas.europa.eu/us/docs/new_transatlantic_agenda_en.pdf.

¹⁴⁹ Bubb & Rose-Ackerman, *supra* note 58, at 297. These agreements served as the basis for early European BITs. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 298.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 309.

¹⁵⁵ *Id.* at 298.

¹⁵⁶ Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 997 (2012).

¹⁵⁷ An improvement to the global economy could occur as a future MAI “would produce larger aggregate benefits from investment than any set of bilateral agreements because providing a single uniform multilateral regime reduces the transaction costs of foreign investment” and would ensure that trade partners with no IIA in effect would have legal protection over their domestic investor’s FDI. Bubb & Rose-Ackerman, *supra* note 58, at 307–08.

global economic output, how many other states will be encouraged to agree to similar provisions, creating a true “de facto MAI” for international investment protection standards?¹⁵⁸ After discussing implications for the U.S.-EU economies and potential impacts on a global scale, this Comment will now discuss general IIA provisions before looking at U.S.-EU public backlash and how actual model IIA ISDS provisions from both sides can be reconciled in the TTIP.

III. GENERAL IIA PROVISIONS

The first time a U.S.-EU IIA was discussed was in 1995,¹⁵⁹ however, “it took the rise of China, the death of world trade talks and the havoc of the global financial crisis” to push leaders together for the current negotiations.¹⁶⁰ Preparations for the current round of negotiations began in 2011.¹⁶¹ Mike Froman, U.S. Trade Representative, said the U.S. went into “these negotiations with the goal of achieving the broadest possible, most comprehensive agreement” with the EU.¹⁶² Important to TTIP provision negotiation, the U.S. typically chooses a legal “functionalist” approach by including fewer provisions but stronger legal enforceability.¹⁶³ However, the EU favors “legal inflation” with the inclusion of more provisions but only having strong legal enforcement on few of the provisions.¹⁶⁴

The proposed U.S.-EU IIA is important because a great economic impact on both the U.S and EU, and far-reaching regulatory effects on both parties are likely. The proposed agreement would become the largest IIA in the world by encompassing about 50% of the world’s economic output, 30% of world trade, and 20% of global FDI.¹⁶⁵ Trade between the U.S. and EU accounted for more than \$645 billion in 2012.¹⁶⁶ Also, the Centre for Economic Policy Research (CEPR) estimates the removal of U.S.-EU tariffs and the reduction of regulations could increase economic growth between the U.S. and EU by more

¹⁵⁸ See generally Dr. Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement?*, 34 BROOK. J. INT’L L. 303 (2009).

¹⁵⁹ Palmer, *supra* note 3.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Mavroidis, *supra* note 87, at 1565–88.

¹⁶⁴ *Id.*

¹⁶⁵ See Palmer, *supra* note 3, at 1.

¹⁶⁶ *Id.*

than \$100 billion per year.¹⁶⁷ Both the U.S. and the EU aim to finalize the TTIP in 2014.¹⁶⁸

With the potential for trade growth between the U.S. and the EU, it logically follows that there could be many more investment disputes. The investment provisions will likely be a cornerstone of the TTIP. With this in mind, this Comment now examines eight key investment provisions in the U.S. Model and the EU Draft for the TTIP: (1) scope of application; (2) conditions for the entry of foreign investment; (3) general standards of treatment of foreign investments; (4) monetary transfers; (5) operational conditions of the investment; (6) protection against expropriation and dispossession; (7) compensation for losses; and (8) investment dispute settlement.¹⁶⁹ The first seven topics will briefly be discussed as to their relevance in IIAs before Part IV analyzes specific provisions and reconciliation of the investment dispute settlement sections for both the U.S. and the EU.

A. *Scope of Application*

The scope of application specifically outlines which investors and investments are under the jurisdiction of the treaty.¹⁷⁰ These limitations typically are found clearly defined near the beginning of an IIA agreement under sections labeled such as “investors,” “companies,” “nationals,” “investments,” “territory,” etc.¹⁷¹ The majority of IIAs consider four basic elements of jurisdiction covered by an IIA: “(1) the form of the investment; (2) the area of the investment’s economic activity; (3) the time when the investment is made; and (4) the investor’s connection with the other contracting state.”¹⁷²

¹⁶⁷ *Id.*

¹⁶⁸ Gary Shapiro, *The Global Economy Is Counting On A U.S./Europe Trade Deal*, FORBES (Aug. 13, 2013), www.forbes.com/sites/realspin/2013/08/13/the-global-economy-is-counting-on-a-u-s-europe-trade-deal/.

¹⁶⁹ See Part I.C.4.

¹⁷⁰ Salacuse & Sullivan, *supra* note 10, at 80.

¹⁷¹ *Id.*

¹⁷² *Id.* The form of investment in most IIAs typically comprises both tangible and intangible property. *Id.* While IIAs of both the U.S. and EU typically provide protection to currently operating investments, there tends to be broad definitions in all IIAs of the terms “investor” and “investment” as countries seek an all-encompassing lexicon. *Id.* Moreover, most IIAs provide investors a certain time period, usually between 15 and 20 years, in which investor protections are still valid when the investment began under the expectation of treaty protection. *Id.* at 81.

An important aspect in defining the scope of application is the decision as to which investors are protected by the treaty.¹⁷³ For individuals, IIAs almost always use a test of citizenship or nationality.¹⁷⁴ For an investor's dispute to fall under an IIA, the agreement will explicitly define jurisdiction.¹⁷⁵

B. Conditions of Entry

A second important part of IIAs are conditions of entry.¹⁷⁶ Conditions of entry provide investors the right to enter the host state and tend to promote investments and provide operation of the investment, rather than focusing on investment protection.¹⁷⁷

C. General Standards of Treatment of Foreign Investments

Third, with regard to general standards of treatment of foreign investments, “[t]he totality of obligations that a host country owes a foreign investor or investment after the investment is made” is referred to in IIAs as the treatment owed to an investor or its investment.¹⁷⁸ These provisions typically are divided between general provisions affecting all foreign investors and specific provisions affecting particular matters discussed by the parties.¹⁷⁹ The general provisions typically fall under six categories, outlined by Salacuse and Sullivan as: “(1) fair and equitable treatment; (2) the provision of full protection and security; (3) protection from unreasonable or discriminatory measures; (4) treatment no less than that accorded by international law; (5) requirement to respect obligations made to investors and investments; and (6) national and/or most-favored-nation treatment.”¹⁸⁰

¹⁷³ *Id.* For example, the U.S. individually defines FDI as “the ownership or control, directly or indirectly, by one foreign person of 10 per centum or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise, including a branch.” *Foreign Direct Investment*, 15 C.F.R. § 806.15 (2009).

¹⁷⁴ Salacuse & Sullivan, *supra* note 10, at 81.

¹⁷⁵ *Id.* at 82. Jurisdiction is based on: “(1) country of the company’s incorporation, (2) country of the company’s seat, registered office, or principal place of business, or (3) country whose nationals have control over, or a substantial interest in, the company making the investment.” *Id.* (noting that some IIAs also require companies to meet at least two of these requirements).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 83.

Fair and equitable treatment is defined by both IIAs and customary international law, but typically concerns the obligation of the host country to treat FDI fairly and equitably.¹⁸¹ A host state is also obligated to provide “full protection and security” to FDI.¹⁸² Additionally, many IIAs bind contracting parties to not “impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of an investment.”¹⁸³ Further, many IIAs provide that in no case should foreign investments be given less favorable treatment than that required by international law.¹⁸⁴

Important to negotiations, countries formalize the law governing disputes, as opposed to relying on customary law, so as to not have any ambiguity about which law governs the agreement.¹⁸⁵ Also, many IIAs require that a signatory state respect contractual obligations in accord with the binding agreement.¹⁸⁶ Finally, many IIAs include provisions for “most-favored-nation treatment” (MFN) that requires “a host country treat an investor or an investment, once made, no less favorably than they treat their own national investors or investments made by their own nationals.”¹⁸⁷

D. Monetary Transfers

Additionally, capital-exporting states seek unrestricted freedom for their investors to conduct monetary transfers between the host state and home state—an activity referred to as “transfers.”¹⁸⁸ Foreign direct investment requires the ability to transfer income and capital between the home state and host state to meet financial obligations in other currencies, to acquire resources and to

¹⁸¹ *Id.* (citing U.N. Ctr. On Transnational Corp. (“UNCTC”), *Bilateral Investment Treaties* 41–45, U.N. Doc. ST/CTC/65 (1988) for more in-depth analysis.).

¹⁸² *Id.* While the host state is not liable for all acts against FDI, the host state typically is liable for any lack of due diligence. *Id.*

¹⁸³ Salacuse & Sullivan, *supra* note 10, at 84 (quoting TREATY CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENTS, U.S.-Turk., art. 2(3) Dec. 3, 1985, available at <http://www.state.gov/documents/organization/43615.pdf> (last visited July 28, 2014)). Although, the term “unreasonable” provides grounds for argument between an investor and host state. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* This can create a situation in which a host state directly contracts with a foreign investor, but must use the dispute resolution in the IIA instead of pursuing any claims using agreed upon international law within the IIA instead of the host state’s domestic law. *Id.*

¹⁸⁷ *Id.* at 84–85. This is important because there is no uniform customary international law requiring a nation to give foreign investors operating within their territory equal protection under their laws as domestic investors, due to the split between the Hull Rule and the Calvo Doctrine.

¹⁸⁸ *Id.* at 85.

maintain operations.¹⁸⁹ However, IIAs almost always conclude after dealing with five attributes of transfers: “(1) the general nature of the investor’s rights to make monetary transfers; (2) the types of payments that are covered by the right to make transfers; (3) the currency with which the payment may be made; (4) the applicable exchange rate; and (5) the time within which the host country must allow the investor to make transfers.”¹⁹⁰

E. Operational Conditions of the Investment

IIAs also include provisions outlining the operational rights provided to investors, such as entering the host country “to manage and operate the investment.”¹⁹¹ Interestingly, most IIAs do not afford investors an automatic right-of-entry into host states.¹⁹²

F. Protection Against Expropriation and Dispossession

Furthermore, IIAs seek to protect foreign investors from host state expropriation and dispossession.¹⁹³ Almost all IIAs dictate “a state may not expropriate property of an alien except: (1) for a public purpose, (2) in a non-discriminatory manner, (3) upon payment of just compensation, and in most instances, (4) with provision for some form of judicial review.”¹⁹⁴

G. Compensation for Losses

Compensation for investor losses due to host state causes are another main part of IIAs. Most IIAs include provisions granting compensation rights to investors due to losses when a host state has armed conflict or internal chaos.¹⁹⁵ However, this right to compensation is not absolute and may only provide investors the same remedy available to a host state’s domestic investors.¹⁹⁶

¹⁸⁹ *Id.* These negotiations normally are quite difficult to arrange when parties to an IIA include a developing and a developed state. *Id.* at 85–86.

¹⁹⁰ *Id.* at 85.

¹⁹¹ *Id.* at 86 (also citing “the investor’s right to enter the country, employ foreign nationals, and be free of performance requirements” as additional aspects of negotiation).

¹⁹² *Id.*

¹⁹³ *Id.* at 86–87. *See also infra* Part I.B.2. As such, most IIAs now prescribe use of the Hull Rule. *Id.* at 87. For a more complete background of the Hull Rule and the Calvo Doctrine, *see infra* Part I.C.1.

¹⁹⁴ Salacuse & Sullivan, *supra* note 10, at 87.

¹⁹⁵ *Id.* at 86.

¹⁹⁶ *Id.*

IV. PUBLIC BACKLASH AND POTENTIAL POLITICAL AMENABILITY

A. *Backlash*

Even with all of the purported economic benefits of an executed IIA, various stakeholders hoist considerable backlash against specific provisions of the proposed TTIP. In December 2013, a consortium of more than 100 citizen protection groups, non-government organizations, and other critics signed an open letter (“Open Letter”) seeking to exclude ISDS provisions from the TTIP.¹⁹⁷ This and other rising public pressure in Europe led to a January 21, 2014 announcement by the European Commission to halt certain talks with the U.S. over the TTIP until it concludes a public consultation about how to deal with ISDS concerns.¹⁹⁸

The Open Letter highlights many public concerns regarding ISDS provisions.¹⁹⁹ First, civil organizations are concerned with foreign companies being able to sue host governments over disputes created when governments enact policies aimed at public policy and environmental protection goals.²⁰⁰ Second, the Open Letter has issue with these provisions because they require a host government compensate foreign companies as a result of any lost profit or investment money due to any host government’s enacted legislation, including a desire to protect its citizens.²⁰¹ Third, the Open Letter highlights issues with a foreign company being able to lobby and challenge host state policies as a result of ISDS provisions.²⁰² Finally, this document concludes by asking both the U.S. and the EU to “exclude Investor-state dispute Settlement” from the TTIP and including a list of all organizations signing the letter.²⁰³

This Open Letter and additional public outcry led to a decision on January 21, 2014 by the European Commission to temporarily freeze all talks over the investment section of the TTIP until a public consultation is completed.²⁰⁴ However, the European Commission publicly stated that negotiations over

¹⁹⁷ *Open letter of civil society against investor privileges in TTIP*, BILATERS.ORG (Dec. 16, 2013), available at <http://www.bilaterals.org/?open-letter-of-civil-society> [hereinafter *Open Letter*].

¹⁹⁸ *EU Says It Will Hit ‘Pause’ on TTIP Investment Talks Pending Public Debate*, INSIDE U.S. TRADE (Jan. 21, 2014), available at <http://insidetrade.com/201401212458789/WTO-Daily-News/Daily-News/eu-says-it-will-hit-pause-on-ttip-investment-talks-pending-public-debate/menu-id-948.html> [hereinafter *EU Pause*].

¹⁹⁹ *Open Letter*, *supra* note 197.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *See id.*

²⁰³ *Id.*

²⁰⁴ *EU Pause*, *supra* note 198.

other parts of the TTIP will commence as planned, with the ISDS talks likely resuming in the summer of 2014.²⁰⁵ The European Commission plans to release a draft text for review by the public, the European Union Council, and all Member State trade ministers.²⁰⁶ Karel De Gucht, the EU Trade Commissioner, explained that the public forum seeks to understand how Europeans can “strike a balance between protecting EU investors and upholding governments’ right to regulate in the public interest.”²⁰⁷ De Gucht concluded by reiterating ISDS provisions were included in the EU Directive as a section the EU has an authority to negotiate with the U.S. in the TTIP.²⁰⁸

On March 27, 2014, the EU Commission launched a 90-day “public consultation” into the proposed investor protection and ISDS provisions currently negotiated in the TTIP discussions.²⁰⁹ The public consultation was meant to clarify the “misconceptions and even misrepresentations as to the aims of ISDS within TTIP negotiations.”²¹⁰ The questionnaire covered twelve key topics and includes has an open comment section for general comments.²¹¹

Finally, a potentially huge shift in TTIP ISDS negotiation transparency may be approaching. On July 3, 2014, the European Court of Justice released a judgment,²¹² recommending to the European Council that it consider, with the U.S. Treasury Department, making financial messaging data public data.²¹³ This requires the EU Council to provide specific reasons that the information will not be made publicly available.²¹⁴ Specifically, the judgment ruled that “documents related to international activity, which would include TTIP, are not automatically exempt from EU transparency requirements.”²¹⁵

²⁰⁵ *Id.* (stating that the European Commission wishes to conclude the three month public consultation and review the gathered information before resuming talks with the U.S. over the ISDS portion of the TTIP).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *See id.*

²⁰⁹ Press Release, European Comm’n, European Commission launches public online consultation on investor protection in TTIP, (Mar. 27, 2014). The online questionnaire is available at <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=ISDS>.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Case C-350/12 P, Council v. Int’l Veld, 2014 EUR-Lex CELEX LEXIS 2039 (Jul 3, 2014).

²¹³ *Id.*

²¹⁴ *TTIP documents could be made public after EU court ruling*, EURACTIV.COM (July 4, 2014), <http://www.euractiv.com/sections/euro-finance/ttip-documents-could-be-made-public-after-eu-court-ruling-303288>.

²¹⁵ *Id.*

B. *Backlash Versus U.S.-EU Relations*

Backlash can pose a threat to either the TTIP or the inclusion of ISDS provisions within the agreement, because the European Commission views ISDS provisions within the TTIP as an important foundation for many future IIAs.²¹⁶ In contrast to the public forum over ISDS provisions that began on January 21, 2013, comments from De Gucht asserted there should be a balance between investor rights and governmental public policy rights.²¹⁷ This Comment will now consider a few of the available U.S.-EU documents released or leaked that point to a desire by both the U.S. and EU to handle stakeholder concerns and move forward with the TTIP.

The U.S. and the EU have jointly released multiple documents over the years describing a long held desire for both sides to seek mutual benefits from their long-standing relationship. The first public declaration of solidarity between the U.S. and Europe was in November 1990, known as the Transatlantic Declaration on EC-US Relations (“Declaration”).²¹⁸ Specifically, the Declaration held that common goals for the U.S.-Europe relationship includes encouraging market principles, eliminating protectionism and furthering the multilateral trading system, and following policy measures towards a sustainable and stable global economy with low inflation, high levels of employment, and fair social conditions.²¹⁹ As a result of these goals, the Declaration stated that both sides will “support further steps towards liberalization, transparency, and the implementation of . . . principles concerning . . . investment.”²²⁰

A second public document highlighting cohesion between both the U.S. and EU was The New Transatlantic Agenda (“Agenda”), released in December 1995.²²¹ The U.S. and EU acknowledged that current global challenges need a strengthened partnership between the two sides and require “multilateral

²¹⁶ *Id.* See also *European Commission Faces Serious Debate over TTIP Investment Rules*, INSIDE U.S. TRADE (Oct. 17, 2013), available at <http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-10/18/2013/european-commission-faces-serious-debate-over-ttip-investment-rules/menu-id-710.html>.

²¹⁷ *Free trade: EU frets over US investment talks*, BBC NEWS (Jan. 22, 2014), available at <http://www.bbc.co.uk/news/world-europe-25829604>.

²¹⁸ European Commission, *Transatlantic Declaration on EC-US Relations* (Nov. 1990), available at http://eeas.europa.eu/us/docs/trans_declaration_90_en.pdf. At the release of this document, the EU was referred to as the European Community (EC).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ European Commission, *The New Transatlantic Agenda* (Dec. 1995), available at http://eeas.europa.eu/us/docs/new_transatlantic_agenda_en.pdf.

efforts towards a more open world system of trade and investment.”²²² Specifically, the Agenda declared the U.S. and EU are “determined to create a New Transatlantic Marketplace, which will expand trade and investment opportunities and multiply jobs on both sides of the Atlantic.”²²³ The Agenda provided an action plan for this result by declaring an agreement between the U.S. and EU will be created to minimize or remove barriers between both sides in the flow of goods and capital.²²⁴ The Agenda continued by highlighting that this agreement will not be possible without an agreement rife with regulatory cooperation.²²⁵

A third document, the Transatlantic Economic Partnership (“Partnership”), was released in May 1998.²²⁶ This Partnership outlines specific sectors and negotiating points that the U.S and EU agree on promoting globally.²²⁷

More than a decade after the Partnership was released, the U.S. and EU distributed an important new document, the Shared Principles for International Investment (“Shared Principles”), on April 20, 2012, publicly stating intentions to continue their historic relationship with an agreement on all provisions of the TTIP.²²⁸ The Shared Principles highlight key areas in which the U.S. and the EU agree that “creating and maintaining open and stable investment climates and policies” is equally important to “governments . . . not [seeking] to attract foreign investment by weakening or failing to apply” appropriate public interest regulations.²²⁹ This brief document is a prime example of how ISDS provisions play an important role in the development of international investments and why the U.S. and EU seek to employ these standards in the TTIP and future IIAs globally.²³⁰ Importantly, there is no distinction in the

²²² *Id.*

²²³ *Id.* The Agenda also describes goals of reduced international crime, increased environmental protection, and increased cooperation in maintaining world peace. *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ European Commission, Transatlantic Economic Partnership (May 1998), *available at* http://eeas.europa.eu/us/docs/trans_econ_partner_11_98_en.pdf.

²²⁷ *Id.*

²²⁸ Transatlantic Economic Council, Statement of the European Union and the United States on Shared Principles for International Investment, (Apr. 10, 2012), *available at* http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf [hereinafter Shared Principles]. *See also* Investment Policies, *supra* note 146; Press Release, European Comm’n, Enterprise and Industry, EU and US adopt blueprint for open and stable investment climates (Apr. 10, 2012).

²²⁹ Shared Principles, *supra* note 228. *See also* Investment Policies, *supra* note 228.

²³⁰ *See* Investment Policies, *supra* note 228.

language throughout the Shared Principles that places business and economic concerns over those of the public and environment.²³¹

The Shared Principles names the following seven topics: (1) Open and Non-Discriminatory Investment Climates; (2) A Level Playing Field; (3) Strong Protection for Investors and Investments; (4) Fair and Binding Dispute Settlement; (5) Robust Transparency and Public Participation Rules; (6) Responsible Business Conduct; and (7) Narrowly-Tailored Reviews of National Security Considerations.²³²

First, the Shared Principles emphasizes foreign investors should have broad market access with investor treatment equal for both domestic and foreign investors.²³³ Second, the U.S. and EU governments seek to extend equal treatment to all entities, state-owned enterprises or private commercial enterprises.²³⁴ Third, all investors should receive “prompt, adequate, and effective compensation in the event of a direct or indirect expropriation or nationalization.”²³⁵ Fourth, the U.S. and EU are to provide investors access to investor-state arbitration, while requiring these procedures permit the public transparency into proceedings and accessibility to participate.²³⁶ Fifth, the Shared Principles point out that transparency concerns should not stop with arbitration, but rather extend to government transparency regarding the “development of domestic laws and other measures relating to investment.”²³⁷ Sixth, while the Shared Principles are focused on pro-business concerns and international arbitration, the document urges negotiations must force investors to act in a socially responsible way.²³⁸ Seventh, the Shared Principles state that any government review of foreign investments should only focus “on genuine national security risks.”²³⁹

Finally, the EU Directive reaffirms that the EU’s objective of the TTIP’s is to realize “the untapped potential of a truly transatlantic market place, generating new economic opportunities for the creation of jobs and growth

²³¹ Shared Principles, *supra* note 228.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* Specifically, the Shared Principles seeks to establish multinational entities that abide by the OECD Guidelines for Multinational Enterprises. See generally OECD, (2011), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, OECD Publishing, available at <http://dx.doi.org/10.1787/9789264115415-en>.

²³⁹ Shared Principles, *supra* note 228.

through increased market access and greater regulatory compatibility and setting the path for global standards.”²⁴⁰ Further, the EU negotiators were tasked with finding mutual agreement regarding market access, regulatory issues and non-tariff barriers, and rules for the purpose of “a single undertaking ensuring a balanced outcome between the elimination of duties, the elimination of unnecessary regulatory obstacles to trade and an improvement in rules, leading to a substantial result in each of these components and effective opening of each others [sic] markets.”²⁴¹

With each of these documents, it becomes evident that both sides have a clear desire to move forward with the TTIP as originally planned. As such, this Comment’s analysis will hopefully engender more debate about the substance of the ISDS provisions in the TTIP and provide a springboard for more fruitful negotiations. Part V of this Comment will now summarize the ISDS provision analysis and reconciliation of the U.S.-EU TTIP.

V. INVESTMENT DISPUTE SETTLEMENT PROVISIONS

The general IIA investor protection provisions discussed in Part III provide a firm basis for why investment dispute settlement provisions are a fundamental question concerning all IIAs and their enforceability.²⁴² States continue to negotiate IIAs as a means to providing dispute resolution procedures for state-state disputes and investor-state disputes.²⁴³ Investor-state disputes typically dictate first a negotiation among the investors and the host state with unresolved conflicts going to an international arbitration tribunal, typically under the rules of the ICSID.²⁴⁴ In addition to the EU Draft, the EU has publicly stated its desire to release an official public text of the EU positions on investor protection and ISDS sections of the TTIP.²⁴⁵ The U.S.

²⁴⁰ *Revision 2*, *supra* note 136.

²⁴¹ *EU Directive*, *supra* note 137.

²⁴² Many academics debate whether these provisions, including both ISDS and state-state dispute settlement, are enforced adequately or provide greater protections to investors or states. Salacuse & Sullivan, *supra* note 10, at 87.

²⁴³ *Id.* State-state disputes are typically negotiated diplomatically, but these may go to an ad hoc arbitration tribunal if the dispute cannot be solved amicably. *Id.* at 88.

²⁴⁴ *Id.*

²⁴⁵ Press Release, John Clancy & Helene Banner, Commission to Consult European Public on Provisions in EU-US Trade Deal on Investment and Investor-State Dispute Settlement (Jan. 21, 2014), *available at* http://europa.eu/rapid/press-release_IP-14-56_en.htm (stating on January 21, 2014, EU Trade Commissioner Karel De Gucht “announced his decision to consult the public on the investment provisions. In early March [of 2014], he will publish a proposed EU text for the investment part of the talks which will include sections on investment protection and on investor-to-state dispute settlement, or ISDS. This draft text will be accompanied

does not want to publicly release any information regarding the closed-door negotiations. This Comment will now analyze specific provisions regarding discrepancies between the U.S. Model and the EU Draft documents to examine differences and offer reconciliation.

A. General Investment Protection Provisions

Investment protection is a large part of deciding which issues the ISDS provisions will apply. While some definitions spill over in relation to ISDS provisions, the majority of these concepts have been discussed earlier in the paper, or, due to brevity, are outside the scope of this Comment. Now, this Comment will briefly consider the agreement between the U.S. and EU on investment protection before analyzing specific ISDS provisions.

The scope of the TTIP ISDS provisions will necessarily regulate the amount of parties and the types of investment covered under the potential TTIP. The U.S. Model limits the treaty to investors of the other Party and covered investments.²⁴⁶

Relevant U.S. definitions are as follows:

by clear explanations for the non-expert.”). For obvious reasons, this section could need significant edits upon any official EU position release on investment protection & ISDS. *Author*.

²⁴⁶ U.S. Model, *supra* note 103, art. 2(1).

U.S. Model – Scope Provisions ²⁴⁷	
“Investor of a Party”	“a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.”
“Investment”	“every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.
“Covered Investment	“with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.”

²⁴⁷ *Id.* art. 1.

The EU positions are as follows:

EU Model – Scope Provisions ²⁴⁸	
“Scope”	<p>“With a view to improving the investment environment, and in particular the conditions of establishment between the Parties, this Section applies to measures by the Parties affecting establishment in all economic activities with the exception of:</p> <p>(a) mining, manufacturing and processing of nuclear materials;</p> <p>(b) production of, or trade in, arms, munitions and war material;</p> <p>(c) audio-visual services;</p> <p>(d) national maritime cabotage; and</p> <p>(e) domestic and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights, other than:</p> <p>(i) aircraft repair and maintenance services;</p> <p>(ii) the selling and marketing of air transport services;</p> <p>(iii) CRS services; and</p> <p>(iv) other services auxiliary to air transport services, such as ground handling services, rental service of aircraft with crew and airport management services.”</p>

Both sides take a very expansive definition of investment, with the EU limiting the scope of any ISDS provisions in a manner that the U.S. would likely accept.²⁴⁹ As the EU does not make any explicit limitations on when an economic activity commences, text regarding that section would likely be negotiated between the sides amicably.

The U.S. also has articles on national treatment,²⁵⁰ most-favored-nation treatment,²⁵¹ minimum standard of treatment,²⁵² expropriation and

²⁴⁸ See *Free Trade Agreement Between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other Part*, EU-S. Korea FTA, Oct. 6, 2010, art. 7.10.

²⁴⁹ The U.S. for national-security purposes would likely wish to narrow an agreement that gives up any U.S. jurisdiction over nuclear materials, war materials, domestic air carriers, or U.S. audio-visual industry materials.

²⁵⁰ U.S. Model, *supra* note 103, art. 3.

²⁵¹ *Id.* art. 4.

²⁵² *Id.* art. 5.

compensation,²⁵³ transfers (capital, profits, and payments),²⁵⁴ performance requirements,²⁵⁵ and transparency (as it relates to laws and proposed regulations to be adopted by each party, including opportunities for the other party to participate in the development of those rules and regulations).²⁵⁶ The EU negotiating parties have been instructed to find agreement in national treatment, most-favored-nation treatment, minimum standard of treatment (“fair and equitable treatment”), expropriation and compensation, transfers (“funds of capital and payment by investors”), performance requirements (“umbrella clause”), and transparency.²⁵⁷ Due to the formal and informal desire to find agreement, the sections concerning investment protection should fall under quick political compromise. Instead, the public pressure mounting in Europe, as discussed in Part IV, may lead to a narrowing of options available to the negotiators.²⁵⁸ Notwithstanding the public debate about these provisions, this Comment will proceed assuming that either the preceding investment protections will be agreed upon quickly and included in the TTIP or public debate will render analysis of standard investment provisions moot.

B. Specific ISDS Provisions

The U.S. Model and EU Draft documents provide important provisions creating the procedure and substance of ISDS, within any proposed IIA. Each of the following provisions in the potential TTIP will likely be negotiated on the basis of clarity, fairness, and predictability for the U.S., EU, and each party’s respective investors. As discussed below, some provisions, such as consultation, mediation, and third party involvement, are argued in connection with whether agreement on ISDS will be possible in TTIP negotiations. However, the U.S. and EU seek broad compromise on other issues of transparency, arbitrator tribunal composition, and the consideration of creating an appellate mechanism to govern ISDS arbitration awards.²⁵⁹ Each of these five issues and proscriptive analysis of reconciliation will now be discussed before the Comment considers macro-level political issues effecting the adoption of the TTIP. The following sub-sections will all conclude with a

²⁵³ *Id.* art. 6.

²⁵⁴ *Id.* art. 7.

²⁵⁵ *Id.* art. 8.

²⁵⁶ *Id.* art. 11.

²⁵⁷ *EU Directive*, *supra* note 136, art. 23.

²⁵⁸ See *infra* Part V.A. for a complete discussion on the public backlash to EU adoption of the TTIP.

²⁵⁹ See *infra* Part II.A.2. for the U.S. Model discussion and Part II.B.2. for the EU Draft discussion about these issues.

recommended text that could be used to reconcile the differences between the U.S. Model and the EU Draft.

1. Consultation/Mediation

Before being able to submit claims for arbitration, both the U.S. and the EU dictate that both the claimant and respondent seek to amicably resolve their dispute. The U.S. Model states that both sides should consult with one another and should consider using a non-binding third party mediator.²⁶⁰ Furthermore, the U.S. Model requires that a minimum of 90 days pass before a claimant may submit their claim to arbitration, the claimant must deliver to the respondent a “notice of intent” including the following: (1) the name, address, and any entity’s place of incorporation; (2) the alleged breached provision of the IIA; (3) the legal and factual basis for the claim; and (4) desired relief and estimated damages.²⁶¹ If six months have elapsed since the breach of the IIA and 90 days have elapsed since providing the other party with the “notice of intent,” only then the claimant may submit the claim to arbitration under their choice of law, whether that is ICSID Rules, ICSID Additional Facility Rules, UNCITRAL Arbitration Rules, or any other mutually agreed upon arbitration rules.²⁶² The U.S. also requires each party to consent to arbitration in accordance with the execution of the IIA, and that consent to arbitration is sufficient for both ICSID and New York Convention rules governing the enforcement of arbitration awards.²⁶³ Finally, the U.S. Model includes a three-year statute of limitations period in which a claim must be submitted to arbitration.²⁶⁴

The EU Draft requires a claimant provide a “request for consultation” to be delivered to the respondent, including: (1) the investor’s name and address; (2) the alleged provision of the IIA breached; (3) the reason provision was breached; and, (4) the remedy desired and damages.²⁶⁵ The EU Draft requires four months from the “request for consultation” before the claimant may submit a claim for arbitration.²⁶⁶ During this time, the EU has a set of rules governing the procedure of mediation to help both sides understand the process

²⁶⁰ U.S. Model, *supra* note 103, art. 23.

²⁶¹ *Id.* art. 24(2).

²⁶² *Id.* art. 24(3).

²⁶³ *Id.* art. 25. See *infra* Part I.B.1. for a discussion of ICSID and New York Convention rules governing arbitration award enforcement.

²⁶⁴ U.S. Model, *supra* note 103, art. 26.

²⁶⁵ EU Draft, *supra* note 126, art. 2.

²⁶⁶ *Id.* art. 4.

and hopefully resolve any issue before arbitration.²⁶⁷ If there is no amicable resolution within three months of submitting the notice of intent to the respondent, the claimant may then submit the claim to arbitration.²⁶⁸ The EU Draft also provides the claimant may submit the claim to arbitration under their choice of law, whether that is ICSID Rules, ICSID Additional Facility Rules, UNCITRAL Arbitration Rules, or any other mutually agreed upon arbitration rules.²⁶⁹ Furthermore, the EU requires each party to consent to arbitration in accordance with the execution of the IIA, and that consent to arbitration is sufficient for both ICSID and New York Convention rules governing the enforcement of arbitration awards.²⁷⁰ Finally, the EU concludes this section by providing a three-year statute of limitations on when the claimant must begin the process through a “request for consultation.”²⁷¹

Both the U.S. and EU already require a claimant provide similar information to the respondent upon knowledge of the claim. Therefore, reconciliation of the above provisions would likely require a compromise on provisions that would lengthen the time before claims are submitted to arbitration. This would provide for greater time for the claimant and respondent to resolve the dispute, requiring fewer costly arbitration proceedings and allowing a mutually agreed upon solution. As such, a claimant should be required to deliver a “request for consultation” immediately upon becoming aware of any alleged breach, then provide up to four months to consult the other side before delivering a “notice of intent” to submit the claim, and finally there shall be a mandatory three month period before the claim shall be allowed to be submitted for arbitration. The U.S. does not have a prescribed set of mediation rules, but already permits a fairly extensive period of extending litigation in its domestic courts. As such, an edited version of the EU Draft’s Mediation Mechanism would likely suffice. The statute of limitations could also be lengthened to provide claimants three years after they have should become aware of a claim to begin the process mentioned in this paragraph, as opposed to the U.S. firm deadline. This would provide an even longer timeline for consultation and mediation. The provisions on arbitration rules, consent, and enforcement protection are already similar between the U.S. and EU Drafts, so these provisions would likely not be an issue for negotiators.

²⁶⁷ *Id.* Annex I.

²⁶⁸ *Id.* art. 5.

²⁶⁹ *Id.*

²⁷⁰ *Id.* art. 7. See *infra* Part I.B.1. for a discussion of ICSID and New York Convention rules governing arbitration award enforcement.

²⁷¹ *Id.* art. 2.

A reconciled version of the following relevant sections of this Consultation/Mediation provision serving both sides could look like the following:

Consultation/Mediation – Relevant Proposed Reconciled TTIP ISDS Sections	
I.	<p>Request for Consultation.</p> <p>(A) Both parties should initially seek to resolve any conflicts amicably.</p> <p>(B) In the case of an investment dispute, a claiming party shall submit to the allegedly adverse party a Request for Consultation (“Request”). The Request shall include:</p> <ol style="list-style-type: none"> (1) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise; (2) the provision of the Agreement allegedly breached for each claim; (3) the legal and factual basis for each claim; and (4) the relief sought and amount of damages claimed. <p>(C) This process shall include one or more of the following: consultation, negotiation, or non-binding mediation.</p> <ol style="list-style-type: none"> (1) Use of the aforementioned procedures shall not prejudice the legal rights of either party in any way. (2) If parties elect to use mediation, the parties shall abide by the Mediation Mechanism, as attached in Annex A. <p>(D) No party shall proceed to any below section of this provision until after 120 days from either submitting or receiving a Request for Consultation.</p>
II.	<p>Notice of Arbitration.</p> <p>(A) In the case where an investment dispute is not settled in at least 120 days after the submission of a Request for Consultation, either party may submit a Notice of Arbitration (“Notice”) to the following:</p> <ol style="list-style-type: none"> (1) the respondent to the claim; (2) the appropriate arbitration body, as follows: <ol style="list-style-type: none"> (a) under ICSID, the Secretary General, as referred to either under paragraph 1 of Article 36 of the ICSID Convention or Article 2 of Schedule C of the ICSID Additional Facility Rules; or

	<p>(b) under UNCITRAL, the respondent as described in Article 3 of the UNCITRAL Arbitration Rules.</p> <p>(B) The Notice shall include:</p> <ol style="list-style-type: none"> (1) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise; (2) the provision of the Agreement allegedly breached for each claim; (3) the legal and factual basis for each claim; and (4) the relief sought and amount of damages claimed.
III.	<p>Statute of Limitations.</p> <p>(A) In the event that a claimant has not submitted a Notice within 18 months of submitting the adverse party a Request, the claimant shall lose their right to submit a Notice.</p> <p>(B) At the time a party shall be deemed to have reasonable notice of a breach of this Agreement, that party shall have only 5 years to submit a Request to the party allegedly breaching this Agreement.</p>
IV.	<p>Award.</p> <p>(A) The arbitration tribunal shall specify the exact relief granted and/or damages awarded.</p> <p>(B) The tribunal shall not award punitive damages, in that any monetary or property award shall not be greater than the loss suffered by a party to this Agreement. However, monetary damages may include commercially reasonable interest.</p> <p>(C) The tribunal shall not award reasonable attorney and court costs, except in the case where one party acts fraudulently or improperly.</p>
IV.	<p>Enforcement Protection.</p> <p>(A) An award issued pursuant to this Agreement shall be binding on both disputing parties, and not subject to any appellate mechanism, except for an appellate mechanism written into this Agreement or added as an Amendment.</p> <p>(B) Any judgment awarded through arbitration shall be deemed enforceable under this Agreement by either:</p> <ol style="list-style-type: none"> (1) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; or (2) the ICSID Convention.

2. *Third-party Involvement*

In addition to consultation and mediation measures, the U.S. and EU have similar provisions regarding third-party involvement in the arbitration process. The U.S. provides two specific provisions governing third-party involvement. First, a “non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.”²⁷² Second, the “tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.”²⁷³ These broad provisions are similar to the exact phrasing of the EU Draft. The EU Draft specifically states that the “arbitral tribunal shall allow a person that is not a disputing party and not a non-disputing Party to the Agreement . . . to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute” when the third-person submits a written document including: (1) the description of the entity and its “membership and legal status;” (2) disclosure of any affiliation to either disputing party; (3) information provided by any government or separate entity assisting in the preparation of their submission; (4) description of its interest in the arbitration; and (5) specific law or fact in the arbitration for which they have relevant information.²⁷⁴ With this information, the EU Draft requires the arbitral tribunal to weigh the prejudice of the party, significance of the information, and opportunity for disputing party to rebut evidence into account when allowing the submission.²⁷⁵

The U.S. Model does not narrow the requirements of third-party submissions, so it will likely accept the requirements set out in the EU Draft. However, the U.S. may wish to reduce any reliance on the arbitral tribunal to accept or deny the submissions. As a matter of predictability and transparency, the U.S. will probably negotiate that any submission meeting the threshold of significant information be allowed into the proceeding. The arbitral tribunal, under the EU Draft already has the ability to weigh evidence differently when making the final judgment.

A reconciled version of the following relevant sections of this Third-party Involvement provision serving both sides could look like the following:

²⁷² U.S. Model, *supra* note 103, art. 28(2).

²⁷³ *Id.* art. 28(3) (italics in original).

²⁷⁴ EU Draft, *supra* note 126, Annex III, art. 4.

²⁷⁵ *Id.* at Annex III, art. 4(c).

Third-party Involvement – Relevant Proposed Reconciled TTIP ISDS Sections	
I.	<p>Non-disputing Party Submissions.</p> <p>(A) A non-disputing party may make written <i>amicus curiae</i> submissions to the arbitration tribunal regarding any interpretation of this Agreement.</p> <ol style="list-style-type: none"> (1) Any submission by a non-disputing party must fall under [Chapter regarding Scope] of this Agreement. (2) Submissions to the arbitration tribunal shall be made in the agreed upon language of the tribunal. (3) The arbitration tribunal may limit the length of non-disputing party submissions. <p>(B) Submissions shall include the following information:</p> <ol style="list-style-type: none"> (1) a description of the non-disputing party making the submission, including its legal status (e.g. NGO, corporate designation, trade association, etc.), general objectives, nature of activities, and all parent and subsidiary organizations; (2) a full disclosure whether or not the non-disputing party has any affiliation, direct or indirect, with any disputing party; (3) a full report of all information disclosed within 3 years to the non-disputing party by any government, person, or organization providing financial, legal, or other assistance in preparing the submission; and (4) the date and signature of the party making the submission to the arbitration tribunal. <p>(C) The tribunal shall have the authority to consider or deny submissions based on the following:</p> <ol style="list-style-type: none"> (1) the merit of the submission; (2) the burden of the submission upon the arbitration tribunal; (3) the interest of the non-disputing party; and (4) the extent the submission is relevant to the arbitration tribunal.

3. *Transparency*

Transparency is a very current issue in ISDS, especially as the public becomes more concerned with governments paying out large awards to foreign investors.²⁷⁶ Both the U.S. Model and the EU Draft provides that the “notice of

²⁷⁶ See *infra* Part II.A.2.

consultation,” “notice of intent,” “notice of arbitration,” all written documents (pleadings, briefs, etc., by both disputing parties and third-persons), expert reports, hearing transcripts, orders, decisions, and awards be made public.²⁷⁷ The U.S. Model and EU Draft also provide mechanisms for disputing parties to hold private hearings when discussing protected information, per arbitral tribunal permission.²⁷⁸ Both the U.S. Model and EU Draft provide disputing parties to submit both original and redacted documents for the arbitral tribunal to use when distributing information to the public.²⁷⁹

The U.S. Model provides for similar transparency rules to the EU Draft. However, the U.S. Model is more efficient in the use of redacted materials, because the U.S. Model requires original and redacted documents to be submitted to the arbitral tribunal at onset.²⁸⁰ This is a more streamlined approach to protected information than the EU Draft, which requires a 30 day period for the arbitral tribunal to determine if a document needs to be redacted before a party needs to provide a redacted document.²⁸¹ Transparency issues, while a problem for international arbitration in the past,²⁸² has been largely resolved through multilateral efforts.²⁸³

A reconciled version of the following relevant sections of this Transparency provision serving both sides could look like the following:

Transparency – Relevant Proposed Reconciled TTIP ISDS Sections	
I.	<p>Documents Made Publicly Available.</p> <p>(A) The following documents shall be made available to the public by the arbitration tribunal repository:</p> <ol style="list-style-type: none"> (1) the Request for Consultation; (2) the Notice of Arbitration; (3) all written briefs, pleadings, and submissions made by any disputing party; (4) all witness statements and expert reports; (5) all written submissions by non-disputing parties to the arbitration tribunal;

²⁷⁷ U.S. Model, *supra* note 103, art. 29(1); EU Draft, *supra* note 126, Annex III, art. 1(2), 2(1), 3(1).

²⁷⁸ U.S. Model, *supra* note 103, art. 29(2); EU Draft, *supra* note 126, Annex III, art. 5(9-10).

²⁷⁹ U.S. Model, *supra* note 103, art. 29(4); EU Draft, *supra* note 126, Annex III, art. 5(4).

²⁸⁰ U.S. Model, *supra* note 103, art. 29(4).

²⁸¹ EU Draft, *supra* note 126, Annex III, art. 5(4).

²⁸² See *infra* Part I.C.

²⁸³ UNCITRAL, 46th session (July 8–26, 2013), A/CN.9/XLVI/CRP.3 (July 9, 2013) (as modified in negotiations). See also EU Draft, *supra* note 126, art. 11.

	<p>(6) all transcripts of the arbitration tribunal hearing; and</p> <p>(7) all orders, awards, and decisions of the tribunal.</p> <p>(B) The tribunal, with reasonable arrangements by disputing parties, shall conduct all hearings in a manner open to the public.</p> <p>(C) Any third party may request non-public documents from the arbitration tribunal. The arbitration tribunal shall exercise prudent discretion in granting requests.</p>
II.	<p>Protection of Confidential Information.</p> <p>(A) Protected information consists of:</p> <ol style="list-style-type: none"> (1) confidential business or trade information; (2) information protected from public availability per this Agreement; and (3) information protected from public availability under the applicable law or rules used by the arbitration tribunal. <p>(B) A party submitting a document containing information it deems to be protected information shall submit an original and redacted document to the arbitration tribunal. The party must attach a brief description of the legal basis for why the document contains protected information.</p> <p>(C) The arbitration tribunal shall decide whether any document or information is protected before making the document or information publicly available.</p> <ol style="list-style-type: none"> (1) Documents or information submitted to the arbitration tribunal before a hearing shall be ruled publicly available or protected before the hearing takes place. The arbitration tribunal shall make arrangements to protect the document or information from becoming public. (2) Documents or information submitted after a hearing shall be ruled publicly available or protected within 30 days of the arbitration tribunal's final order, award, or decision. A party disputing the arbitration tribunal's decision may present written or oral argument regarding why the protected information shall remain publicly unavailable.

4. *Arbitration Tribunal Composition*

Another important factor in ISDS is the composition of the actual arbitral tribunal. The U.S. Model follows a more traditional approach, whereas the EU Draft creates a new process of selecting arbitrators. The U.S. Model specifies that “the tribunal shall comprise three arbitrators, one arbitrator appointed by

each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.”²⁸⁴ Furthermore, the Secretary-General of the ICSID acts as the appointing authority for all arbitration proceedings.²⁸⁵

Contrary to the U.S. Model, the EU Draft develops a new methodology implemented for all future EU IIAs in which: (1) each party proposes at least five arbitrators of their own choosing; (2) each party selects at least five arbitrators “who are not nationals of either Party to act as chairperson of the tribunals;” and (3) additional arbitrators, as agreed upon by both parties during the IIA’s execution.²⁸⁶ Furthermore, the EU Draft outlines that arbitrators “shall have a specialised knowledge of international law, in particular international public law and international investment law,” be independent of affiliation with any government party to the IIA or disputing party, and not receive any instruction or advice from any government or organization.²⁸⁷

The U.S. could mandate an essentially limitless potential number of arbitrators, as it sees fit. Additionally, it would be in both parties’ interests to require knowledgeable and independent arbitrators, more fitting with the EU Draft requirements. The U.S. Model could require the EU to include in the arbitral tribunal composition requirements that the Secretary-General of the ICSID have final authority to select the neutral arbitrator from the lists of the IIA’s contracting party not presently involved in the dispute. As such, this concession would likely be debated, but would be an easier way to make the selection process more predictable to parties and to potential arbitral tribunal members awaiting selection.

A reconciled version of the following relevant sections of this Arbitration Tribunal Composition provision serving both sides could look like the following:

²⁸⁴ U.S. Model, *supra* note 103, art. 27(1).

²⁸⁵ *Id.* art. 27(2). *See id.* art. 1.

²⁸⁶ EU Draft, *supra* note 126, art. 8(6).

²⁸⁷ *Id.* art. 8(7).

Arbitration Tribunal Composition – Relevant Proposed Reconciled TTIP ISDS Sections	
I.	<p>Arbitration Tribunal Composition.</p> <p>(A) Unless the disputing parties agree to appoint a sole neutral arbitrator, the arbitration tribunal shall consist of three arbitrators, one appointed by each disputing party and a neutral chairperson, appointed by agreement of the disputing parties.</p> <p>(B) If parties agree to use a sole arbitrator, the disputing parties shall agree to a sole arbitrator within 90 days of submission of the Notice. If a sole arbitrator is not made within that time frame, a sole arbitrator shall be selected by the Secretary-General of the ICSID, pursuant to the approved list of chairpersons established in [Section XX] of this Chapter.</p> <p>(C) If parties use an tribunal, the arbitration tribunal shall be constituted within 90 days of submission of the Notice. If the arbitration tribunal is not confirmed, the remaining members of the arbitration tribunal shall be selected by the Secretary-General of the ICSID, pursuant to the approved list of chairpersons established in Section II of this Chapter.</p>
II.	<p>Arbitrators.</p> <p>(A) At the execution of this Agreement, a Committee for the Settlement of Investor-State Disputes shall be formed. That committee shall, before this Agreement goes into effect, establish a list of individuals willing and able to serve as arbitrators. At all times, this list shall include at least 15 individuals.</p> <p>(B) Within 30 days of the submission of the Notice, each party shall propose at least 5 individuals to serve as arbitrators. The parties shall propose at least 5 individuals who are not nationals of either disputing party that may act as a chairperson. In the case where one disputing party wishes to propose more than 5 individuals to act as an arbitrator, the other party may propose the same number of arbitrators. Parties may also agree to increase the number of chairpersons accordingly.</p>
III.	<p>Arbitrator Requirements.</p> <p>(A) The Secretary-General of the ICSID shall not appoint a sole arbitrator or a chairperson that is a national from either disputing party. In the case of a chairperson, the composition of the arbitration tribunal shall not be geographically unbalanced.</p> <p>(B) All arbitrators shall:</p> <ol style="list-style-type: none"> (1) have specialized knowledge of international law, specifically international public law and international investment law; (2) have independence from disputing parties or their respective governments; (3) take no advice, instruction, or interest from any organization or government, with respect to the matters in the dispute.

5. *Potential Appellate Mechanism*

In addition to the ISDS provisions discussed, both IIA drafts for the U.S. and the EU include potential appellate mechanisms for arbitral awards.²⁸⁸

The U.S. Model does not mention any desire to create a future appellate body for arbitral decisions.²⁸⁹ Instead, the U.S. Model states that “in the event that an appellate mechanism” is created to review arbitration awards, “the parties shall consider” whether to subject awards of the TTIP (or any U.S. IIA) to that mechanism.²⁹⁰ Furthermore, the U.S. Model states that any such appellate mechanism should include the same transparency objectives highlighted in Article 29 of the U.S. Model.²⁹¹ Additionally, the EU Draft, highlights that a within each IIA, a “Committee for the Settlement of Investor-State Disputes” shall be created with one purpose being to consider “under what conditions an appellate mechanism could be created or integrated into the current section (Article 19) to review, on points of law, awards rendered under this section.”²⁹² The EU Draft leaves open for consideration by both parties whether “to create, or integrate” any appellate mechanism into the TTIP (or any other future EU IIA), if it is desirable to both parties.²⁹³

As discussed above, geopolitical forces have been working on an appellate mechanism. However, both the U.S. and EU have strong rule of law and very similar ISDS provisions. For an appellate mechanism to be incorporated into the TTIP for the purpose of reviewing awards, the U.S. and EU should strongly consider whether the system created in the TTIP wishes to provide an appellate mechanism (either between U.S., EU, or multilaterally) the jurisdiction to review and amend arbitration awards. Reconciliation on that topic would likely be a large amendment after considerable debate by both sides, and is an issue likely to not find quick agreement by either side.

A reconciled version of the following relevant sections of this Potential Appellate Mechanism provision serving both sides could look like the following:

²⁸⁸ U.S. Model, *supra* note 103, art. 28(10); EU Draft, *supra* note 126, art. 19.

²⁸⁹ See U.S. Model, *supra* note 103, art. 28(10).

²⁹⁰ *Id.*

²⁹¹ *Id.* See *infra* Part II.B.2.c. for an analysis regarding U.S. Model transparency objectives.

²⁹² EU Draft, *supra* note 126, art. 19(2)(c).

²⁹³ *Id.*

Potential Appellate Mechanism – Relevant Proposed Reconciled TTIP ISDS Sections	
I.	<p>Potential Appellate Mechanism.</p> <p>(A) In the event that an appellate mechanism for reviewing awards rendered by Investor-State Dispute Settlement arbitration is developed as either an Amendment to this Agreement or a future institutional arrangement, the Parties to this Agreement shall consider whether awards rendered under this Agreement should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Section [X – Transparency].</p> <p>(B) Parties shall consider any issues related to jurisdiction issues with a future appellate mechanism having the ability to review and amend awards under this Agreement.</p>

As discussed above, key ISDS provision differences between the U.S. Model and the EU Draft can be reconciled after considering the objectives of both U.S. and EU stakeholders. As such, this Comment proposes concludes with a summary of the above stated analysis and recommendations.

CONCLUSION

The U.S. and the EU are viewed as the main regulatory actors of the world, and may be responsible “for around 80 percent of the rules that regulate the functioning of world markets.”²⁹⁴ Most important to this Comment, ISDS provisions can be part of a vital agreement with massive future economic implications for both the U.S. and the EU. Ongoing negotiations are vital to ensuring both the U.S. and the EU will adequately consent to the final TTIP text. Though this Comment has thoroughly analyzed ISDS provisions centered on the TTIP, it is important to consider any potentially farther reaching global implications beyond the TTIP.

A. Summary

Part I of this Comment provided a brief introduction to both IIAs and ISDS provisions. Part II of the Comment highlighted the history of U.S. and EU IIAs and the respective 2012 U.S. Model BIT text and the EU Draft text. Part II

²⁹⁴ Mavroidis, *supra* note 87, at 1565–88.

further gave a short introduction to long-discussed multilateral agreement on investment. Then, Part III discussed general investor protection provisions included in almost all IIAs. Part IV considers the recent public backlash over the TTIP and examines whether U.S. and EU negotiators are likely to move forward with the agreement. Then, Part V provides original analysis on specific ISDS provisions that will likely be negotiated between the U.S. and EU for inclusion into the TTIP, and offers reconciliation for provisions seemingly at odds. This Comment was largely limited in scope to specific ISDS provisions used by the U.S. and the EU in past IIAs and their potential inclusion in the currently negotiated TTIP. As such, there exist many areas of the TTIP that will be researched and analyzed by future academics and international practitioners.

B. Importance to International Community

ISDS provisions have become increasingly important protections for international investments, and this trend will likely expand greatly if the TTIP is finalized. Then, this Comment looked at the interplay between the public and government while seeming to hint that a compromise on investment law and public policy seems likely. It will take compromise on all stakeholders to reach a deal that is mutually beneficial to all involved. Finally, this Comment considered ISDS provisions generally and then examined the background of U.S. Model and EU Draft texts concerning the specific provisions and possible reconciliation. This Comment stresses a finalized TTIP would place a high percentage of global output covered under one set ISDS provisions and has global implications, regardless of whether the impact is only felt between the U.S. and EU. The U.S.-EU TTIP could be an important development regarding global trade, as roughly fifty percent of global economic output occurs between these two parties.²⁹⁵ International adjudication in a post-TTIP world would likely never again be “marginal to world affairs.”²⁹⁶

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²⁹⁵ Palmer, *supra* note 3.

²⁹⁶ ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM 132 (2009); Born, *supra* note 26, at 868.

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