National Interest vs. Foreign Investment—Protecting Parties through ISDS

Jonathan Klett*

Dispute resolution between foreign investors and their various host states is in a state of turmoil with recent negotiation between the United States and the European Union of the Transatlantic Trade Investment and Partnership. The current arbitration system has a variety of problems that the European Union wishes to resolve through its proposal of an investment court system. The current system provides a channel for investors to influence the states' right to regulate and circumvent domestic courts. The investment court system is an interesting alternative, but has some drawbacks as well. An alternative must be found that provides the proper balance between investor protection and independence of the host state to regulate. Public debate has provided a few alternatives that attempt to strike the proper balance. The advantages and disadvantages of the investment court proposal and the alternatives to seeking the appropriate system in resolving investor-state disputes are discussed below.

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I. INTRODUCTION

Investor-state dispute settlement (ISDS) is a legal instrument that provides foreign investors the right to call for arbitration against a government when they believe the government has violated an international investment treaty.[1] Disputes arising between investors and foreign countries is not a novel concept, creating a need for such resolution mechanisms ever since the establishment of cross-border investment.[2] The modern form of ISDS has been subject to heavy criticism lately, as the growth of foreign investment has led to an increase in investor-state disputes.[3] This has created a public debate, calling for reform of current investor-state dispute resolution with the ongoing negotiations of the Transatlantic Trade Investment and Partnership (TTIP). The TTIP is a potential international treaty between the European Union and the United States to stimulate economic growth through transatlantic economic cooperation.[4] The European Commission has made a proposal for a new investment court system that would effectively replace ISDS. The proposal was an internal document of the European Commission submitted for discussion among the European Union Member States, potentially progressing to a formal text proposal to the United States in its TTIP negotiations.[5]

II. BACKGROUND LAW

Investment disputes originated when developed countries started to invest overseas and companies first built factories in other countries.[6] Bilateral investment treaties (BITs) are international agreements that

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1. Roderick Abbott et al., *Demystifying Investor-State Dispute Settlement (ISDS)* 3 (European Ctr. Int'l Pol. Econ., Occasional Paper No. 5/2014), http://www.ecipe.org/app/uploads/2014/12/OCC52014__1.pdf.

2. *Fact Sheet: Investor State Dispute Settlement (ISDS)*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds. (last visited Oct. 5, 2016) [hereinafter OFF. U.S. TRADE REPRESENTATIVE, *ISDS Fact Sheet*].

3. *Id.*

4. Council of the European Union Memorandum MEMO/11/843, EU-US Summit: Fact Sheet on High-Level Working Group on Jobs and Growth (Nov. 28, 2011).

5. EUROPEAN COMM'N, DRAFT TEXT TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP—INVESTMENT I (Sept. 16, 2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

6. Abbott et al., *supra* note 1, at 4.

establish the rules for private investment by nationals and companies of one state in another state.[7] These rules are established to protect foreign investors in different economies and resolve investment conflicts without creating state-to-state conflict.[8] BITs require that governments not discriminate against foreign investors; allow foreign investors fair and equitable treatment and full protection of their investment; provide full, prompt, and adequate compensation in the event of an expropriation; allow investors to move their capital in and out of the country; not impose performance requirements; and allow for neutral arbitration of disputes if treaty obligations are breached.[9] There are about 2500 BITs currently in force worldwide, including other international investment agreements, like investment chapters in free trade agreements.[10] The United States is party to over one hundred of these international investment agreements.[11]

Prior to BITs, foreign investors had to rely on their own governments to recover any losses from another government's expropriation or other mistreatment of their investment (called "gunboat diplomacy").[12] During the era of gunboat diplomacy, the United States military intervened in foreign countries eighty-eight times to protect Americans' private commercial interests.[13] Concerns of investor-state disputes becoming state-to-state disputes initiated the enactment of the first BIT. These BITs include ISDS provisions that provide protections to foreign investors by allowing them to bring a claim in arbitration directly against the host state for a breach of the terms of an agreement.[14] Today's system of dispute resolution for foreign investors was first implemented in 1959 when the first BIT was introduced between Germany and Pakistan.[15] The goal of this BIT was to protect investors against expropriation and avoid resorting to gunboat diplomacy or

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7. *Bilateral Investment Treaty*, CORNELL U. L. SCH., https://www.law.cornell.edu/wex/bilateral_investment_treaty (last visited Nov. 4, 2016).

8. OFF. U.S. TRADE REPRESENTATIVE, *ISDS Fact Sheet*, *supra* note 2.

9. Scott Miller & Gregory N. Hicks, Investor-State Dispute Settlement: A Reality Check (Ctr. Strategic Int'l Stud., Working Paper, Jan. 2015), https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150116_Miller_InvestorStateDispute_Web.pdf.

10. *International Investment Agreements Navigator*, U.N. CONF. ON TRADE & DEV., http://investmentpolicyhub.unctad.org/IIA (last visited Oct. 5, 2016).

11. *Id.*

12. Miller & Hicks, *supra* note 9, at 4-5.

13. *Id.*

14. *Id.* at 1.

15. Abbot et al., *supra* note 1, at 5.

domestic courts where resolution was often impossible and always uncertain.[16]

The implementation of the first BIT led to many more BITs and the creation of the International Centre for Settlement of Investment Disputes Convention (ICSID) in the 1960s.[17] This provided the first multilateral instrument for stronger investment protection and solving disputes.[18] ICSID is an institution for international investment disputes, which provides facilities and services to support conciliation and arbitration for these disputes.[19] This development instituted a significant shift away from power politics and gunboat diplomacy toward settling and resolving disputes through mediation and arbitration.[20] ICSID has been signed by 153 economies to arbitrate binding decisions by a neutral panel.[21] In fact, ICSID is the facility of choice for 60% of investor-state disputes.[22] Other popular facilities for ISDS arbitration include the United Nations Commission on International Trade Law (UNCITRAL), the London Court of Arbitration, the Stockholm Chamber of Commerce and the International Chamber of Commerce (ICC).[23] These facilities provide guidance and rules for ISDS arbitration proceedings.[24]

Recently, the number of ISDS arbitration proceedings has increased tremendously, particularly in the past ten years.[25] According to the United Nations Conference on Trade and Development (UNCTAD), approximately one hundred claims were initiated between 1987 and 2002.[26] As of today, the number of arbitrations initiated has increased to a total of 696 claims, 329 of which were initiated after 2010.[27] This dramatic increase can be attributed to the growth of foreign direct

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16. *Id.*

17. *ICSID Convention*, INT'L CTR. FOR SETTLEMENT INV. DISP. [ICSID], https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention.aspx (last visited Nov. 4, 2016).

18. Abbott et al., *supra* note 1, at 5.

19. INT'L CTR. FOR SETTLEMENT INV. DISPUTE, BACKGROUND INFORMATION ON THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTE (ICSID) 1 (2015), https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf.

20. Abbott et al., *supra* note 1, at 5.

21. *ICSID Convention*, *supra* note 17.

22. Miller & Hicks, *supra* note 9, at 10.

23. Abbott et al., *supra* note 1, at 5.

24. *Id.*

25. Miller & Hicks, *supra* note 9, at 6.

26. U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE 114 (2015), http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

27. *Id.*

investment (FDI)[28] and increased awareness of the availability of the ISDS provisions to contest a wide array of actions against host governments.[29]

III. PROBLEMS WITH ISDS

ISDS allows foreign individuals and foreign companies to sue host country governments through arbitration proceedings rather than through domestic administrative and judicial channels.[30] The United States is a strong proponent of ISDS[31] and has recently signed the Trans-Pacific Partnership (TPP), that includes an ISDS provision.[32] The United States is also currently seeking to put an ISDS provision in the TTIP.[33] However, the recent backlash against ISDS has caused government bodies to seek reform of the current system and look for an alternative.[34] Prior to the signing of the TPP, Senator Elizabeth Warren took a stand against ISDS, declaring that:

> Agreeing to ISDS in [TPP] would tilt the playing field in the United States further in favor of big multinational corporations. Worse, it would undermine U.S. sovereignty. ISDS would allow foreign companies to challenge U.S. law—and potentially to pick up huge payouts from taxpayers—without ever stepping foot in a U.S. court.[35]

Resentment towards the ISDS was further established in a letter to Congress by several legal experts, stating:

> ISDS weakens the rule of law by removing the procedural protections of the legal system and using a system of adjudication with limited

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28. Miller & Hicks, *supra* note 9, at 6.

29. Lise Johnson et al., Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law 2 (Columbia Ctr. on Sustainable Inv., Policy Paper, May 2015), http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-U.S.-Domestic-Law-FINAL-May-19-8.pdf.

30. *Id.* at 1.

31. OFF. U.S. TRADE REPRESENTATIVE, *ISDS Fact Sheet*, *supra* note 2.

32. N.Z. FOREIGN AFFAIRS & TRADE, TRANS-PACIFIC PARTNERSHIP INVESTMENT AND ISDS: FACT SHEET 2 (Oct. 9, 2015), https://www.tpp.mfat.govt.nz/assets/docs/TPP_factsheet_Investment.pdf.

33. *Dispute Settlement*, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-14 (last visited Nov. 4, 2016).

34. *See* DRAFT TEXT TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP—INVESTMENT, *supra* note 5.

35. Elizabeth Warren, Editorial, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html.

> accountability and review. It is antithetical to the fair, public, and effective legal system that all Americans expect and deserve.[36]

These are just a few excerpts of the widespread opposition of ISDS that has driven many to call for change.

Yet, governments must seek to encourage foreign and domestic investment to sustain economic growth.[37] This creates the need for certain protections of their investors against foreign governments. A system for foreign dispute resolution must be placed within international investment agreements for governments to protect their investors and prevent regression to prior gunboat diplomacy, where potential state-to-state conflict may arise from a dispute. Tension arises when too much power is given to foreign investors to take unfair advantage of and manipulate the power to unduly influence host governments. Many critics reject the modern ISDS based on various policy arguments that hinge upon this balance.[38]

The most recurrent debate over ISDS is that it provides a mechanism for investors to affect a government's right to regulate by unilaterally bringing claims against them.[39] Further, opponents of ISDS claim that it permits foreign investors to forum-shop between domestic courts and investor-state arbitration, or treaty-shop to find the most favorable international treaties against the host government.[40] Consequently, ISDS undermines host governments by providing a mechanism for investors to circumvent domestic legal systems.[41] Lastly, the arbitration proceeding is deemed inadequate because of its lack of transparency, excessive costs, flawed arbitrator selection process, arbitrator interpretation of various treaties, and nonexistent appellate mechanism.[42]

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36. Letter from Judith Resnik, Professor of Law, Yale L. Sch., et. al., to Mitch McConnell, Senate Majority Leader, Harry Reid, Senate Minority Leader, John Boehner, Speaker, and Nancy Pelosi, Minority Leader, U.S. Congress 3 (Apr. 30, 2015), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphics/oppose_ISDS_Letter.pdf.

37. Johnson et al., *supra* note 29, at 3.

38. *See*, *e.g.*, *id.* at 4; PUBLIC CITIZEN, CASE STUDIES: INVESTOR-STATE ATTACKS ON PUBLIC INTEREST POLICIES 1, http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf; OFF. U.S. TRADE REPRESENTATIVE, *ISDS Fact* Sheet, *supra* note 2.

39. EUROPEAN COMM'N, CONCEPT PAPER: INVESTMENT IN TTIP AND BEYOND—THE PATH FOR REFORM 3 (May 5, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF [hereinafter EUROPEAN COMM'N, CONCEPT PAPER].

40. Johnson et al., *supra* note 29, at 11.

41. *Id.* at 4.

42. *See generally* Johnson et al., *supra* note 29, at 11; Ambassador Miriam Sapiro, *Transatlantic Trade and Investment Negotiations: Reaching a Consensus on Investor-State Dispute Settlement*, BROOKINGS INST. GLOBAL VIEWS 2 (Oct. 16, 2015), https://www.brookings.edu/wp-content/uploads/2016/07/GlobalViews5Oct2015_FINAL.pdf.

The modern ISDS has six unfavorable features that allow foreign investors to manipulate arbitration decisions. First, ISDS creates a unilateral right by allowing foreign investors alone to initiate claims against the government, while the government cannot initiate an ISDS proceeding.[43] Second, ISDS is an ad hoc proceeding, where arbitrators are appointed on a case-by-case basis to decide the investors' claims against the host government.[44] Third, the arbitrators appointed do not apply the domestic law of the host government, instead, they apply the law of a treaty pursuant to their individual interpretation.[45] Fourth, the arbitrators have wide latitude in applying the law of the treaty because treaty standards are typically drafted in vague, broad terms.[46] Fifth, there are limited procedures to challenge arbitral awards for errors of law or fact because there is currently no appellate mechanism for ISDS decisions and the tribunal has only limited checks on its decisions.[47] Sixth, the arbitrators can force the host government to pay large awards to the investor or order injunctive relief against the host government to mandate what actions they can or cannot take.[48] These features of ISDS create a powerful mechanism for foreign investors to challenge the actions of host governments and provide ample reasons for several opponents to call for reform.

A. Right to Regulate

The resounding denunciation made by ISDS opponents is premised on the argument that ISDS forms a mechanism for investors and corporations to influence public policy of host governments. The European Union explains this as a drafting mistake in previous agreements where the protection of investments was the principal purpose without affording much thought on how it would affect a state's right to regulate.[49] These assertions have been brought to light in recent ISDS arbitration proceedings where foreign investors sued host governments based upon regulations centered upon domestic policy issues, like health care, the economy, and the environment.[50] For examples of investor influence on regulations in the health sector, look no further than the international corporation of Philip Morris. In *Philip*

43. Johnson et al., *supra* note 29, at 2.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. EUROPEAN COMM'N, CONCEPT PAPER, *supra* note 39, at 5.
50. PUBLIC CITIZEN, *supra* note 38, at 1.

Morris v. Australia, Morris' international tobacco company sued Australia for enacting tobacco packaging regulations that required a graphic health warning.[51] The corporation claimed that the regulations increased packaging costs, thus diminishing the value of their investment.[52] Further, in *Philip Morris v. Uruguay*, the corporation sued Uruguay for amending its legislation on health warnings on cigarette packets and the ban on the sale of "light" brands.[53] Philip Morris claimed these restrictions harmed the corporation's business.[54]

In the economic sector, foreign investors have put pressure on the regulations of foreign governments through the use of ISDS. For example, in *Veolia v. Egypt*, the French firm sued Egypt for the increase of its minimum wage.[55] This decision is still pending.[56] Also, in *Antin v. Spain*, a Luxembourg/Netherlands shareholder in two solar thermo plants located in Spain sued the Spanish government for its energy reform, which included a 7% tax on power generators' revenues and a reduction of subsidies for renewable energy producers.[57] This proceeding is still pending as well.[58]

Additionally, foreign investors have threatened the environmental sector of foreign governments through ISDS arbitration. For instance, in *Vattenfall v. Germany*, the Swedish energy corporation sued Germany for its decision to phase out all nuclear energy by 2020.[59] The corporation sued Germany for loss of profits, and the arbitration proceedings are still ongoing. In *Mobil Investments v. Canada*, the corporation sued Canada for its imposition of research and development

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51. Philip Morris Asia Ltd. v. Austl., UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 94-98 (Dec. 17, 2015), https://pcacases.com/web/sendAttach/1711.

52. *Id.*

53. Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶ 4-8 (July 2, 2013), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC3592_En&caseId=C1000.

54. *Id.*

55. *Investment Dispute Settlement Navigator: Veoilia Propreté v. Arab Republic of Egypt*, U.N. CONF. ON TRADE & DEV. (2012), http://investmentpolicyhub.unctad.org/ISDS/Details/458.

56. *Id.*

57. *Investment Dispute Settlement Navigator: Antin Infrastructure Services Lux. S.à.r.l. et al. v. Kingdom of Spain*, U.N. CONF. ON TRADE & DEV. (2013), http://investmentpolicyhub.unctad.org/ISDS/Details/556.

58. *Id.*

59. *Investment Dispute Settlement Navigator: Vattenfall AB and Others v. Federal Republic of Germany (II)*, U.N. CONF. ON TRADE & DEV. (2012), http://investmentpolicyhub.unctad.org/ISDS/Details/467.

expenditure requirements on their two oil fields.[60] This proceeding was decided in favor of the investor.[61]

The wide-ranging subject matter of these ISDS proceedings validate the outcry of opponents: ISDS creates an outlet for foreign investors to challenge public policy when it has a negative impact on the investor. The United States Trade Representative (USTR) rejects this criticism of ISDS, claiming that it has not lost a case through ISDS, and "only a quarter of concluded ISDS cases worldwide have been decided in favor of investors."[62] It further supports ISDS as a valid mechanism because "the right of private parties to challenge the actions of government is one of the oldest and most established legal principles."[63] However, the USTR rejects the assertion that ISDS is a mechanism for challenging the right of governments to regulate, with the support of the provisions that limit ISDS arbitration awards to compensation for loss or damage to investments and inability to overturn domestic laws or regulations.[64]

Research validates the USTR's claim that only a quarter of ISDS cases were decided in favor of the investor. According to UNCTAD data, of the 444 concluded ISDS arbitration proceedings, the investor prevailed 117 times, or 26.4% of the time.[65] The USTR failed to mention that the state prevailed only 162 times, or 36.5% (a difference of a mere forty-five proceedings).[66] The other 165 arbitration proceedings were either settled, discontinued, or not decided in either party's favor.[67] Nevertheless, the slight difference of forty-five cases decided in favor of the state compared to those in favor of the investor does not exactly bolster the argument that investors have a "low winning percentage."[68]

The United States has been the respondent to only fifteen of the concluded ISDS arbitrations proceedings.[69] While the United States has not lost any of the previous proceedings, only ten were decided in favor

60. Mobil Invs. Can. Inc. et al. v. Can., ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, ¶ 1-3, 5 (May 22, 2012), http://www.italaw.com/sites/default/files/case-documents/italaw1145.pdf.

61. *Id.*

62. OFF. U.S. TRADE REPRESENTATIVE, *ISDS Fact Sheet*, *supra* note 2.

63. *Id.*

64. *Id.*

65. *Investment Dispute Settlement Navigator*, U.N. CONF. ON TRADE & DEV., http://investmentpolicyhub.unctad.org/ISDS (last visited Oct. 5, 2016).

66. *Id.*

67. *Id.*

68. OFF. U.S. TRADE REPRESENTATIVE, *ISDS Fact* Sheet, *supra* note 2.

69. *Investment Dispute Settlement Navigator*, *supra* note 65.

of the United States.[70] Three ISDS proceedings were settled and one was discontinued.[71] The three settled proceedings were claims by Canadian lumber companies regarding the countervailing duties and anti-dumping measures imposed by the United States on Canadian softwood lumber, and consequently became moot with the passing of the Softwood Lumber Agreement.[72] On the other hand, U.S. corporations have initiated ISDS proceedings 138 times.[73] An arbitration tribunal has decided in favor of these corporations twenty-one times (15.2%) and against them thirty-nine times (28.3%).[74] These numbers are significant because they demonstrate the historical success of the United States and its corporations under ISDS. Unfortunately, this data should not provide confidence in ISDS because the enactment of the TPP and TTIP would force the United States' exposure to liability to greatly increase. The countries who are party to the new treaties would now have the capability of initiating ISDS proceedings against the United States. The remedy limitation of ISDS to monetary damages does not sufficiently counter the investor challenge to government regulations and laws. Monetary damages can still lead to a "regulatory chill," causing governments to hesitate in creating law for the fear that investors may make claims.[75]

B. Forum-Shopping

ISDS additionally provides foreign investors with an opportunity to forum-shop when a dispute arises with a host government. ISDS allows the investor to choose between the use of domestic legal systems or make a claim under ISDS. The dispute resolution system provides a mechanism for foreign investors to undermine the development of domestic legal systems by circumventing these systems through arbitration.[76] For instance, a foreign investor may repackage a domestic law claim as a treaty claim.[77] Opponents have included examples, such as "[t]akings claims under US federal law could be framed . . . as expropriation claims under a treaty; claims of substantive due process

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70. *Id.*
71. *Id.*
72. Canfor Corp. v. U.S., ICSID, Decision on Preliminary Question, ¶¶ 1-5, 27, 349-50, (June 6, 2006), http://www.italaw.com/sites/default/files/case-documents/ita0122.pdf.
73. *Investment Dispute Settlement Navigator*, *supra* note 65.
74. *Id.*
75. Johnson et al., *supra* note 29, at 5.
76. *Id.* at 1.
77. *Id.* at 11.

under US law could be framed as expropriation claims, fair and equitable treatment claims, or 'umbrella clause' claims under a treaty."[78]

To add, forum-shopping allows foreign investors greater rights than those of domestic investors, while also expanding the liability of host governments. The foreign investor could determine whether it would be more advantageous to avoid domestic courts or make a claim under ISDS. The Organisation for Economic Co-operation and Development (OECD) generated a report on inter-governmental discussion of ISDS to summarize different governments' perspectives of this phenomenon.[79] Many governments embraced the uneven playing field between domestic and foreign investors with ISDS.[80] They rationalized the expanded protection of foreign investors as the cost of avoiding gunboat diplomacy, a way to avoid bias in domestic courts, and as a natural result of the more competitive market foreign investors face.[81] Other governments denounce the unequal treatment by arguing that preferential treatment towards foreign investors could impact economic efficiency, is not valid under certain states' constitutions, and promotes outsourcing of investment.[82]

C. Treaty-Shopping

ISDS goes further to allow the investor to "treaty-shop" by finding the most suitable agreement under which to bring an ISDS claim. This is allowed through the "most favored nation" clause found in international investment agreements. This clause allows a host country to extend treatment to a foreign investor no less favorable than it allows any other foreign investor.[83] It is put in place to "ensure an equality of competitive conditions between foreign investors of different nationalities seeking to set up an investment or operating that investment in a host country."[84] This provision has been used by investors to import more favorable ISDS

78. *Id.*

79. ORG. FOR ECON. CO-OPERATION & DEV. [OECD], GOVERNMENT PERSPECTIVES ON INVESTOR-STATE DISPUTE SETTLEMENT: A PROGRESS REPORT 4 (Dec. 14, 2012), http://www.oecd.org/daf/inv/investment-policy/ISDSprogressreport.pdf [hereinafter OECD, ISDS PROGRESS REPORT].

80. *Id.* at 9-11.

81. *Id.*

82. *Id.*

83. U.N. CONF. ON TRADE & DEV., Most-Favoured Nation Treatment, at 13, UNCTAD Series on Issues in International Investment Agreements II (2010), http://unctad.org/en/Docs/diaeia20101_en.pdf.

84. *Id.* at 13-14.

provisions or substantive provisions from a third-party treaty into any domestic treaty.[85]

As an example, in *Philip Morris v. Australia*, previously mentioned for conflicting with Australia's right to regulate, the company used its Asian subsidiary for the purpose of bringing an ISDS proceeding against Australia.[86] Philip Morris' headquarters are located in the United States, but the treaty between Australia and the United States did not guarantee an ISDS proceeding and provided exemptions for expropriation obligations for limitations of intellectual property rights.[87] The Australian-Hong Kong BIT that Philip Morris made a claim under did not include these restrictions.[88] Thus, the company would have had a greater likelihood of failure under the United States treaty, and chose to make a claim under the more advantageous Australian-Hong Kong treaty.

D. Inadequacies of the ISDS Arbitration

The ISDS arbitration proceeding is considered to be peppered with structural deficiencies that lead opponents to deem it inadequate. For one, ISDS arbitration has a general lack of transparency in its proceedings.[89] ISDS arbitration proceedings can also lead to extraordinary costs and have a flawed ad hoc process for selecting arbitrators that can lead to impartiality in the decision-making. Additionally, the selected arbitrators have all-inclusive authority in the interpretation of broad international treaties. Finally, ISDS lacks an appellate mechanism that would convey checks and balances on arbitration decisions.

1. Lack of Transparency

The lack of transparency in ISDS arbitration proceedings is a major concern due to the secretive nature of the arbitration process and the deficiency in consideration of precedents.[90] ISDS provisions restrict openness and transparency, with a secretive arbitration process that

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85. *Id.* at 18.

86. Matthew Webb, *Treaty Shopping: How Philip Morris Cherry-Picked Worst Case BITs*, INFOJUSTICE.ORG (Dec. 2, 2012), http://infojustice.org/archives/28044.

87. *Id.*

88. *Id.*

89. Valentina Vadi, *Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?*, 48 VAND. J. TRANSNAT'L L. 1285, 1332 (2015) (discussing the lack of transparency in the ISDS arbitration proceedings).

90. NIKOLAOS THEODORAKIS, TRANSPARENCY IN INVESTOR-STATE DISPUTE SETTLEMENT: LAW, PRACTICE, AND EMERGING TOOLS AGAINST INSTITUTIONAL CORRUPTION 24 (2015) (ebook).

allows documents to be withheld from disclosure.[91] Opening up these documents to the public would facilitate the proceedings, render them more credible, and reduce corporate corruption.[92] On the other hand, proponents of ISDS claim that confidentiality is important because it "enables a constructive, de-politicized and fact-oriented atmosphere of dispute resolution."[93] However, trends suggest the benefits of transparency appear to outweigh the outdated disadvantages.

2. Excessive Cost

The cost of ISDS arbitration is substantial.[94] The OECD has estimated that each proceeding averages US$8 million, occasionally exceeding US$40 million.[95] The costs are worrisome because the rules of cost allocation among parties are very flexible and can create uncertainty for both claimants and respondents.[96] This uncertainty around allocation allows investors to use the threat of high-cost ISDS litigation to encourage governments to settle.[97] Also, it has caused investors to discontinue proceedings due to refusal or inability to pay the high costs.[98] The high costs will likely advantage the financially stronger party.[99]

3. Flawed Arbitrator Selection

Under the ICSID and UNCITRAL rules, ISDS arbitrators are selected on a case-by-case basis.[100] Each party may appoint one arbitrator, and those two chosen arbitrators appoint a third, unless the parties agree upon another method.[101] This is a flawed process because it does not preclude the same individuals from acting as lawyers (e.g., preparing the investor's claims) in other ISDS cases.[102] The current

91. *Id.* at 25.
92. *Id.* at 26.
93. *Id.*
94. Miller & Hicks, *supra* note 9, at 15.
95. OECD, ISDS PROGRESS REPORT, *supra* note 79, at 8.
96. *Id.*
97. *Id.* at 9.
98. *Id.*
99. *Id.*
100. INT'L CTR. FOR SETTLEMENT OF INV. DISP. [ICSID], ICSID CONVENTION, REGULATION AND RULES Art. 37 (2006), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter ICSID CONVENTION]; U.N. COMM'N ON INT'L TRADE LAW [UNICTRAL], UNCITRAL ARBITRATION RULES Art. 9 (2013), https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf [hereinafter UNCITRAL ARBITRATION RULES].
101. ICSID CONVENTION, *supra* note 100; UNICTRAL ARBITRATION RULES, *supra* note 100.
102. EUROPEAN COMM'N, CONCEPT PAPER, *supra* note 39, at 6.

system gives rise to conflicts of interest, creating concerns that individuals are not acting with impartiality as arbitrators.[103] The ad hoc selection process of appointment is perceived by the public as an interference with a decision maker's ability to act independently.[104] Additionally, it has led to perceptions that the high arbitrator fees provide financial incentives to multiply ISDS cases.[105]

ISDS arbitrator selection also gives rise to bias because each party's candidate will be selected based upon a belief the arbitrator would be sympathetic to its case. They will be chosen because the party trusts they have "the right character, reputation, and persuasiveness to convince the other two arbitrators . . . of the validity of their case."[106] Each party's power of selection creates a perception that arbitrators will stray from independence and impartiality.

4. Arbitrator Interpretation

The appointed arbitrators are given considerable authority to interpret and apply investment provisions through ISDS.[107] Inconsistent interpretations have led to uncertainty concerning the meaning of key treaty provisions. The lack of consistency in ISDS decisions is worrisome because it causes unpredictability for how future cases will be decided.[108] Consistency is important because it provides predictability and security to investors and states.[109] A reasonable degree of consistency would also contribute to the system's legitimacy and perceived fairness.[110]

5. Appellate Mechanism

A persistent criticism of the international investment arbitration process is that ISDS tribunals can get decisions wrong, and there is no corrective mechanism via an appeals process, as is found in almost all legal systems.[111] There is only a limited avenue for annulment of an arbitration award under ICSID on relatively narrow grounds, not

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103. *Id.*
104. *Id.* at 6-7.
105. OECD, ISDS PROGRESS REPORT, *supra* note 79, at 15-16.
106. *Id.* at 15.
107. Johnson et al., *supra* note 29, at 6.
108. UNCTAD IIA, REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT: IN SEARCH OF A ROADMAP 3 (June 2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf [hereinafter UNCTAD, REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT].
109. OECD, ISDS PROGRESS REPORT, *supra* note 79, at 17.
110. *Id.*
111. EUROPEAN COMM'N, CONCEPT PAPER, *supra* note 39, at 8.

including mistakes of law or fact.[112] The lack of an appellate mechanism makes ISDS less predictable for governments and investors.[113] Another related issue is that the dispute resolution system allows foreign investors to outsource decisions to privately appointed arbitrators, who are free from checks and balances in their interpretation of treaty provisions.[114] The finality of arbitral tribunals for investor-state disputes has become a justification for critics of ISDS to call for reform out of a fear that arbitrators may make erroneous decisions.[115]

IV. RESOLUTION

A. European Proposal of an Investment Court System

The opposition to the ISDS system has produced multiple proposals for alternative systems in investor-state dispute resolution, including eliminating it completely.[116] The European Union "wants to use the TTIP as a starting point for creating a new way of protecting investments."[117] On September 16, 2015, the European Union approved a draft proposal for an investment court system to replace the existing ISDS mechanism in all ongoing and future European Union investment negotiations, including the TTIP negotiations.[118] European Trade Commissioner Cecilia Malmström stated that "the old, traditional form of dispute resolution suffers from a fundamental lack of trust," and that the European Union's frequent use of ISDS required them to "reform and modernize it."[119] The European Union finalized its reformed approach of investment protection and investment dispute resolution for the TTIP on November 12, 2015, and formally sent it to the United States.[120] The proposed investment court system for TTIP resolves previously stated ISDS concerns by effectively safeguarding a government's right to

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112. ICSID CONVENTION, *supra* note 100, at art. 52.

113. EUROPEAN COMM'N, CONCEPT PAPER, *supra* note 39, at 8.

114. Johnson et al., *supra* note 29, at 7.

115. UNCTAD, REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT, *supra* note 108, at 3.

116. Letter from Resnik et al., *supra* note 36, at 3.

117. EUROPEAN COMM'N, FACT SHEET ON INVESTMENT PROTECTION IN TTIP (2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153018.5%20Inv%20Prot%20and%20ISDS.pdf.

118. European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sept. 16, 2015).

119. *Id.*

120. EUROPEAN UNION, PROPOSAL TEXT TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP—INVESTMENT PROTECTION AND RESOLUTION OF INVESTMENT DISPUTES 1 (Nov. 12, 2015), http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [hereinafter EUROPEAN UNION, TTIP INVESTMENT PROPOSAL].

regulate while: providing sufficient protection to investors, eliminating forum-shopping, increasing transparency for resolving investment disputes, removing party-appointed arbitrators and publicly appointing judges with the "highest ethical standards," reducing costs while increasing efficiency, and providing the opportunity to correct errors through an appeal mechanism.[121]

1. Advantages

The European Union insists that the investment court system proposal for investment protection effectively reforms ISDS by preserving investor protection while safeguarding governments' right to regulate in the public interest.[122] Under Article 2 of the proposal, the right to regulate is stated explicitly "to reinforce the point that the act of regulating cannot be considered a breach of investment protection standards."[123] Additionally, to limit the risk of influence on government regulation, only compensation may be awarded to the investor, and punitive damages are prohibited.[124]

The proposal eliminates opportunities for foreign investors to forum-shop between domestic and investor-state dispute tribunals by implementing a "no U-turn" provision in Article 14.[125] This provision allows the tribunal to dismiss claims that have been submitted to other courts or to require evidence of withdrawal of any concurrent pending claim.[126] It also requests that investors waive their right to go to domestic courts once they submit a claim to the tribunal.[127] Furthermore, in Article 15 of the proposal, if the investor has acquired ownership or control of the investment for the main purpose of submitting a claim, the tribunal shall decline jurisdiction.[128] The anti-circumvention provision of the proposal effectively does away with the procedural shenanigans seen in

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121. European Commission Memorandum MEMO/15/6060, Why the New EU Proposal for an Investment Court System in TTIP is Beneficial to Both States and Investors (Nov. 12, 2015) [hereinafter European Commission MEMO/15/6060]; EUROPEAN COMM'N, FACT SHEET ON INVESTMENT PROTECTION IN TTIP, *supra* note 117.

122. European Commission MEMO/15/6060, *supra* note 121.

123. EUROPEAN UNION, TTIP INVESTMENT PROPOSAL, *supra* note 120, art. 2; EUROPEAN COMM'N, TRANSATLANTIC TRADE & INVESTMENT PARTNERSHIP ADVISORY GROUP—MEETING REPORT 2 (Nov. 10, 2015), http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153926.pdf.

124. EUROPEAN UNION, TTIP INVESTMENT PROPOSAL, *supra* note 120, art. 5.

125. *Id.* art. 14; EUROPEAN COMM'N, CONCEPT PAPER, *supra* note 39, 11.

126. EUROPEAN UNION, TTIP INVESTMENT PROPOSAL, *supra* note 120, art. 14.

127. *Id.*

128. *Id.* art. 15.

Philip Morris v. Australia, where the corporation re-organized its Asian subsidiary to make a claim.[129]

The European Union asserts that the proposed investment court system provides full transparency.[130] Under Article 18 of the proposal, all documents, including third party submissions and amicus curiae briefs, would be made public.[131] Moreover, hearings would be open and the European Commission is arranging a repository to store documents from public proceedings that would be accessible to everyone.[132] This investment court proposal allows full transparency and avoids the secretive nature of arbitration proceedings.

The new investment court system proposal further eliminates party-appointed arbitrators and allows for the public appointment of fifteen judges.[133] Five of the judges are to be nationals from European Union member states, five are to be nationals of the United States, and the remaining five are to be nationals of third countries.[134] The provisions providing the qualifications of judges are derived from the International Court of Justice.[135] The public appointment process eliminates the bias of previous arbitrator selection in ISDS because the judges are appointed for a certain period of time, are paid in retainer fees, and are subject to a code of conduct that removes individuals with conflicts of interest.[136] Article 11 of the proposal includes a code of ethics for selected judges that requires full independence and includes a provision for a disputing party to challenge an appointed judge for a conflict of interest.[137] The appointment of judges who are subject to a strict code of conduct significantly reduces the bias that may be found in the ISDS arbitrator selection process.

Moreover, the European Union claims that the new investment court proposal reduces the costs associated with ISDS and increases efficiency in resolving investor-state disputes.[138] The investment court system has

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129. Philip Morris Asia Ltd. v. Austl., UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 94-98 (Dec. 17, 2015), https://pcacases.com/web/sendAttach/1711.

130. European Commission MEMO/15/6060, *supra* note 121.

131. EUROPEAN UNION, TTIP INVESTMENT PROPOSAL, *supra* note 120, art. 18; EUROPEAN COMM'N, TRANSATLANTIC TRADE & INVESTMENT PARTNERSHIP ADVISORY GROUP—MEETING REPORT 7 (Oct. 9, 2015), http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154015.pdf [hereinafter EUROPEAN COMM'N, OCTOBER MEETING REPORT].

132. EUROPEAN COMM'N, OCTOBER MEETING REPORT, *supra* note 131, at 7.

133. EUROPEAN UNION, TTIP INVESTMENT PROPOSAL, *supra* note 120, art. 9.

134. *Id.*

135. EUROPEAN COMM'N, OCTOBER MEETING REPORT, *supra* note 131, at 4.

136. *Id.* at 5.

137. EUROPEAN UNION, TTIP INVESTMENT PROPOSAL, *supra* note 120, art. 11.

138. European Commission MEMO/15/6060, *supra* note 121.

clear procedural deadlines that ensure quick dispute settlement and lower costs.[139] The overall proceedings, including appeals, are limited to two years. In comparison, ISDS arbitration proceedings have an average duration of three to four years, with annulment or set aside potentially adding another two years.[140] The investment court's costs would be lower because outside lawyers would charge less under this duration limit, and the daily fees for the appointed judges would also have a cap, unlike the current ISDS system where arbitrator fees are negotiated.[141] The European Commission has made a rough estimate that the proposed investment court system would cost around €800,000, to be shared between the European Union and the United States.[142]

More importantly, the investment court system formulates an appellate mechanism under Article 10 of the European Union's proposal.[143] This appeal tribunal is composed of six members, two of which would be U.S. nationals, two would be nationals of a member state of the European Union, and two would be nationals of a third country.[144] This number is based on the expectation that there will not be a vast number of appeals, but the number of judges may increase by increments of three if more cases than anticipated arise.[145] The appeal tribunal will possess the qualifications required to hold "the highest judicial offices" or be "jurists of recognized competence."[146] The members shall have demonstrated expertise in public international law, and there is a desired interest in individuals with expertise in international investment law, international trade law, and related dispute resolution.[147] The appeal tribunal will "examine errors of law or manifest errors of fact, as well as some existing grounds under the ICSID annulment procedure."[148]

2. Disadvantages

The European Union's proposed investment court system has many appealing aspects directed at eliminating the current problems of the ISDS system. The proposal does include drawbacks that do not sufficiently reform investor-state dispute resolution, however. These

139. *Id.*
140. *Id.*
141. *Id.*
142. EUROPEAN COMM'N, OCTOBER MEETING REPORT, *supra* note 131, at 5.
143. EUROPEAN UNION, TTIP INVESTMENT PROPOSAL, *supra* note 120, art. 10.
144. *Id.*
145. EUROPEAN COMM'N, OCTOBER MEETING REPORT, *supra* note 131, at 4.
146. EUROPEAN UNION, TTIP INVESTMENT PROPOSAL, *supra* note 120, art. 10.
147. *Id.*
148. EUROPEAN COMM'N, OCTOBER MEETING REPORT, *supra* note 131, at 6.

drawbacks include: a remaining unilateral channel for foreign investors to avoid domestic courts, politicizing investor-state disputes, and the impartiality of publicly appointed judges.

Accepting the proposal would perpetually lock in the special right for foreign investors to sue host governments. The European Union counters this perceived drawback by alleging foreign investors need this special right for protection to avoid potential abuses of a foreign state.[149] The right is unilateral because the host country has the right to regulate the foreign investor's use of assets in its territory and has full recourse in its own domestic courts to enforce such regulations.[150] Furthermore, the European Union contends that domestic investors are not placed at a disadvantage by the inability to use the investor-state dispute resolution system because they do not require protection from nationality discrimination.[151] Protection of the rights of domestic investors is claimed to be unnecessary because the investors already benefit from the "high guarantees" of domestic law through domestic courts.[152] Thus, the right does not disadvantage investors because it is put in place to curb the risk for everyone involved in investment activities abroad.

The first investor-state dispute resolution system was put in place to avoid politicization of disputes between investors and states through private arbitration.[153] Acceptance of the investment court proposal would undo this system and politicize investment disputes.[154] The risks of previous gunboat diplomacy may be realized as archaic and foregone, but politicization may possibly reemerge through interstate friction in investor-state disputes.[155]

The European Union's proposal has the goal of eliminating inherent bias within ISDS.[156] The plan intends to resolve this problem through the use of publicly appointed judges subject to a strict code of ethics.[157] Questions will arise about the true impartiality of the appointed judges. Some critics are concerned that all systems of investor-state dispute resolution will have an inherent bias attributed to the decision makers.[158] Judges would be paid by the members of the international treaty and may

149. *Id.* at 2.
150. *Id.*
151. *Id.*
152. *Id.*
153. Abbott et al., *supra* note 1, at 5.
154. Sapiro, *supra* note 42, at 5.
155. *Id.*
156. EUROPEAN COMM'N, CONCEPT PAPER, *supra* note 39, at 6-7.
157. EUROPEAN UNION, TTIP INVESTMENT PROPOSAL, *supra* note 120, art. 9.
158. Sapiro, *supra* note 42, at 13.

lack independence if they are seeking reappointment.[159] The current ISDS system may be viewed as superior because it enables parties to appoint arbitrators with specialized knowledge of certain issues or sectors that might be germane to the dispute.[160] Although, a disadvantage of party-selected arbitrators is that their quality may vary.[161]

B. Alternatives

The European Union's proposal to replace ISDS for an investment court system delivers many solutions to the issues associated with the current system. The proposal includes a few drawbacks that worry many opponents of investor-state dispute resolution. Critics have provided possible alternatives to improving ISDS that are suggested to properly level the balance of investor protection and the government's right to regulate. The most obvious alternative to ISDS is its elimination altogether.[162] This would require foreign investors to use the domestic courts of the host government to settle disputes. A second recommended alternative is the enhancement of the current ISDS system in order to resolve the public issues in demand.[163] A third suggested alternative is the purchase of political risk insurance by foreign investors to meet the government interests of investor protection.[164]

1. Elimination of ISDS

The radical opponents of the current ISDS system assert that it is no longer necessary for investor protection.[165] These opponents believe that the domestic courts provide sufficient protection for all investors, foreign and domestic.[166] The elimination of ISDS in lieu of protections in domestic courts is a progressive thought. Unfortunately, states will not feel comfortable leaving their investors at the mercy of foreign courts. The legal protections and systems differ greatly among foreign states.[167] There continue to be legal systems that do not function in accordance with accepted standards of fairness and due process, despite the

159. *Id.*
160. *Id.*
161. *Id.*
162. Johnson et al., *supra* note 29, at 16.
163. Sapiro, *supra* note 42, at 16.
164. Johnson et al., *supra* note 29, at 16.
165. *See* Warren, *supra* note 35.
166. TRANS ATL. CONSUMER DIALOGUE, RESPONSE TO THE EUROPEAN COMMISSION'S INVESTOR-STATE DISPUTE SETTLEMENT "REFORM" PROPOSAL 2 (Doc. No. Tade 01/16) (2016), http://tacd.org/wp-content/uploads/2015/02/TACD-resolution-ICS-proposal.pdf.
167. Sapiro, *supra* note 42, at 4.

requirements of treaty obligations and customary international law.[168] As evidence, the largest number of ISDS disputes are brought against less standardized countries, like Argentina and Venezuela.[169] The United States is not likely to entertain the elimination of an investor-state dispute system in the TTIP with European Union members like Romania and Hungary, who fall in the bottom half of the 138 countries surveyed for judicial efficiency and impartiality in deciding commercial disputes.[170] The interpretations of treaty and international law are issues that domestic courts, especially those that are less developed, are unlikely to have much experience with.[171]

Additionally, there is an inherent potential for national bias and an unfair playing field when a foreign investor's only avenue for dispute resolution is to ask one part of the host government to repudiate the act of another part of that very same government.[172] The USTR affirms the need of an investor-state dispute resolution system "because the potential for bias can be high in situations where a foreign investor is seeking to redress injury in a domestic court, especially against the government itself."[173] There is a strong need of governments for a device such as ISDS to provide sufficient protection for foreign investors. However, this need has been refuted with data suggesting that investors do not base their foreign investment decisions on the reliance of resolution mechanisms in international investment agreements.[174] For the foregoing reasons, domestic courts, in lieu of investor-state dispute resolution systems, will likely not be a persuasive alternative to the government authorities negotiating the TTIP or any further international investment agreements.

2. Reform ISDS

A reasonable alternative to its proposed investment court system would be a reformation of the current ISDS system in response to the various problems. A reform of ISDS would be the most probable alternative that the United States would suggest and that it will likely be negotiating with the European Union in the TTIP. Michael Froman, the U.S. Trade Representative, is wary of the new court system proposed by

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168. *Id.*

169. *Investment Dispute Settlement Navigator*, *supra* note 65.

170. *See* WORLD ECON. FORUM, GLOBAL ENABLING TRADE REPORT (2014), http://www3.weforum.org/docs/WEF_GlobalEnablingTrade_Report_2014.pdf.

171. Sapiro, *supra* note 42, at 5.

172. *Id.*

173. OFF. U.S. TRADE REPRESENTATIVE, *ISDS Fact Sheet*, *supra* note 2.

174. Sapiro, *supra* note 42, at 6.

the European Union.[175] He implied the United States will negotiate to include both investor-state rules adopted in 2012 and a revised version contained in the TPP.[176] The TPP that was recently signed included revisions to ISDS to address negative public opinion.[177]

The TPP revisions include provisions that affirm a government's right to regulate,[178] eliminate forum shopping,[179] impose more restrictive selection of arbitrators[180] who are subject to a code of conduct,[181] increase transparency,[182] and provide a stricter interpretation of international treaties.[183] The TPP also includes a provision that allows parties to the international treaty to submit outside materials that evidence their interpretations of the agreement.[184] This allows the arbitration panel to apply the treaty according to the parties who drafted it, limiting mistaken interpretation. Although the revisions of the current ISDS system in the new TPP treaty address many of the public concerns, the recurrent lack of an appellate mechanism has not deterred its opposition.[185] The United States has left open the possibility of an appellate mechanism with ISDS and this could be negotiated as an addition to TTIP.[186]

3. Purchase Political Risk Insurance

A third approach to fixing the current investor-state dispute resolution system would be to urge foreign investors to rely on political risk insurance for protection. Political risk insurance is offered to businesses to mitigate risks when investing in foreign markets.[187] The World Bank Group's Multilateral Investment Guarantee Agency (MIGA) defines political risk as:

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175. Krista Hughes & Philip Blenkinsop, *U.S. Wary of EU Proposal for Investment Court in Trade Pact*, REUTERS (Oct. 29, 2015, 3:00 PM), http://www.reuters.com/article/us-trade-ttip-idUSKCN0SN2LH20151029.

176. *Id.*

177. *Trans-Pacific Partnership (TPP)* ch. 11, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (last visited Nov. 4, 2016).

178. *Id.* art. 9.16.

179. *Id.* art. 28.4.

180. *Id.* art. 28.10.

181. *Id.* art. 28.10.1(d).

182. *Id.* art. 9.24.

183. *Id.* art. 28.2.

184. *Id.* art. 9.23(3).

185. Johnson et al., *supra* note 29, at 16.

186. Sapiro, *supra* note 42, at 12.

187. *Political Risk Insurance*, OVERSEAS PRIVATE INV. CORP., https://www.opic.gov/what-we-offer/political-risk-insurance (last visited Nov. 4, 2016).

> [T]he probability of disruption of the operations of multinational enterprises by political forces or events, whether they occur in host countries or result from changes in the international environment. In host countries, political risk is largely determined by uncertainty over the actions not only of governments and political institutions, but also of minority groups such as separatist movements.[188]

Many governments provide investment guarantees and political risk insurance to protect their investors in the global market.[189] Investors concerned about their host government's legal system can secure political risk insurance to protect against losses suffered.[190]

Political risk insurance is an appealing alternative to ISDS. International investment agreements and political risk insurance have essentially the same goal of promoting international investment by lowering political risks.[191] They both cover similar risks of expropriation, conflict, currency inconvertibility, and breach of host government commitments.[192] The risk assessments of many political risk insurers often look at the existence of BITs or other agreements and draw upon the same international dispute resolution procedures specified in these agreements.[193] The major difference between international investment agreements and political risk insurance is that of promotion and protection.[194] The agreements seek to protect investors, and the insurers seek to make money through promotion of foreign investment. The downfall of this alternative would be the costs related to political risk insurance. Smaller businesses would have trouble affording insurance coverage of this magnitude and states would have significant administrative costs if they were to require all investors to purchase the insurance.

C. Recommendation

The acceptance of the proposed investment court system is an extreme solution to the public criticisms of ISDS. Implementing this proposed system would bring about additional problems, in addition to

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188. MULTILATERAL INV. GUARANTEE AGENCY, 2010 WORLD INVESTMENT AND POLITICAL RISK 19 (2011), https://www.miga.org/documents/WIPR10ebook.pdf.

189. Kathryn Gordon, *Investment Guarantees and Political Risk Insurance: Institutions, Incentives and Development*, OECD INV. POL'Y PERSPECTIVES 92 (2008), https://www.oecd.org/finance/insurance/44230805.pdf.

190. Johnson et al., *supra* note 29, at 4.

191. Gordon, *supra* note 189, at 107.

192. *Id.*

193. *Id.*

194. *Id.*

those described, as disadvantages. The investment court system would have high administrative costs imposed upon the states that agree and increased complexity of coordinating many states to fall in line with the new system. The complete elimination of ISDS would not be a feasible option because it would cause investor reliance on domestic courts to settle disputes. These domestic courts may not be sophisticated enough to handle the intricacies of international investment law and create an inherent bias against foreign investors. Further, the risk of regressing back to gunboat diplomacy, creating interstate altercations, is not ideal. The dependence on political risk insurance for foreign investors to remove the need for a system of dispute resolution for investor protection would not be feasible because of the high costs and unknown disputes that may arise between investors and states. Smaller investors would struggle to afford the insurance coverage in comparison to large multinational corporations. Also, the political risk insurance does not provide blanket coverage for investor protection and only specifies instances where the insured may recover. This leaves states uneasy about pure reliance on this type of insurance.

The reasonable alternative would be to reform the current ISDS system put in place. The United States has chosen this option by revising the ISDS system in the TPP, while being open to a mechanism for appeal. A reform of the current ISDS would impose the least problems on governments and foreign investors using the current system because it is already well understood with facilities already in place to hold ISDS arbitration. The changes imposed by such a reformation would be minimal. Reform would create more restrictions in what cases would be arbitrated, who could be appointed to arbitrate, and increase transparency by making arbitration documents available to the public. The changes address all of the concerns but lack an appellate mechanism. My recommendation would include a channel for disputing parties to appeal decisions when there is a mistake in law or fact. A provision should allow the tribunal to dismiss frivolous claims that do not meet the requirements for appeal. Thus, all of the argument by ISDS opponents would be met to the best of the treaty parties' ability, while safeguarding protection for investors.

V. CONCLUSION

Investor-state dispute resolution is undergoing a period of reform because of widespread criticism in the signing of the TPP and the impending TTIP. The TPP includes a reformed ISDS system and the United States is pushing to include a similar provision in the TTIP. The

European Union addressed the public opposition by proposing an investment court system that would radically change the current ISDS system. It is agreed that the current ISDS system has various issues that must be resolved. The parties of the TTIP must negotiate the best solution to these issues. That appropriate solution would be the adoption of the revised ISDS system of the TPP and the inclusion of an appellate mechanism.