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A Tale of Two Trade Powers: Balancing Investor-State Dispute Settlement and Environmental Risk Between the European Union and United States in a Changing Political Climate

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A TALE OF TWO TRADE POWERS: BALANCING INVESTOR-STATE DISPUTE SETTLEMENT AND ENVIRONMENTAL RISK BETWEEN THE EU AND US IN A CHANGING POLITICAL CLIMATE

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In order to remain economically competitive in an increasingly global market, a growing number of countries have begun adapting bilateral and multilateral trade agreements between each other. Legal conflicts between countries with differing regulations and international obligations must be negotiated before trade partners can sign onto an agreement. However, even after implementation, disputes can still arise between signing member states and foreign businesses operating in their markets. A popular method of resolving these disputes is investor-state dispute settlement (ISDS), a system by which individual companies can sue countries for alleged discriminatory practices in an arbitral tribunal, rather than through a national court system.

While ISDS is renowned for its efficiency and cost saving, many NGOs and international groups feel its growing influence creates a potential for companies to circumvent environmental regulations set forth by countries, by binding countries to sentences created by privately selected arbiters, rather than through traditional judicial mechanisms.

This is particularly a concern in the negotiating of the Transatlantic Trade and Investment Partnership (T-TIP), an agreement between the European Union and the United States that began negotiation in 2013, especially because of their different levels of environmental safeguards. Critics have argued that both the United States and the

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European Union will expose themselves to litigation by private actors under the implementation of this trade agreement, incurring large costs and increasing the potential for biased or one sided results.

This paper examines the benefits and the potential dangers of ISDS, considering the increasing importance of free trade agreements in the global economy, and exploring solutions to the current draft ISDS provisions. ISDS mechanisms provide a much needed efficiency and consensus to large-scale economic agreements. Any rules or mechanisms that are written into T-TIP must balance efficiency and environmental interests of contracting states, so that they may serve as a viable long-term solution to global disputes.

INTRODUCTION

The Transatlantic Trade and Investment Partnership (T-TIP) is a trade and investment agreement between the United States and the European Union that has been undergoing negotiations for the past three years.[1] President Barack Obama of the United States, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso publicly announced the onset of the negotiations on June February 17, 2013.[2] Given the size of the negotiating parties, if successful, it is estimated that the T-TIP could become the largest free trade agreement in world history,[3] implicating nearly half of the global GDP and total world trade.[4]

The agreement seeks to increase investment in both areas by breaking down structural trade barriers,[5] covering a broad area of

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1.Office of the United States Trade Representative, *Transatlantic Trade and Investment Partnership (T-TIP)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (2017) https://ustr.gov/ttip [https://perma.cc/JQ8T-9BL5].

2. *See* Press Release, United States Trade Representative, U.S., EU Announce Decision to Launch Negotiations on a Transatlantic Trade and Investment Partnership (Feb. 13, 2013), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2013/february/statement-US-EU-Presidents [https://perma.cc/RUR8-HA8V].

3. *See id.*

4. *See* Neil Campbell et al., *The Impact of New Transatlantic Trade Agreements on Commercial and Investment Transactions,* 16 BUS. L. INT'L 185, 187 (2015).

5. Sandra T. Fung, *Negotiating Regulatory Coherence: The Costs and Consequences of Disparate Regulatory Principles in the Transatlantic Trade and*

trade—including goods, services and establishment, investment protection and public procurement.[6] As expected, the announcement of these negotiations triggered a fair amount of criticism from civil society, particularly regarding the provisions of the draft agreement on Investor-State Dispute Settlements (ISDS).

This paper will focus on ISDS provisions as envisioned in the draft agreement. Part I will examine the future of free trade, and the role of ISDS within bilateral free trade agreements. It will focus specifically on the basic structures of ISDS, and the international structures in place for arbitrating claims that arise out of investment and trade agreements, as well as issues of enforceability of rulings and jurisdiction. Part II of this paper will be devoted to the controversy behind the ISDS provisions in T-TIP, specifically regarding environmental risk. It will first discuss the arguments for the provisions' inclusion, and then examine the risks associated with the evasion of regulation by investors, faults in political insulation, and flaws within the arbitration process. It will also examine differences between the international environmental commitments of the United States and the European Union. Part III will assess the validity of these risks, and examine solutions to mitigate environmental risk in the inclusion of ISDS provisions to the final agreement.

I. THE MECHANICS OF ISDS, AND ITS ROLE IN FREE TRADE

This part discusses the general structure of ISDS and its role in free trade agreements. First, it discusses the future of free trade in a changing political climate, discussing recent shifts in political attitudes towards free trade agreements, as well as the longevity of trade agreements in similar political cycles. Then, it examines the mechanics of ISDS, focusing on the ICSID and UNCITRAL rules, two popular choices of rule for arbiters, and the rules referenced by the a draft

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Investment Partnership Agreement Between the United States and the European Union, 47 CORNELL INT'L L.J. 445, 446 (2014).

6. Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, TTIP and Labour Standards, EUR. PARL. DOC. PE 578.992 (2016), http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578992/IPOL_STU(2016)578992_EN.pdf.

circulated by the working group on T-TIP. Finally, it details the role of ISDS in free trade agreements, historically and looking forward.

A. The Future of Free Trade

The future of free trade has recently become a contentious topic in the international sphere. On June 23, 2016, the United Kingdom voted by referendum to exit the European Union,[7] a movement that became known as "Brexit,"[8] severing a political link of over 40 years with the European Community.[9] Although the consequences of the referendum will not take effect for several years,[10] there is widespread speculation as to the fate of free trade with the UK. Prime Minister Teresa May has expressed the desire to keep an open movement of goods and services between the UK and the EU, but rejected the idea of free movement of people,[11] a codified principle of the European Union since 1993.[12] However, many nations have seen the break with the EU

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7. Alex Hunt & Brian Wheeler, *Brexit: All You Need To Know About The UK Leaving The EU*, BBC NEWS (Jan. 17, 2017), http://www.bbc.com/news/uk-politics-32810887 [https://perma.cc/4NC8-877V].

8. *Id.*

9. *A Timeline of Britain's EU Membership*, THE GUARDIAN (June 25, 2016), https://www.theguardian.com/politics/2016/jun/25/a-timeline-of-britains-eu-membership-in-guardian-reporting [https://perma.cc/K972-ZU4N].

10. Leaving the European Union requires a member state to trigger Article 50 of the Treaty on the European Union (TEU). Article 50 allows a member state to notify the EU of its withdrawal, and obliges the EU to negotiating a withdrawal agreement with the exiting member state within a two-year period, or another mutually agreed upon date should the agreement be finalized. *See* Consolidated Version of the Treaty on European Union art. 50, Dec. 13, 2007, 2012 O.J. C 83/01, 31 [hereinafter TEU post-Lisbon]; *see also* Owen Bowcott et al., *Supreme Court Rules Parliament Must Have Vote To Trigger Article 50*, THE GUARDIAN (Jan. 24, 2017), https://www.theguardian.com/politics/2017/jan/24/supreme-court-brexit-ruling-parliament-vote-article-50 [https://perma.cc/GK69-A8DR] (explaining that the Supreme Court of the United Kingdom has ruled that a Parliamentary vote is necessary for the triggering of Article 50).

11. *See Theresa May's Brexit Speech: What Does It Mean For Free Trade?*, BBC NEWS (Jan. 18, 2017), http://www.bbc.com/news/uk-38658697 [https://perma.cc/6QFL-5RBW].

12. Susanne Kraatz, *Fact Sheets on the European Union, Free Movement of People*, EUROPEAN PARLIAMENT (June 2017), http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.10.3.html [https://perma.cc/R28B-4YG2].

as opening up the possibility for far more economically liberal bilateral treaties with the UK,[13] including President Donald Trump, who has stated his interest in repealing NAFTA[14] and withdrawing from the World Trade Organization.[15] He has also signed an executive order to withdraw the United States from the Trans-Pacific Partnership (TPP),[16] a move that critics have stated may set back efforts to curb the Chinese economic influence in the area.[17]

Whether the role of free trade agreements will change fundamentally over the next few years remains to be seen. Political contention over free trade agreements is not a new phenomenon in U.S. politics. During its initial implementation, NAFTA was heavily contested. Although NAFTA was the third free trade agreement negotiated by the United States, it became the subject of contentious political debate in

13. Some of the countries expressing interest in bilateral trade with the United Kingdom include New Zealand, China, Canada, Japan and the United States. *See* Henry Meyer et al., *What the World Thinks About Post Brexit Trade*, BLOOMBERG (Jan. 11, 2017, 7:01 PM), https://www.bloomberg.com/news/articles/2017-01-11/let-s-make-a-deal-what-the-world-thinks-about-post-brexit-trade [http://perma.cc/E9DM-Q6SU].

14. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA].

15. William Mauldin, *Trump Threatens to Pull U.S. Out of World Trade Organization*, WALL STREET JOURNAL (July 24, 2016), http://blogs.wsj.com/washwire/2016/07/24/trump-threatens-to-pull-u-s-out-of-world-trade-organization/ [https://perma.cc/C4FN-DQZZ].

16. The Trans-Pacific Partnership is a trade pact between 12 nations in the Asia-Pacific region and the United States, originally signed on February 4, 2016. *See* Office of the United States Trade Representative, *Trans-Pacific Partnership*, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, https://ustr.gov/tpp/#what-is-tpp [https://perma.cc/F6H3-KVYQ].

17. *See Donald Trump's Trade Strategy Starts With Quitting The Trans-Pacific Partnership, White House Says*, ABC AUSTRALIA (Jan. 21, 2017), http://www.abc.net.au/news/2017-01-21/donald-trump-trade-strategy-starts-with-quitting-asia-pact/8200426 [https://perma.cc/G579-6FUS]; *see also* Xiang Wang, *Good News For China? No TPP For The U.S., And Now Vietnam*, FORBES (Nov. 17, 2016), https://www.forbes.com/sites/xiangwang/2016/11/17/good-news-for-china-no-tpp-for-the-u-s-and-now-vietnam/#233ebfb7b76f [https://perma.cc/DT3N-JK3S].

the 1992 presidential election, and the beginning of the Clinton presidency.[18]

While NAFTA has been the subject of recent political controversy, it must be distinguished from the TPP and T-TIP. The TPP, although signed, had not yet been ratified or implemented before it was undone.[19] The longevity of NAFTA has allowed it to become so ingrained in the United States economy that dismantling it may not be as simple as anti free-trade proponents have claimed.[20] This serves as proof that trade agreements such as TPP and T-TIP are not necessarily completely eradicated by short term political shifts. Trade agreements often take years to negotiate and longer to implement.[21] Though they are often the subject of contentious political debate, these agreements maintain a long-term stability allowing them to transcend political change.[22]

Free trade has a long history in the international economic realm and in the United States.[23] The World Trade Organization (WTO)/General

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18. *See* C. O'Neal Taylor, *Fast Track, Trade Policy, And Free Trade Agreements: Why The NAFTA Turned Into A Battle*, 28 GW J. INT'L L. & ECON. 2, 4 (1993).

19. *See Donald Trump's Trade Strategy*, *supra*, note 17.

20. The dismantling of NAFTA could have a large negative effect on the United States' economy. Trade experts fear as many as 5 million jobs could be affected given the dependence of North American economies, and cross border supply chains. Canada is currently the largest export destination for the United States, followed by Mexico. *See* Elizabeth Gurdus, *Withdrawing from NAFTA Would Be Trump's Gravest Economic Mistake, Says Bush 41 Trade Chief*, CNBC (Feb. 13, 2017 12:06 PM), http://www.cnbc.com/2017/02/13/dismantling-nafta-may-be-trumps-gravest-economic-mistake-carla-hills.html [https://perma.cc/72E6-TFEZ].

21. *See* Rosamond Hutt, *With Brexit In Mind, Just How Long Do Trade Deals Take To Agree?*, WORLD ECON. FORUM (July 22, 2016), https://www.weforum.org/agenda/2016/07/how-long-do-trade-deals-take-after-brexit/ [https://perma.cc/3NKX-XUAE]; Christoph Moser & Andrew K. Rose, *Why Do Trade Negotiations Take So Long?* 5 (Swiss Institute of Business Cycle Research, Working Paper No. 295 & Center for Economic Policy Research, Discussion Paper No. 8993, Jan. 10, 2012).

22. *See* Roger Lowenstein, *Why Attacking Free Trade Is Great Politics and Bad Economics*, FORTUNE (Jan. 23, 2017), http://fortune.com/2017/01/23/trump-nafta-protectionism-tariffs-politics/ [http://perma.cc/A2LN-PB56]; *see also* Paola Conconi et al., *Policymakers' Horizon And Trade Reforms* (Centro Studi Luca d'Agliano, Working Paper, Sept. 1, 2011) (comparing politicians preference for trade expansionist and protectionist ideologies at different generations).

23. I.M. Destler, *America's Uneasy History with Free Trade*, HARV. BUS. REV. (Apr. 28, 2016), https://hbr.org/2016/04/americas-uneasy-history-with-free-trade

Agreements on Tariffs and Trade (GATT)[24] was the preferred mechanism for trade initiatives until the collapse of the Doha Agreements,[25] an event which shifted stakeholder's interest to the use of bilateral and regional trade agreements.[26] The increased growth within the economies of BRIC (Brazil, Russia, India, and China) countries has also inspired the opening of both markets.[27] It is estimated that the EU's annual benefit from the T-TIP could be as much as "0.9 % of GDP, or 163 billion U.S. dollars; the United States is estimated to realize a 0.8% increase in GDP, or 132 billion U.S. dollars."[28] The T-TIP is only a recent development in what has been

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[https://perma.cc/P756-232M]; *see also A Century of Free Trade*, BBC NEWS (Feb. 12, 2003), http://news.bbc.co.uk/2/hi/business/533716.stm [https://perma.cc/Z29C-97MM].

24. The General Agreement on Tariffs and Trade is an agreement established on October 30, 1947 in Geneva, Switzerland, which covers international trade in goods. It lasted until April 14, 1994, during the Uruguay Round Agreements, which established the World Trade Organization. The text of the 1947 agreement (with 1994 modifications) is still in effect and is overseen by the Council for Trade and Goods, a body composed of WTO members. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947]; *see also* General Agreement on Tariffs and Trade, Apr. 15, 1994, 33 I.L.M. 1153, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

25. After the attacks on the World Trade Center on September 11, 2001, members of the World Trade Organization (WTO) gathered in Doha, Qatar for the fourth Ministerial Conference where they discussed a broad mandate, including provisions such as reductions in non-agriculture tariffs and domestic agricultural support programs, and expansion of coverage in services. In July 2008, negotiations of this agreement broke down, as parties failed to come to a final consensus on its provisions. Former WTO Director General Pascal Lamy estimated the cost of this breakdown could amount to around $130 billion in potential tariff savings per year. *See* Robert Wolfe, *First Diagnose, Then Treat: What Ails the Doha Round*?, (European Union Institute, Working Paper No. 85, 2013).

26. *See* Neil Campbell et al., *The Impact of New Transatlantic Trade Agreements on Commercial and Investment Transactions*, 16 BUS. L. INT'L 185, 186 (2015).

27. *See id.* at 187 n.10.

28. Fung, *supra* note 5, at 446. It should also be noted that these numbers might be subject to change with the recent vote for the United Kingdom to exit the European Union. *See* Steve Erlanger, *'Brexit': Explaining Britain's Vote on European Union Membership*, N.Y. TIMES (June 21, 2016), http://www.nytimes.com/interactive/2016/world/europe/britain-european-union-brexit.html?_r=0 [https://perma.cc/Q8H2-TAGU] (updated Oct. 27, 2016).

an ongoing move towards free trade agreements. [29] For the reasons outlined above, although a potential trade deal between the European Union and the United States is currently under threat, given the international move to free trade, and the growing need for competition in both of these sizable markets, discussions are likely to continue in some form.

B. *Basic Structure of Investor State Dispute Settlement and its Role in Bilateral Trade*

Investor-state dispute resolution (ISDS) is a neutral mechanism established through investment agreements—it provides a forum where states parties and investors in those parties' jurisdiction can bring claims against each other in front of an objective panel, whose decision has been made binding on both parties through prior reciprocal agreements.[30] ISDS is unique in international law, obligating states' parties to take part in arbitration proceedings for any violation of previously negotiated and signed investment agreements outside of the jurisdiction of national court systems.[31]

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29. *See* Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT'L L. 1, 3 (2015) (explaining some scholars have deemed this movement as "mini-lateralism"—the move from large trade organizations to reliance on regional trade agreements (RTA) in order to achieve large scale financial and investment goals).

30. *See* SHAYERAH ILIAS AKHTAR & MARTIN A. WEISS, U.S. INTERNATIONAL INVESTMENT AGREEMENTS: ISSUES FOR CONGRESS (Congressional Research Service ed., 2013), https://fas.org/sgp/crs/row/R43052.pdf.

31. *See* David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 7 (Org. for Econ. Co-operation and Dev., Working Paper No. 3, 2012), http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf. It should be noted issues of competence between national court systems and arbiters has been a long subject of debate, with countries taking a variety of legal stances, in classic arbitration proceedings. The doctrine of "competence" in arbitration is a long-established principle allowing arbiters to rule on challenges brought to their jurisdiction over matters. However, it "cannot completely divest national courts of all authority to consider challenges to arbitral jurisdiction because it is the courts (and the state's enforcement resources), ultimately, which must enforce any arbitration agreements and awards not voluntarily honored by the parties, and the courts will not enforce such agreements and awards absent a jurisdictional basis for doing so." Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex*

Arbitration has grown significantly in the past couple of years, with most recent treaties incorporating a provision on ISDS.[32] There are roughly 125 international bodies, and 3,000 Bilateral Investment Agreements (BITs)[33] and investment chapters in Free Trade Agreements (FTAs),[34] which compromise the complex system of ISDS.[35] Investment disputes are most frequently arbitrated at the World Bank International Center for the Settlement of Investment Disputes (ICSID),[36] which is governed by the International Convention on the Settlement of Investment Disputes (ICSID Convention).[37] The United Nations Commission on International Trade law (UNCITRAL) also oversees some investment disputes as well, though not nearly the volume of the ICSID.[38]

As the agreement is still being negotiated, it cannot be said with certainty what the ISDS provisions will look like in the finalized

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Nihilo Nihil Fit? Or can Something Indeed Come from Nothing?, 13 AM. REV. INT'L ARB. 19, 25 (2002).

32. In 2012, the OECD produced a scoping paper, in which they explored the prominence of ISDS in the international investing community, as well as provided support to inter-governmental dialogue at several OECD hosted roundtable meetings. From the relevant sample, they found that approximately 93% of bilateral investment treaties allow for private enforcement. *See* Gaukrodger & Gordon, *supra* note 31, at 10.

33. *See Bilateral Investment Treaties*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/bilateral-investment-treaties [https://perma.cc/JE83-J2LX].

34. *See* DR. CHRISTIAN TIETJE ET AL., THE IMPACT OF INVESTOR-STATE-DISPUTE SETTLEMENT (ISDS) IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands ed., 2014).

35. *See* Smit, *supra* note 31.

36. *See* Christiane Gerstetter & Nils Meyer-Ohlendorf, *Investor-State Dispute Settlement Under TTIP – A Risk For Environmental Regulation?*, HEINRICH BÖLL STIFTUNG TTIP SERIES 4, 7 (2013).

37. World Bank, *International Convention on the Settlement of Investment Disputes*, Annual Report (2003) [hereinafter ICSID Convention].

38. "The UNCITRAL Arbitral Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations." United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html [hereinafter UNCITRAL Arbitration Rules].

version. However, there are indicators as to what form they may take. Firstly, in 2012, the European Union and United States agreed on a joint document entitled the Shared Principles for International Investment,[39] in which they advocated for strong protection for investors against potential discriminatory, arbitrary or harmful treatment, as well as for sound dispute settlement mechanisms, whereby investors would have access to states parties. In their negotiations, the US and EU have discussed allowing the tribunals to be governed by the ICSID Convention,[40] the ICSID Additional Facility

39. In April 2012, the EU Trade Commission released a press statement announcing an agreement by the Transatlantic Economic Council, led by EU Trade Commissioner Karel De Gucht and Deputy Assistant to the President of the United States Michael Froman, in order to forward an "ambitious set of investment principles" between the two parties. *See EU And US Adopt Blueprint For Open And Stable Investment Climates,* EUROPEAN COMM'N (Apr. 10, 2012), http://trade.ec.europa.eu/doclib/press/index.cfm?id=796 [https://perma.cc/6KZR-56QN]; *see also* Statement, European Union, Statement of the European Union and the United States on Shared Principles for International Investment, http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf [hereinafter Shared Principles].

40. *See* ICSID Convention, *supra* note 37.

Rules,[41] arbitration rules under UNCITRAL,[42] and any other rules[43] agreed by the parties in dispute at the time the complaint is filed.[44]

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41. As of April 10, 2006, 143 states have become contracting members of the ICSID. On this date, the Administrative Council of the ICSID adopted a set of additional rules authorizing the Secretariat to govern additional areas outside of the rules' original purview. These include

> (i) fact-finding proceedings; (ii) conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not a Contracting State or a national of a Contracting State; and (iii) conciliation and arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction.

International Centre for Settlement of Investment Disputes, *Introduction*, ISCID (Apr. 10, 2006), http://icsidfiles.worldbank.org/ICSID/ICSID/StaticFiles/facility/intro.htm.

42. *See* UNCITRAL Arbitration Rules, *supra* note 38.

43. There are a vast number of international treaties that currently govern the legal sphere of arbitration. These include: the New York Convention of 1958, UNCITRAL rules, as well as a variety of national jurisprudence, and the jurisprudence of the Court of Justice within the European Union. In addition to the ICSID rules, many arbitration proceedings may find themselves subject to these conventions, and the norms established by these conventions, either directly or indirectly. It's important to note that the arbitration field has a long established history of norms dealing with questions of competence between national court systems and arbiters, as well as conduct of third parties and their link to arbitration proceedings. ISDS, dealing with states' parties in their entirety, opens up an entirely new set of concerns when it comes to these conflicts of laws, which both negotiating parties to the trade deal, during and after it is signed into law. As further developed in this paper, ICSID is generally the governing body for ISDS disputes. *See generally* U.S. COMM'N ON INT'L TRADE L., CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK, 1958) (2015) [hereinafter New York Convention on Arbitration].

44. On November 15, 2015, the European Union submitted and made public a draft proposal Investment Protection and Resolution of Investment Disputes in the Transatlantic Trade and Investment Partnership. Negotiations with the United States have been tabled, but a final draft will be submitted once the details of the deal are finalized. *See* EU Commission Draft Text, Transatlantic Trade And Investment

1. ICSID

The ICSID is the most commonly used arbitration forum.[45] The ICSID Convention precludes use of any other judicial mechanism outside of the arbitration proceedings.[46] National courts of bound state parties are required to refrain from issuing a ruling on any matter that may fall under the jurisdiction of the ICSID until the matter is referred to the ICSID, and determined to be outside of its jurisdictional scope.[47] The Convention provides a caveat—the committee overseeing a legal claim can declare a judgment outside of its competence, however that decision falls within at sole discretion of the committee itself. They can also refuse a request for arbitration, however the Secretary General of the ICSID has to date, not chosen to do so.[48]

Article 14 of the Convention provides that arbiters are to be selected on the basis of "high moral character and recognized competence in the fields of law, commerce, industry or finance" that they can rely

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Partnership: Trade in Services, Investment and E-Commerce (Nov. 15, 2015) [hereinafter EU Commission Draft Text].

45. *See* Tamara L. Slater, I*nvestor-State Arbitration And Domestic Environmental Protection*, 14 WASH. U. GLOBAL STUD. L. REV. 131, 138 n.41 (2015).

46. *See* ICSID Convention, *supra* note 37, at 19, 24.

> Article 26: Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.
>
> Article 44: Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

47. *See* ICSID Convention, *supra* note 37, at 30. This principle is known as the "rule of abstention" and can be found in Article 64 of the ICSID Convention.

> Article 64: Any dispute between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by application of any party to such dispute, unless the States concerned agree to another method of settlement.

See also Georges R. Delaume*, ICSID Arbitration And The Courts*, 77 AM. J. INT'L L. 784, 785 (1983).

48. *See* ICSID Convention, *supra* note 37, at 21.

upon to exercise independent judgment.[49] The members serve "renewable periods of six years."[50] The convention limits its competency requirements to these four areas.

There are very few mechanisms for further pursuing a ruling once it has been issued by the ICSID. Domestic judicial mechanisms do not offer a sufficient avenue. Both the ICSID as a whole and its arbitrators are immune from legal liability for actions performed while acting in their capacity under the Convention,[51] and thus are unable to be pulled into any adverse litigation.

The Convention forbids parties from seeking any other remedy or appeal outside of the ones provided therein.[52] The Convention provides limited avenues to pursue appeal: parties may request revision or annulment of the award through writing to the Secretary General.[53] Other than that, there are no avenues for appeal and the award is binding.[54] Additionally, arbiters cannot be disqualified except for the limited circumstances where one party can challenge the arbiter's competence within Article 14 qualifications, but this determination is solely at the discretion of the committee.[55]

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49. ICSID Convention, *supra* note 37, at 15 (Art. 14).
50. ICSID Convention, *supra* note 37, at 15 (Art. 15).
51. *See* ICSID Convention, *supra* note 37, at 16-17 (Arts. 20-1).
52. *See* ICSID Convention, *supra* note 37, at 18 (Art. 53).
53. *See* ICSID Convention, *supra* note 37, at 26 (Art. 52).

> Article 52(1): Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
> (a) that the Tribunal was not properly constituted;
> (b) that the Tribunal has manifestly exceeded its powers;
> (c) that there was corruption on the part of a member of the Tribunal;
> (d) that there has been a serious departure from a fundamental rule of procedure; or
> (e) that the award has failed to state the reasons on which it is based. □

54. *See* ICSID Convention, *supra* note 37, at 27 (Art. 53). While this may be cause for concern regarding the accountability of arbiters, many of the reasons cited are to protect the finality of arbitration judgments, the effectiveness, and the legitimacy of the process as a whole. Additionally, arbitration has also been argued to protect clients from re-litigating matters. However, many ISDS clients are sophisticated indicating the preference for arbitration generally. *See* Michael A. Helfand, *Arbitration, Transparency, And Privatization: Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L. J. 2994, 3001 (2015).
55. *See* ICSID Convention, *supra* note 37, at 27-28 (Art. 57-58).

2. UNCITRAL

The standards under the UNCITRAL convention are slightly less stringent than those of the ICSID, but still leave a fair amount of discretion to the committee itself. Under the UNCITRAL rules, parties file a notice of arbitration, which requires a response in 30 days.[56] The appointing authority[57] then goes on to select an arbiter pursuant to the rules of the Convention. Typically three arbiters are appointed (each party having the authority to appoint one as well) but parties may request the appointing authority appoint a sole arbiter instead.[58]

Parties may challenge the appointment of an arbiter for facts that come to light that would create doubt as to this arbiter's impartiality by giving a notice of 15 days to the other party, but only for things that have come to light after the appointment.[59] UNCITRAL awards are binding on the parties, though they may make a challenge as to the competency of jurisdiction during the proceeding, which the committee will take into consideration.[60] Similar to ICSID, arbiters are immune from liability against them for any judgment rendered, however, UNCITRAL specifies an exception for intentional wrongdoing.[61]

II. THE CONTROVERSY OF ISDS PROVISIONS: BUSINESS CONCERNS VS. ENVIRONMENTAL IMPACT

Proponents of ISDS argue that the implementation of ISDS provisions in an agreement of this size is critical for protecting investments in foreign markets, whereas many civil society groups warn of the dangers of ISDS, specifically pointing to the potential of

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56. *See* UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION, U.N. COMM'N ON INT'L TRADE LAW 6-8 (2013) [hereinafter UNCITRAL ISDS Rules]; *see also* G.A. Res. 68/109, Art. 3-4 (Dec. 16, 2013).

57. Article 6 of the UNCITRAL Arbitration Rules covers the process by which arbiters are chosen. Unless previously agreed upon, parties can propose appointing authorities at any time, including the Secretary General of the Permanent Court of Arbitration at The Hague. *See* UNCITRAL ISDS Rules, *supra* note 56 at 8-9.

58. In the case of three arbiters, a presiding officer shall be appointed in a similar fashion as the sole arbiter. *See* UNCITRAL ISDS Rules, *supra* note 56, at 10, 19.

59. *See* UNCITRAL ISDS Rules, *supra* note 56, at 12-13.

60. *See* UNCITRAL ISDS Rules, *supra* note 56, at 18-19.

61. *See* UNCITRAL ISDS Rules, *supra* note 56, at 14.

multinational corporations to evade government regulations designed to protect the public interest.[62] This part will examine the validity of both of these arguments.

A. Advantages of ISDS

1. Attracting Foreign Investment through Financial Security

Proponents for including ISDS provisions in the eventual agreement stress that in order to encourage foreign investment, investors must be promised a certain level of treatment.[63] Without a formal arbitration mechanism, it is very difficult for investors to combat strict environmental regulation, especially regulations passed after the implementation of investment agreements.[64] However, some have countered this assertion, stating that where the financial cost of non-participation in a newly created market is high enough, many firms will not be stopped from making a lucrative investment,[65] and that financial security has often been used as a blanket justification for ISDS.

A more pressing concern of many investors in seeking arbitration clauses in trade agreements derives from the fear of political bias towards the multinational corporate community on the part of national judicial systems, including the risk for corporation.[66] It is important to distinguish the difference between trade and investment and the implications that this has on corporations. The domain of trade concerns itself primarily with goods traveling across borders, while foreign investment requires individual investors to assume the risk of expending their own capital, and being liable for the laws of the host

62. *See* AKHTAR & WEISS, *supra* note 30.

63. *See* EUROPEAN COMM'N, ATTRACTING US INVESTORS WHILE PROTECTING EU GOVERNMENTS' RIGHTS.

64. *See* Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes In Investment Treaty Arbitration*, 65 DUKE L.J. 459, 471 (2015).

65. *See* Robin Broad, *Corporate Bias In The World Bank Group's International Centre For Settlement Of Investment Disputes: A Case Study Of A Global Mining Corporation Suing El Salvador*, 36 U. PA. J. INT'L L. 851, 872 (2015).

66. *See* Slater, *supra* note 45 (citing Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365 (2003) (explaining the concept of "hometown justice" and the desire by investors to settle investment disputes with foreign states through arbitration, especially in Latin America)).

country they are operating in.[67] As a result, investment activists have pushed for political isolation as a necessary component of any new trade deals. While, traditionally, trade and investment concern separate areas of law, in practice, they significantly overlap. Although trade deals are more commonly within the purview of multinational agreements, such as in the WTO, the recent move to free trade agreements disrupts that trend.[68] Furthermore, investors and representatives of the investment community have an active influence in the negotiations of free trade agreements.[69] The risk to investors is not a result of two fields of the law that are functionally separate, but instead, from the practical implications of the conflicts of law that arise when an investor is forced to consider the international investment treaty it is operating under and the laws of the host state in which it is conducting business.

The need for financial security has a much more sound basis in the liability it opens investors to, especially where courts may not be amicable to the investors within their jurisdiction. There is a fear within the investor community of the trend of what is called "hometown justice," in which states courts react more favorably towards citizens or representatives of the host country in which they are operating.[70] This concern extends past the purview of environmental protection, such as with competing economic interests of host states and investors,[71] but there are still arguments for the

67. Peter H. Chase, *TTIP, Investor–State Dispute Settlement And The Rule Of Law*, 14 EUR. VIEW 217, 217-29 (2015).

68. *See* Puig, *supra* note 29; *see also* Wolfe, *supra* note 25.

69. *How to Influence Trade Negotiations*, INT'L TRADE CENTRE, http://www.intracen.org/itc/policy/how-to-influence-trade-negotiations/ [https://perma.cc/2RUE-9R8Z].

70. One example of this "hometown justice" trend is the ruling in Chevron Corp. v. Donzinger where the United States Southern District of New York found Steven Donziger, the lead lawyer behind the Ecuadorian lawsuit against the company, violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO) in his initial investigations. *See* Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016).

71. *See* Timothy J. Tyler & James L. Loftis, *Implications of Exxon Mobil v. Venezuela*, LAW360 (July 19, 2010), https://www.law360.com/articles/180073/implications-of-exxon-mobil-v-venezuela [https://perma.cc/Z7ZC-S658] (stating "foreign investors like Exxon Mobil can gain the protection of international treaty law, but only if their holdings are in the right places, namely in those countries with treaties with the host state. And it is important to structure the treaty chain before disputes arise. Later attempts invite challenges. If ExxonMobil relied solely on

implementation of ISDS generally when it comes to environmental litigation.[72] ICSID arbitration has gained popularity due to its isolation from scrutiny or control of domestic states that have signed the Convention, whether directly or through agreement.[73]

Rather than decreasing the policy space for environmental regulation, a motivating factor for including these provisions is motivated by the need for an efficient forum that is shielded from the internal politics of states parties in a way that individual judicial forums may not be.[74]

2. Uncertainty of Abuse by Multinational Companies

ISDS supporters point to the history of ISDS use in trade agreements so far, stating of the 20 FTAs it has been incorporated in, there should be statistical data reflecting the abuse of the arbitration mechanism by multinational companies.[75] In fact, of the over 2000 BITs currently in place, 90% of them have never had operated without a single investor claim of treaty breach.[76] Many of the accusations of political involvement and non-meritorious claims are said to be exaggerated—most in the investment community emphasize that a large reason for the increase in ISDS litigation can be tied to the general increase of the number of investors and capital invested abroad.[77] Additionally,

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Venezuelan law, it would have been out of luck - and could have been out of billions").

72. In regard to the argument surrounding isolation from "hometown justice," it is unclear whether investors are deterred. The potential for fraud and unjust process must be distinguished from the enforcement of principles that inconvenience investors, or deviations permissible under an envisioned treaty.

73. *See* Delaume, *supra* note 47.

74. *See* Tyler & Loftis, *supra* note 71.

75. Of the more than 500 cases brought into ICSID since its inception, 36% have been settled before appearing before a tribunal and only 13 have commenced action against the United States, none of which found the United States liable. *See* Gary Clyde Hufbauer, *Senator Warren Distorts the Record on Investor-State Dispute Settlements*, PETERSON INST. FOR INT'L ECON. (Mar. 2, 2015), https://piie.com/blogs/trade-investment-policy-watch/senator-warren-distorts-record-investor-state-dispute [https://perma.cc/9WDD-SBB2].

76. *See* Scott Miller & Greg Hicks, *Investor - State Dispute Settlement: A Reality Check* (Ctr. For Strategic and Int'l Stud. (CSIS), Working Paper Oct. 29, 2014).

77. *See id.*

lawyers are selected from a large panel, with opportunities to object by all parties to the arbitration[78] and sworn to take an oath of impartiality.

Proponents have also pointed out that ISDS is not a foreign process being imposed onto the United States, but, instead, a mechanism designed and forwarded by the United States in order to embody United States' legal principles.[79] However, the case of the European Union is much more complicated, given the large number of member states, and the varying national interests at play.

B. Criticisms Of ISDS Mechanisms

This section examines the critiques of ISDS, including the potential for companies to evade national regulation by suing outside of traditional judicial mechanisms, issues of political insulation and role of international law.

1. Evasion of National Regulation

i. Challenging Domestic Environmental Regulation in Non-Domestic Courts

Generally, the criticism against ISDS and environmental challenges tends to focus on developing countries, due to vulnerability of poorer populations in these areas.[80] However, in the case of the T-TIP, since the two parties represent such a large percentage of the global GDP, they hold a similar negotiating power, so different concerns have risen. Specifically, the culture of environmental protection in the EU and the potential for its erosion has alarmed many in civil society.[81]

There is an apprehension within the environmental community that T-TIP has the potential to provide a forum for challenging environmental regulation on a much larger scale than previous agreements. Much of this criticism comes after seeing the effects of

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78. *See* ICSID Convention, *supra* note 37.

79. *See* Hufbauer, *supra* note 75.

80. *See* Pac Rim Cayman LLC v. Republic of El Salvador, ARB/09/12 (2014); *see also* Slater, *supra* note 45.

81. *See* UNWELT BUNDESAMT, ENVIRONMENTAL PROTECTION UNDER TTIP, (Fed. Env't Agency 2015), https://www.umweltbundesamt.de/sites/default/files/medien/376/publikati onen/environmental_protection_under_ttip_0.pdf.

the ISDS provisions within NAFTA,[82] which have allowed investors to bring forth claims against states for any regulation that has, or that they have perceived to have, harmed the investor's property or investment.[83] Indeed, Canada has become the most sued country under NAFTA, and the most sued country over ISDS generally, largely due to the environmental regulations they have in place.[84]

A vocal advocate against ISDS provisions in trade agreements has been United States Senator Elizabeth Warren, who has actively warned against the risks of corporate abuse of arbitration against states.[85] Specifically, ISDS might allow foreign companies to "challenge U.S. laws—and potentially to pick up huge payouts from taxpayers—without ever stepping foot in a U.S. court."[86] There is an underlying sentiment that similar to other private stakeholders, investors should have to pursue the avenues granted to them by their host country, or to persuade their own government to engage in state-to-state litigation over bilateral investment treaties on their behalf.[87] In fact, in 2009, the

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82. *See* NAFTA, *supra* note 14.

83. *See* Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 148-49 (2002); *see also* Stephen J. Byrnes, *Balancing Investor Rights and Environmental Protection in Investor-State Dispute Settlement under CAFTA: Lessons from the NAFTA Legitimacy Crisis*, 8 U.C. DAVIS BUS. L. J. 103 (2008) (explaining investors need only satisfy the evidentiary burden set forth by the convention under Chapter 11 of NAFTA).

84. *See* Sunny Freeman, *NAFTA's Chapter 11 Makes Canada Most-Sued Country Under Free Trade Tribunals,* HUFFINGTON POST (Jan. 14, 2015), http://www.huffingtonpost.ca/2015/01/1 4/canada-sued-investor-state-dispute-ccpa _n_6471460.html [https://perma.cc/DVP7-KUPA]. "Canada has lost or settled six claims paying a total of $170 million in damages, while Mexico has lost five cases and paid out $204 million. The U.S., meanwhile, has won 11 cases and has never lost a NAFTA investor-state case." *Id.*

85. Elizabeth Warren, *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 [https://perma.cc/G47P-HQ3X].

86. Becky L. Jacobs, *A Perplexing Paradox: "De-Stratification" of "Investor-State" Dispute Settlement?*, 30 EMORY INT'L L. REV. 17, 18 (2015) (quoting Warren, *supra* note 85).

87**.** Marco Bronckers, *Is Investor–State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts?: An EU View on Bilateral Trade Agreements*, 18 J. INT'L ECON. L. 655 (2015).

State Department recommended ISDS be replaced with state-to-state litigation mechanisms similar to those in bilateral investment agreements, stating:

> [I]f the administration continues to include an investor-state dispute settlement mechanism, investors should be required to exhaust domestic remedies before filing a claim before an international tribunal. That mechanism should also provide a screen that allows the Parties to prevent frivolous claims or claims which otherwise may cause serious public harm.[88]

ii. Double Adjudication

Given the complexity of the regulatory schemes of both bodies, there is a risk that many investment claims being brought to arbitration may either be claims that had already been addressed by national courts or that were substantially similar enough to previous claims. The provisions of the ICSID and UNCITRAL Conventions are written broadly, giving guidance only as to the fact that both committees are in charge of determining the scope of their competence.

While it is true that technically ISDS does not have the power to overturn any domestic environmental litigation,[89] it is not necessary to have a the literal overturning of regulation in order to chill legislation, instead it is possible to de-incentivize environmental regulation—essentially by deciding cases against states who issue environmental regulation, ISDS can create de-facto stop order on all environmental reform that potentially can lead to large fines for the host state. In fact, there is some difficulty in assessing which regulations investors may be successful in pursuing, given that neither UNCITRAL or ICSID

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88. U.S. DEP'T OF STATE, REPORT OF THE SUBCOMMITTEE ON INVESTMENT OF THE ADVISORY COMMITTEE ON INTERNATIONAL ECONOMIC POLICY REGARDING THE MODEL BILATERAL INVESTMENT TREATY: ANNEXES (2009).

89. *See* Linda Dempsey, *Three Facts Apologists for Foreign Mistreatment of U.S. Manufacturers Should At Least Acknowledge*, NAT'L ASS'N OF MFRS. (Feb. 27, 2015), http://www.shopfloor.org/2015/02/three-facts-apologists-for-foreign-mistreatment-of-u-s-manufacturers-should-at-least-acknowledge/ [https://perma.cc/DJ65-Y42D].

conventions nor are their judgments legally binding. [90] A number of countries have left ICSID,[91] due to the fact that it makes no use of precedent and it gives itself such a wide jurisdictional reach.

There is a potential that the vague definition of investors[92] and loose standing requirements[93] will provide a "catch-all" definition for standing under the treaty, allowing many more parties the ability to bring suit against either the EU or the US, and for other investors to follow suit.

2. Lack of Political Isolation/Potential Bias of Proceedings

The use of ISDS has risen dramatically in the last couple of years.[94] As a result, there has been increasing criticism about the structure of ISDS proceedings and the potential for bias within the process.[95] The fear of bias within ISDS proceedings is not unfounded, as the amount of arbitration cases being decided in favor of investors tips in favor of investors.[96]

There are many factors that lead to this phenomenon. First off, most ISDS proceedings give parties a guarantee of confidentiality[97] making

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90. *See generally* UNCITRAL Arbitration Rules, *supra* note 38; *see also* UNCITRAL ISDS Rules, *supra* note 56; August Reinisch, *The Role of Precedent in ICSID Arbitration*, *in* AUSTRIAN ARBITRATION YEARBOOK 495-510 (2008).

91. *See* Broad, *supra* note 65, at 869.

92. *See* Shared Principles, *supra* note 39.

93. *See id.*; *see also* ICSID Convention, *supra* note 37.

94. *See* Slater, *supra* note 45; *see also* CORPORATE EUROPE OBSERVATORY, PROFITING FROM INJUSTICE HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELING AN INVESTMENT ARBITRATION BOOM at 4, 8 (2012), https://www.tni.org/files/download/profitingfrominjustice.pdf.

95. *See* Howard Mann, *ISDS: Who Wins More, Investors or States?,* INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, INVESTMENT TREATY NEWS, June 2015, http://www.iisd.org/itn/wp-content/uploads/2015/06/itn-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf.

96. *See* Slater, *supra* note 45, at 137-38 ("As of the end of 2012, 244 disputes had been resolved through arbitration under various ISDS provisions with approximately 42% decided in favor of the state, 31% decided in favor of the investor, and 27% settled, typically on confidential terms. In 2012, however, 12 out of 17 decisions, 71%, rendered on the merits accepted - in part or in full - the claims of the investors.").

97. *See generally* Olivier Oakley-White, *Confidentiality Revisited: Is International Arbitration Losing One of Its Major Benefits?*, 6 INT'L ARB. L. REV. 29 (2003).

it difficult to ascertain a sense of transparency about the process. Second, parties who frequently litigate in these contexts may retain an influence over the arbitrators, creating difficulty in shielding the arbitration from bias.[98]

A large critique centers on the lack of representation of state parties involved in potential arbitration. Critics have pointed to the lack of geographical bias among the members of ICSID members, noting that "sixty eight percent of arbitrators, conciliators, and ad hoc committee members that judge the tribunal cases are from North America and Western Europe, while their home countries represent only 6% of all state respondents in ICSID case[s]."[99]

More concerning to critics than geographical bias is the fact that many arbitration proceedings conducted within ICSID tend to involve a small group of arbitrators, and an even smaller group of law firms representing investor parties. A 2012 report published by the Transnational Institute, an advocacy and research institute, revealed that Freshfields (UK), White & Case (US) and King & Spalding (US) can be traced to the involvement of at least 130 investment treaty cases in 2011 alone and that "15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes."[100] In fact, the world of ISDS consists of a "revolving door" of experts serving as counsel and investors on a number of different cases.[101]

Although there is a fair amount of criticism of the ICSID proceedings because of the frequency with which they are used, the UNCITRAL proceedings have their own issues of transparency as well.[102]

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98. *See* CORPORATE EUROPE OBSERVATORY, *supra* note 94.

99. *See* Slater, *supra* note 45, at 140.

100. CORPORATE EUROPE OBSERVATORY, *supra* note 94, at 8, 38.

101. *See* Sergio Puig, *Emergence & Dynamism In International Organizations: ICSID, Investor-State Arbitration & International Investment Law*, 44 GEO. J. INT'L L. 531, 592 (2013).

102. *See* Samuel Levander, *Resolving "Dynamic Interpretation": An Empirical Analysis of the UNCITRAL Rules on Transparency*, 52 COLUM. J. TRANSNAT'L L. 506, 535 (2014).

3. The Role of International Law

An added layer of complexity arises when states have signed onto international legal obligations. There is a difficulty that arises when assessing the responsibility of states under their international commitments and their international commitments to investment treaties. This is especially the case within the European Union, due to the large number of member states and potential for liability.

The European Union has openly stated its commitment to the Rio Declaration,[103] and although the Rio Declaration is not binding as an instrument of law, the European Union has codified its adherence to one of its major principles, the "Precautionary Principle."[104] The Precautionary Principle provides that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[105] The difficulty in harmonizing environmental regulation between the two parties derives from the fact that while the Precautionary Principle has been well integrated in the EU, since its establishment,[106] the United States. does not formally adhere to the Precautionary Principle,[107] creating a wide variation of

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103. *See* RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT (1992), http://www.unesco.org/education/pdf/RIO_E.PDF.

104. *See id.* (Principle 15).

105. *See id.*

106. "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies." Treaty on European Union, Title XVI, Art. 130r, July 29, 1992, 1992 O.J. C 191/1 at 60, http://eur opa.eu/eu-law/decision-making/ treaties/pdf/treaty_on_european_union/treaty_on_european_union _en.pdf [herein after Maastricht TEU].

107. James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1, 11-12 (1991) (citing United States' vocal opposition to the Precautionary Principle); *contra*_Jonathan B. Wiener & Michael D. Rogers, *Comparing Precaution In The United States And Europe*, 5 J. OF

environmental standards for products within the two markets. While how the two environmental regulatory regimes will be harmonized is unclear, the inclusion ISDS provisions into T-TIP negotiations has created an apprehension among EU member states that US based companies doing business in the EU may be able to bring them into arbitration for violating the provisions of the investment treaty, without having to go through EU or member state judicial mechanisms.[108]

Additionally another concern of environmentalists is that the use of ISDS provisions will make it difficult to invoke general exception clauses for good faith measures taken for public welfare objectives, notably, environmental or public health measures.[109] Previously, these general exception clauses have allowed the EU to protect its environmental interests in both GAT and GATTS.[110] It is unclear how much of an impact general exception clauses would have in arbitration proceedings, a risk which leaves environmental protectionists wanting stronger safeguards and flexibility for national regulation.[111]

Accordingly, in November of 2013, the EU released to the United States, a draft proposal for the agreement that would incorporate areas

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RISK RES. 317 (2002) (arguing that although not formally adherent, in practice, the United States is not necessarily less precautionary than the EU).

108. It should be noted that if the deal were finalized, the precautionary principle would have to be addressed in its entirety, given its prominence in European Union discourse. This may be solved during the standardization of regulations, rather than individual arbitration hearings, but the issue of conflict of laws still remains.

109. *See* **Levent Sabanogullari,** *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice*, 6 INVESTMENT TREATY NEWS 3 (2015), https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/.

110. The clauses in both tend to include the following legal structures:

> 1. An exhaustive list of permissible policy objectives; for example, the protection of human, animal, or plant life or health, or the conservation of natural resources;
>
> 2. A nexus requirement, denoting the required link between a state measure and a permissible objective; frequently used nexus requirements include "necessary for," "relating to," and "designed and applied for;" and
>
> 3. A prohibition of discriminatory or arbitrary application.

See id.

111. *See id*.

on trade and sustainable development.[112] Within this agreement, they directly reference both the Rio Declaration and the Sustainable Development Goals, as well as note the benefit of considering trade and environmental protection within their discussions. The text of the agreement also outlines a commitment by both parties to international environmental commitments and a good faith effort to regulate, and the right to regulate, in line with those obligations. Furthermore, this version asks both parties to adhere to the principles of Corporate Social Responsibility, by openly supporting the text of both the UN Global Compact, the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.[113] At the present moment, it does not seem likely that the United States will accept many of the draft proposals submitted within the text of this section, however, that remains to be seen as the negotiations continue. Furthermore, while ambitious, this text of the agreement helps ameliorate the position of state parties while in arbitration, but does not incorporate a structural argument as to how these principles can be incorporated into the structure of the ISDS provisions.

III. BALANCING INVESTOR PROTECTIONS WITH APPROPRIATE STRUCTURAL AND ENVIRONMENTAL SAFEGUARDS

There are risks and benefits to ISDS that will arise as the issue continues to be negotiated. This part will examine solutions to balancing concerns by both environmental advocates and investors.

The European Union has made public its desire in these negotiations to advocate for both transparency and mechanisms for appeal in order to address concerns that have been raised about binding states party's to adverse arbitration decisions.[114] There has been a lot of criticism also surrounding the inability of appeal in both conventions.[115] In

112. "This textual proposal is the European Union's initial proposal for legal text on 'Trade and Sustainable Development' in TTIP. It was tabled for discussion with the US in the negotiating round of 19 - 23 October 2015 and made public on 6 November 2015." *EU Textual Proposal Trade And Sustainable Development*, COM (2015), http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf

113. *See id*. at Art. 20.

114. *See* EU Commission Draft Text, *supra* note 44.

115. *See id.*

response to these criticisms, the European Commission proposed setting up an Investment Court System (ICS) with judges publicly appointed by the EU and US as well as an appeals tribunal, with three judges from the US, EU, and a third impartial country.[116] To ensure effective, impartial rulings, the Commission also recommends judges "hold qualifications comparable to judges in other international courts, such as the International Court of Justice," be assigned to cases on random basis, follow a strict set of rules on ethics, and be banned from working as legal counsel on any other investment disputes while they act as judge.[117] The committee contends that the presence of an appeals tribunal and transparent procedures combats the problems of legitimacy and consistency raised by critics.[118]

While these reforms address a number of concerns, they do not go far enough to ensure accountability within the proceedings. A key distinction in the structure of these arbitration hearings is that the two parties to the underlying trade agreement both possess a fair amount of bargaining power. Unlike many trade conventions between smaller countries and the EU or US, where the incentive to close the deal is higher on one side, the EU and US, representing such a large portion of the global GDP, are in a position to take as much time as each party needs in order to reach a deal that addresses the differences in their environmental and trade policies. In order to adequately balance the concerns of both the investor community and of environmental activists, ISDS reforms must address the following:

A. Structure of Proceedings and Selection of Arbiters

As stated earlier, ISDS mechanisms are incorporated in a large number of treaties,[119] and there is a genuine argument as to the benefit of having them as politically isolated as possible. The efficiency and isolation with which arbitration hearings are able to settle litigation is one of the key incentives for their incorporation into trade agreements.

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116. The Investment Court System would be compromised of: an Investment Tribunal with 15 judges (five EU nationals, five U.S. nationals, five nationals of other countries) and an Appeals Tribunal with 6 judges (two EU nationals, two U.S. nationals, and 2 nationals of other countries). *See id.*

117. *Id.*

118. *See id*.

119. *See* Smit, *supra* note 31.

Rather than having arbiters appointed by member states, which may politicize the selection process (especially in a contentious political atmosphere), an alternative to shielding the process would be to have a closed pool of potential arbiters, with an allocated number of spots for nationals or representatives from each party.[120] In addition to competencies in trade, financial, and commerce law, there should also be a requirement for a minimum number of arbiters to have qualifications in the fields of human rights, environmental law, and sustainability, in order to balance the interests of both states' parties and investors in the arbitration proceedings.

It is not necessary to have an equal number of arbiters of each discipline in each and every proceeding; however, there should be a robust process in place for vetting qualifications and impartiality both before the confirmation of arbiters and the appointment of arbiters to a case.

Impartiality and independence have long been an integral part to the legitimacy of the arbitration process, with arbiters having an affirmative duty to disclose all potential biases in the cases they oversee, or risk having their sentences later overturned.[121] However, in the domain of competence, where there is a conflict of law, the Secretary General should be able to provide detailed reasoning as to why none of the national judicial mechanisms involved in a specific litigation are the correct authority for a particular case, so as to create increased transparency and create a precedent for similar cases.

B. *Appeals Tribunal*

The EU has proposed their own version of an Appeals Tribunal,[122] rather than relying on the finality of arbitration decisions. This is a good first step in making the process more approachable and just. Given the rate of cases being settled before they get to arbitration,[123] a robust appeals tribunal may incentivize states parties to fully pursue

120. Instead of basing it on nationality, allowing member states to choose arbiters they find most favorable to their interest is more effective.

121. *See Rules of Ethics for International Arbitrators* (Art. 3.2), IBA RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS 1987, https://www.trans-lex.org/701100/_/iba-rules-of-ethics-for-international-arbitrators-1987/.

122. EU Commission Draft Text, *supra* note 44, at Art. 10.

123. *See id.*

claims before defaulting to a settlement. The proposal calls for the appointment of six members— two EU nationals, two US nationals, and two of other countries—to serve for six-year terms.[124] Unlike the initial selection process for arbiters, there is a benefit to relying on nationality as a proxy for impartiality here because the appeals tribunal should be set before cases appear in front of it. This ensures the finality that ISDS seeks to provide as well as the consistency of rulings within the process.

Lastly, the EU recommends members of the Appeal Tribunal possess "the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognized competence" and mention expertise in public international law, as well as "international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements."[125] However, they should also include language regarding expertise in the fields of human rights and environmental law for at least some of the members, in order to ensure a wider range of considerations in each of the appeals.

C. Implementing Environmental Principles within T-TIP Generally

In their draft proposal, the EU has not addressed the effect of this deal on both parties' international obligations, especially when it comes to the EU's strong commitment to environmental protection. It is important for both the United States and the European Union to decide upon the environmental principles both parties are committed to before the T-TIP can be finalized. The question of regulations and how to handle contradictions of the law is one that is best addressed by the treaty writing process. If the EU is serious about its commitment to the Precautionary Principle and the Rio Declaration, it shall continue to push for its implementation in T-TIP, as it has with similar trade deals in the past.[126] It is important for the finalized agreement to reflect the spirit of the laws and commitments of both parties.

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124. *See id.*

125. *Id.*

126. "CETA [EU-Canada Comprehensive Economic and Trade Agreement] makes clear from the outset that the EU and Canada preserve their right to regulate and to achieve legitimate policy objectives, such as public health, safety, environment, public morals, social or consumer protection and the promotion and

However, if the US refuses to acknowledge the Precautionary Principle in its investment treaty, then the EU must examine which specific industries it seeks to open trade with in the US, and limit the scope of the free trade deal, if they are to reach an agreement. Either way, the final version of the deal must be one which reflects the culture of environmental law of both parties, and which does not lead to later collisions with national legislation and regulation.

In order to shield themselves from certain lawsuits beforehand, both the EU and US should determine a set of claims that are definitively outside the competence of arbiters. The broad language of forums such as the ICSID and UNCITRAL have the potential to bypass national court systems on a larger scope of litigation than either party may be seeking by signing this treaty. Accordingly, there is an incentive for each party to make reservations in the text of the treaty regarding the areas they determine to be within the exclusive scope of their national court systems.

CONCLUSION

The move to free trade agreements is one that will continue to change the nature of the international financial sector in the coming years. With increased trade commitments, comes increased liability and standardization of markets, commitments, and cultural norms. The discussion of investment and trade between the European Union and the United States speaks to a contrast between the motives of each state party, but also with the larger international community, which is becoming more engaged with environmental protection and the role of corporate social responsibility.

Investor State Dispute Settlements are a byproduct of a need for efficiency and security, and although their importance should not be understated, they cannot take a backseat to environmental protections, especially not with the possibility of a trade deal as massive as the T-TIP. The investment and trade communities of both the United States and the European Union should take proactive steps in order to reform the currently proposed ISDS mechanisms in order to ensure

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protection of cultural diversity." *See* EUROPEAN COMMISSION, INVESTMENT PROVISIONS IN THE EU-CANADA FREE TRADE AGREEMENT (CETA) (2016), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.

impartiality, efficiency, and fairness, and to resolve any conflicts of law between the states' commitments before they arise.