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Investor Protection in the Transatlantic Trade and Investment Partnership
By: Daniel Hewitt

I. Introduction

After twelve rounds of negotiations, the Transatlantic Trade and Investment Partnership (TTIP) is nearing completion. The objective of the TTIP is to ease any existing trade barriers between the United States and the European Union. The inclusion of an investment protector clause in the form of an investor state dispute settlement (ISDS) Clause has generated great controversy and concern from members of the EU Parliament, EU member states, and individuals living within the EU. ISDS clauses deal with disputes between investors and states and provide investors the ability to bring certain claims against states in private arbitration.¹ Many fear that a powerful investor protection clause will jeopardize EU member states' ability to properly introduce legislation that has the purpose of furthering "public policy" (e.g. environmental policies and consumer protection).² Various EU leaders have publicly denounced the inclusion of an Investor State Dispute Settlement (ISDS) clause.³ These complaints exist despite the fact that the inclusion of these clauses is standard for Bilateral Investment Treaties (BITS), and has been included in approximately 93% of them.⁴

This note will analyze the use of investor-state arbitration and evaluate the recent Proposal of the European Commission.⁵ The Commission Proposal will be evaluated through the lens of five critiques associated with investor state arbitration: (1) that arbitrators are inherently biased

¹ International Centre for Settlement of Investment disputes, *Background Information on the International Centre for Settlement of investment Disputes*, available at: <https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf> (last visited Nov. 29, 2015).

² European Council on Foreign Relations, A Fresh Start For TTIP, http://www.ecfr.eu/page/-/ECFR124_-_TTIP.pdf (last visited November 29, 2015).

³ European Parliament, *Bernd Lange on TTIP: "We have to be transparent"*, available at:

http://www.europarl.europa.eu/pdfs/news/public/story/20150701STO72930/20150701STO72930_en.pdf.

⁴ Christian Tietje, *The Impact of Investor- State- Dispute Settlement (ISDS) in the Transatlantic Trade and Investment partnership: Prepared for Minister of Foreign Trade and Development Cooperation* (2014).

⁵ Commission Draft Proposal to the United States on Transatlantic Trade and Investment Partnership: Chapter II- Investment [hereinafter Commission Proposal].

against states; (2) the arbitration process is alarmingly non-transparent; (3) investor state arbitration poses the risk of causing a regulatory freeze; (4) arbitrator quality is not guaranteed in this process and (5) the lack of appealability denies parties of a fundamental safeguard.

Part II of this note will include a brief history of TTIP and an introduction to the Commission Proposal. Part III introduces the proposal and the mechanisms it establishes to handle the concerns mentioned above. Part IV conceptualizes the foundation of the concerns in traditional ISDS clauses and describes how they are normally dealt with. Part V will evaluate this Proposal. The conclusion of this note will recommend that while some of the Proposal's ideas are good, the proposed system should not be accepted as the ISDS system for TTIP.

II. History of TTIP

TTIP is a free trade agreement currently in negotiations between the European Union and the United States. TTIP began in 2011 with an EU-US summit, which set up a “high-level working group” (HLWG) to research methods of strengthening EU-U.S. trade relations.⁶ In June 2013, the European Council gave the “green light” to the European Commission to begin negotiations with the United States.⁷ The first round of negotiations occurred in July 2013 and the most recent round (twelfth) occurred in February 2015.⁸

⁶ Commission Press Release, IP-11-1481 (Nov. 29, 2011).

⁷ Council Directive 1103/13/ EEC, For the negotiation of the Transatlantic Trade and Investment Partnership between the European Union and the United States of America (Jun. 17, 2013); Commission Communication, Transatlantic Trade and Investment Partnership Commissioner Karel De Gucht Welcomes Member States' green light to start negotiations (Jun. 14 2013).

⁸ *See generally* Commission Communication, EU and US conclude first round of TTIP negotiations in Washington (Jul. 12 2013); Commission Communication, Report of the Eleventh Round of Negotiations for the Transatlantic Trade Investment Partnership (Oct. 23 2015).

The debate around the ISDS clause has garnered a great deal of attention in recent years.⁹ Advocates of the clause believe its inclusion will help increase foreign investment as well as provide a fair and objective tribunal to settle disputes. Disputes often arise when a state acts in a manner contrary to the interests of foreign investors. When this occurs, investors commonly bring claims of direct or indirect expropriation.¹⁰ Those opposed to ISDS clauses claim that private tribunals will favor private investors over state interests. There is a sentiment that states will be unable to enact public policy measures if they contradict foreign investor interests.

The potential for an ISDS clause in TTIP can be traced back to 2009 with the ratification of the Lisbon treaty.¹¹ The Lisbon Treaty conferred upon the EU the competence to deal with investor protection.¹² Early in the negotiations the inclusion of an ISDS clause proved controversial. In 2011, a Parliament resolution stated “consideration should be given to the possibility of creating an appellate mechanism applicable to investor-to-state dispute settlement under the agreement.”¹³ This resolution echoed a Commission Communication produced the previous year.¹⁴ In a European Commission press release, issued July 12, 2013, ISDS was listed as one of the key topics discussed during negotiations.¹⁵

⁹ See generally Stefan Martinić & Mihael Maljak, *Certain Controversial Issues of EU-US Trade Negotiations Leading to the Signing of the Transatlantic Trade and Investment Partnership (TTIP)*, 10 Croatian Y.B. Eur. L. & Pol’y 341 (2014); *The Proposed Transatlantic Trade and Investment Partnership TTIP: ISDS Provisions, Reconciliation, and Future Trade Implications*, 28 Emory Int’l L. Rev. 225 (2015); Charles N. Brower & Sadie Blanchard, *What’s in a Meme? The Truth about Investor-State Arbitration: Why it Need not, and Must Not, Be Repossessed by States*, 52 Colum. J. Transnat’l L. 689 (2014) (Articles on the general debate surrounding ISDS clauses and the development of this debate).

¹⁰ OECD, ““Indirect Expropriation” and the “Right to Regulate” in International Investment Law”, OECD Working Papers on International Investment, 2004/04. <http://dx.doi.org/10.1787/780155872321> (disputes between foreign investors and states often arise when the state enacts policy that impacts the interests of private companies; this OECD working paper defines indirect and direct expropriation disputes).

¹¹ Consolidated Version of the Treaty on the Functioning of the European Union art. 64, 2012 O.J. (C 326/ 47) at- 92 [hereinafter TFEU].

¹² *Id.*

¹³ European Commission Concept Paper, *Investment in TTIP and Beyond- the Part for Reform: Enhancing the right to Regulate from Current ad hoc arbitration towards an Investment Court* at 8.

¹⁴ *Id.* (discussing various methods that could be implemented to improve ISDS clauses).

¹⁵ European Commission, *supra* note 13.

The EU's negotiating position on the inclusion of an ISDS clause began with two basic premises: 1) "To clarify and improve investment protection rules" and 2) "improve the structural integrity of arbitration."¹⁶ This is meant to insure that states' rights to regulate are not compromised by foreign investor pressure and that when disputes do occur they are handled in a fair and transparent manner.¹⁷ These include a limitation to claims, a more transparent system, and other procedural safeguards.¹⁸

The development of this clause has been slow, and concerns surrounding public policy and public protest have created tension between the EU and their population and the EU and the United States. Periodically the Commission publishes updates on the progression of the EU's position on ISDS. Recently, the EU Commission published the following statement on the ISDS clause:

Constructive discussions continued on the state-to-state dispute settlement chapter, which aims at establishing an effective mechanism for resolving any disputes between the Parties on the interpretation and implementation of the Agreement. During the ninth round both sides made further progress on developing compromise text and continuing discussions on the compliance phase.¹⁹

Public concern over ISDS clauses continued to grow and in January 2015 the European Union presented a report on investor protection. On January 13th, the Commission published a report titled "Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)."²⁰

This consultation allowed different parties, such as individuals, NGOs, and other entities, to

¹⁶ Commission Executive Summary, Investment Protection and Investor-to- State Dispute Settlement in EU agreements (Nov. 2013) at 7. available at: http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf.

¹⁷ *Infra* Part IV. (see discussion on critiques of ISDS clauses)

¹⁸ *Id.*

¹⁹ Commission Communication, Report of the Ninth Round of Negotiations For the Transatlantic Trade and Investment Partnership (Apr. 20 2015).

²⁰ TTIP Advisory Group, *Meeting Report, 17 September 2015* (Jan. 13 2015).

submit questions regarding TTIP. This consultation sought to allay the fears of the public by describing the limitations of ISDS and demonstrating that it would not restrict the regulating rights of states.²¹ The full report contains who asks these questions, the types of questions asked, and general questions about TTIP.²² Acknowledging the fear associated with TTIP and ISDS clauses, the Commission created an online document database titled “TTIP in Focus”. This database has the purpose of presenting easily accessible information to the public on TTIP and ISDS.²³ The twelfth round of negotiations concluded at the end of February 2016. Recently, the Commission published a summary of the twelfth round. This summary includes a statement that progress has been made regarding the ISDS clause, and the Commission proposed court system is being discussed.²⁴

Between the tenth and eleventh rounds the European Commission published the proposed ISDS system discussed above (the September 16th proposal). This proposal aims to create a permanent court to handle disputes that arise between foreign investors and states.²⁵ This proposal creates two different bodies, the Court of First Instance and the Court of Appeals.²⁶ This 39-page proposal lays out the structure of the courts, the types of claims that may be brought before the courts, the remedies that may be given by the courts, the jurisdictional power of the courts, and the laws that govern the courts. Article I of the proposal defines the scope of the

²¹ *Id.*

²² European Communication, *Meeting Report, 17 September 2015* (Answering questions submitted to the Commission regarding ISDS)

²³ *See generally* European Communication, *The Top 10 myths about TTIP: Separating Fact From Fiction 2015* (Explaining the 10 ten concerns of TTIP); European Communication, *Investment Protection and Investor-to State Dispute Settlement (ISDS) in EU agreements 2015* (Explaining the official commission Proposal in ISDS clauses and the role they play generally in EU agreements); European Commission, *Investment Protection in TTIP 2015* (Explaining the specifics of TTIP ISDS in a 2 page document); European Communication, *Meeting Report, 17 September 2015* (Answering questions submitted to the Commission regarding ISDS) (All of the aforementioned documents are published as a series of documents providing furthering support for the Inclusion of ISDS clauses). available at http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#_documents.

²⁴ Commission Communication, *Statement by the EU Chief Negotiator Ignacio Garvia Bercero Following the Conclusion of the 12th TTIP negotiation Round at 3* (Feb. 26 2016)

²⁵ Commission Proposal at 1.

²⁶ Commission Proposal at 3.

courts; Articles 2 through 8 deal with the procedural mechanisms the parties must adhere to before resorting to arbitrations; Articles 9 through 11 create the two courts as well as dictates the ethical rules which bind both courts; Articles 13 through 30 deal with the different procedural and substantive rules of the courts.²⁷ This proposal also includes annexes that clarify various definitions used in the proposal.²⁸ This note focuses in on how this proposal deals with five specific critiques leveled at traditional ISDS clauses.²⁹ These five critiques are: that arbitrators are inherently biased against states; the arbitration process is alarmingly non-transparent; investor state arbitration poses the risk of causing a regulatory freeze; arbitrator quality is not guaranteed in this process and the lack of appealability denies parties of a fundamental safeguard.

III. Current Commission Proposal

On September 16, 2015, the Commission published a draft Proposal for a “revised” system for investor state dispute settlement. This proposal is titled “Chapter 2: Investment” and is a 39-page Proposal that outlines the relationship between investors and the state.³⁰ The “investor court” created by this Proposal is similar to the tribunal set up by the WTO.³¹ This section will specifically analyze the five critiques mentioned above and how they relate to the proposal.

a. Arbitrator Bias

There are several provisions of this Proposal that deal directly with concerns of bias. Sub-section 4 of this Commission Proposal addresses arbitral bias. Sub-section 4 creates an

²⁷ Commission Proposal.

²⁸ *Id.* at 30.

²⁹ *Infra* Section III.

³⁰ Commission Proposal, *supra* note 5.

³¹ *Id.* at 11

Investment Court System. The concern of bias stems from the fact that in traditional arbitration the parties are able to select one of the arbitrators to overhear the dispute.³² Under this proposed system, a panel of 15 judges sits on a “tribunal of first instance.” Judges on the Tribunal of First Instance will be granted a monthly retainer fee of 2,000 euro a month (1/3 the retainer fee of those who sit of the WTO appeals tribunal). When a case comes before the tribunal, a panel of three judges is chosen to hear the case (one from the US, one from the EU and one from a third party nation).³³ The judge from the third party nation chairs the committee of judges.³⁴ In cases with only one arbitrator, the judge will be from a third-party nation.³⁵ The judges are up for appointment once every six years and are renewable once. The President of the tribunal shall within 90 days of a submission, appoint the judges to the tribunal to hear the case.³⁶

In regards to the composition of the tribunal for an individual case, this article dictates that in his or her determination the president shall consider a “rotational basis, ensuring that the composition of the divisions is random and unpredictable.”³⁷ The parties may agree to a tribunal of one judge from a third party state. This article is meant to deal with arbitrator bias on two levels. The first is the parties are no longer able to pick the arbitrators who overhear their dispute. This is furthered by the ability of the president of the tribunal to pick judges in a random manner that ensures little communication between the parties and the arbitrators. This system also helps prevent issues of single arbitrators having repeat cases with the same parties.³⁸ This Commission Proposal also contains an appeals tribunal with 6 judges (2 from each

³² *Id.*

³³ *Id.* at 17.

³⁴ *Id.*

³⁵ *Id.* at 18.

³⁶ *Id.* at 17.

³⁷ *Id.*

³⁸ *Id.*

category). Judges on the Appeals tribunal do not yet have a set salary, but the Commission recommends 7,000 euro per month.³⁹

Article 11 of this Proposal is at the heart of how this Commission Proposal deals with issues of neutrality. This article is titled “ethics” and contains four paragraphs addressing ethics and investor state dispute settlement. The level of independence required of the chosen judges is “persons whose independence is beyond doubt.”⁴⁰ This Commission Proposal also contains a code of conduct as well as detailed rules on conflicts of interest.⁴¹ These rules include dictating when a judge must remove himself or herself and when the president of the tribunal may make the determination if a conflict of interest exists.⁴²

b. Transparency

In the definition scope of this Proposal there is a reference to the UNCITRAL rules of transparency.⁴³ This reference is just one of many in this chapter meant to increase transparency. Article 18 of this Commission Proposal is titled “transparency” and binds the parties before the tribunal to follow the UNCITRAL rules of transparency.⁴⁴ The UNCITRAL rules on transparency are a body of law that is normally “recommended” but not required of parties. This Proposal dictates that the parties follow these rules.

c. The ability of nations to regulate

This Commission Proposal deals with state regulation through express provisions regarding regulation, through limiting the types of claims that may be brought by investors and mandating the deference that needs to be given to national policies in dispute. Article 2

³⁹ *Id.* at 18-9

⁴⁰ *Id.* at 20

⁴¹ *Id.* at 36.

⁴² *Id.* at 37.

⁴³ *Infra* Note 75.

⁴⁴ *Id.* at 24.

paragraph 1 of the Proposal states the following: “The Provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.”⁴⁵

Proponents of this Proposal, who state that nations will not be at risk of regulatory chill, praise this section.⁴⁶ This Proposal also limits the types of complaints that may be brought before this tribunal. One example of this is the thorough definition given to “expropriation.”⁴⁷

Expropriation is a common claim made by investors against states when dealing with investor state disputes. When a nation regulates a concerned subject that impacts an investor’s interests the investor may bring a claim of direct or indirect expropriation.⁴⁸ Annex I of this Proposal, titled Expropriation, defines direct and indirect expropriation.⁴⁹ Direct expropriation is not difficult to define as it deals directly with nationalization and formal transfer of title or outright seizure.⁵⁰

The definition of indirect expropriation is much more important to the purpose of this Proposal. Under this Proposal, indirect expropriation occurs when measures taken by the state “substantially deprives the investor of the fundamental attributes of property in its investment.”⁵¹ This Annex also requires that the tribunal consider each case on a “case-by-case basis”, and list various conditions that may be used in this determination.⁵² Furthermore, Article 28 of this Proposal, which dictates certain metrics that must be considered when rendering an award, limits

⁴⁵ *Id.* at 3.

⁴⁶ European Commission, *supra* note **Error! Bookmark not defined.** at 3.

⁴⁷ European Commission, *supra* note 5 at 9.

⁴⁸ *Id.* at 5.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 29.

awards.⁵³ This idea of clearly defining what claims may be bought and what damages may be given are done to ensure the state is able to regulate without risk of complaints by investors, and that the contents of any complaints that do come forward will be limited.⁵⁴

One area that is of specific concern is the area of environmental regulation. In three separate places in the Proposal there are references made to environmental protection. To further this area of interest, member states and the European Union are granted the right to weigh in on disputes even if they are not a direct party to the dispute. The first mention of environmental concerns is article 2 of the Proposal, quoted above.⁵⁵ In Annex 1 of this Proposal (“Expropriation”) a carve out is created that dictates that non-discriminatory loss based on policies that legitimately protect environmental concerns may not lead to investor recovery.⁵⁶ The third reference is in article 24 of the Proposal, which allows the tribunal to call upon expert’s to testify on issues concerning “environment, health and safety.”⁵⁷ Proponents of these provisions claim that these express provisions are needed to ensure that nations’ ability to regulate are not compromised. Proponents of traditional ISDS clauses believe that these clauses add nothing to the current international arbitration system.⁵⁸

This Commission Proposal also allows intervention from “non-disputing parties.”⁵⁹ Non-disputing parties are defined as the sovereign body that is related to the applicant (e.g. in a case bought by a European investor the EU or the EU member states are the non-disputing parties).⁶⁰ Non-disputing parties are given the right to participate in the dispute by submitting reports and being made privy to the reports made by the committee. This runs contrary to traditional

⁵³ *Id.*

⁵⁴ Yuka Fukunaga, *supra* note 90.

⁵⁵ European Commission, *supra* note 5 at 3.

⁵⁶ *Id.* at 27.

⁵⁷ *Id.* at 3.

⁵⁸ Stephen M. Schwebel, *infra* note 99.

⁵⁹ Commission Proposal at 26.

⁶⁰ *Id.*

arbitration, which is very private and only between the two parties. Opening up the dispute to these parties will give states more of an opportunity to protect their interests.

d. Qualifications of Arbitrators

This Commission Proposal replaces arbitrators with judges, which sit on a specialized tribunal. Normally, there is great flexibility given to parties to decide on the qualifications of the arbitrators as well as the individuals chosen to arbitrate.⁶¹ In this Commission Proposal, there are two sets of qualifications discussed (one set for the Tribunal of First Instance and another for the Appeals Tribunal). The Proposal dictates that judges of the Tribunal of First Instance “possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence.”⁶² For the Appeals Tribunal, the Judge is mandated to “possess the qualifications required in their respective countries to the highest judicial offices, or be jurists or recognized competence.”⁶³ This is another more controversial aspect of the Proposal as it takes away the arbitrator completely, and replaces it with nationally recognized judges. One major question left open by the proposal is who will be chosen to serve as these judges. The 2,000-euro a month retainer fee is noticeably lower than that given to members of the WTO tribunal.

e. Appealability

“Final and binding” is the standard language found in many arbitration clauses, and leaves no room for appeal except for exceptional circumstances.⁶⁴ This Commission Proposal

⁶¹ *Id.* at 17.

⁶² *Id.*

⁶³ *Id.* at 18.

⁶⁴ United Nations Conference on Commercial Arbitration, *supra* Note 64.

sets up an Appeals Tribunal, which has the competence to hear appealed cases. This is a simple change with vast implications, as it gives both parties an avenue to seek an appeal. This is a change that does not involve much analysis simply because it is still in its infancy in the field of international arbitration.⁶⁵ One benefit of appealability is that an appeals system in investor state arbitration allows for precedent. Traditionally, the decisions rendered by arbitrators only binds the parties involved. Appeals allows for a more predictable dispute settlement system, as well as gives the arbitrators a body of “case law” to base decisions on.

IV. ISDS Clauses

This section will consider the legitimacy the critiques leveled at traditional ISDS clauses are. When determining that there is some validity to the critique an analysis will be given to demonstrate how traditional ISDS clauses contend with this problem.

A. Arbitration Bias

Is investor state arbitration inherently biased towards the investor? There is little evidence that investors are more likely to succeed in arbitration than states. This school of thought gained prominence after President Hugo Chavez of Venezuela condemned investor state arbitration as a form of imperialism, and stated that ICSID⁶⁶ (International Centre for Settlement of Investment Disputes) tribunals have ruled in favor of investors 232 out of 234 cases in its history.⁶⁷ The revelation of this statistic sent shockwaves through the global community. Some accused ICSID of perpetuating “the inequities of the international system” and promoting a system that is “not

⁶⁵ *Id.*

⁶⁶ ICSID is a World Bank institution, which sets up a system for investors and states to settle disputes. More information on the organization is available at <https://icsid.worldbank.org/apps/icsidweb/about/pages/default.aspx>.

⁶⁷ Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth about Investor-State Arbitration: Why it Need not, and Must Not, Be Repossessed by States*, Jun, 2007, at 729.

fair, independent, or balanced.”⁶⁸ In 2012, a study was done polling data from all of the major investor-state settlement centers (UNCITRAL, ICSID, SCC).⁶⁹ This study found that 42% of concluded cases went in favor of the state, 31% in favor of the investor, and 27% settled.⁷⁰ Thus, there is no statistical proof that investors have an unfair advantage during arbitral proceedings.

The aspect of this critique, regarding the inequality between developed and developing countries is worth addressing as well. Researchers have found no correlation between a nation’s status as a developed or a developing country as impactful on the outcome of arbitration.⁷¹ The statistical support for this claim simply does not exist.

B. Transparency

Does the lack of transparency associated with investor state arbitration corrupt the system’s legitimacy?⁷² This concern stems from the fact that many traditional arbitral bodies have privacy “built in” to their default rules. Examples of this include the AAA’s International Arbitration Rules and the ICC’s standard rules.⁷³ This concern has already influenced the bodies that regulate investor state arbitration. For Example, in 2013 the UN Conference on Trade and Development published a report dealing with different methods to reform the investor state dispute system. One of the most prominent concerns addressed was the, “perceived deficit of legitimacy and transparency”.⁷⁴ UNICTRAL arbitral rules were known for their high level of

⁶⁸ *Id.*

⁶⁹ UNCITRAL is the United Nation Commission on International Trade Law; ICSID is the International Center for Settlement of investment Disputes; SCC is the Stockholm Chamber of Commerce.

⁷⁰ UNICTAD, United Nations Conference on Trade and Development: Recent Developments in Investor State Dispute Settlement (28 May 2013) at 4.

⁷¹ *Id.*

⁷² TTIP Advisory Group, *supra* note 20. at 107.

⁷³ Amy J. Schmitz, *Secrecy and Transparency in Dispute Resolution: Untangling the Privacy Paradox in Arbitration*, 54 Kan. L. Rev. 1121, 1220 (2006).

⁷⁴ IIA Issue Note No. 2: Reform of investor-State Dispute Settlement: In Search of a Roadmap, UNCTAD, at 1-2, n. 4 (May 24, 2013), available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf

secrecy until 2013, when the UNCITRAL Working Group created a set of rules that provide for a significant increase in transparency.⁷⁵

UNCITRAL accepted these rules as binding in early 2014, but any case that began before this acceptance is not privy to these rules. Furthermore, any future case may forgo their applicability through contract.⁷⁶ The creation of these rules is a big step towards dealing with this critique, but the fact that a large number of cases are not subject to these rules still lends some legitimacy to it. This may be dealt with by making UNCITRAL transparency rules mandatory in TTIP's ISDS clause. The next question is, are the transparency rules sufficient? Considering how new these rules are, it is difficult to evaluate how effective they will be in practice. It is worth noting however, that the Commission Proposal employs these rules, demonstrating the Commission has some approval of this system.⁷⁷

C. Regulatory Freeze- Environment

Does investor-state arbitration create a risk that states will be unable to regulate in the public interest? This is not just a critique leveled at ISDS but at free trade in general. There is a concern that large foreign investor presence will result in the creation of “pollution havens.”⁷⁸ Many arbitration agreements already include provisions giving states protection against investors when the disputed government act is done to further the environmental interest of the state.⁷⁹ There is

⁷⁵ U.N. Sec., Settlement of commercial disputes of the UNCITRAL Rules on Transparency in Treaty-based Arbitration to existing investment treaties- Draft Convention, Res A/CN.9/WG.II/WP.179 (Sep. 20, 2013).

⁷⁶ *Id.*

⁷⁷ *Infra* Section III.

⁷⁸ Linda J. Allen, *The North American Agreement on Environmental Cooperation: Has fulfilled its Promises and Potential? An Empirical study of Policy effectiveness*, 23 *Colo. J. Int'l Envtl L. & Pol'y* 121 at 125 (2012); see also Tamara L. Slater, *Investor- State Arbitration and Domestic Environmental Protection*, 14 *Wash. U. Global Stud. L. Rev.* 131 (2015).

⁷⁹ See e.g. Comprehensive Economic and Trade Agreement chapter 33(CETA (Sep 26, 2014); U.S. Model Bilateral Investment Treaty 2012; UK Model Bilateral Investment Treaty (2008); German Bilateral Investment Treaty 2008)for examples of treaties that include provisions dictating that investor claims cannot interfere with a state's

a concern that arbitrators will not grant deference to the environmental policies of the state and find in favor of the arbitrator. In cases such as these, there is a question of scientific fact.⁸⁰ In these cases, the arbitrator evaluates whether the state action furthers a legitimate state environmental interest or if the action arbitrarily deprives an investor of his or her “legitimate” expectations. Those skeptical of international arbitration point to disputes such as *Metalclad Corp. v. Mexico*, which deemed a governmental regulatory act as “tantamount to expropriation”, setting off a furious debate as to the ability of private arbitrators to declare domestic governmental acts as “expropriation”.⁸¹

Currently, there is no clear standard for what deference must be given to national policies in traditional arbitration. The current standard gives arbitrators “full discretion in assessing the probative value of the evidence before the court.”⁸² ICSID rule 34.1 stipulates that “[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value. An arbitral tribunal also has the right to appoint experts on its own initiative to report to it on technical issues.”⁸³ There is an interesting comparison that may be drawn between the evaluation of national policies based on environmental concerns on the global level and those

ability to regulate. See also Gabriel M. Lenter, *A Uniform European Investment Policy?: The unwritten model BIT*, 2 J.L. & Admin. Sci. 156 at 159 (2014) (*Stating* a clarification is included that the right to regulate should prevail over economic impact of state measures when they protect the public interest in a non-discriminatory way).

⁸⁰ Tamara L. Slater, *Investor-State Arbitration and Domestic Environmental Protection*, 14 Wash. U. Global Stud. L. Rev. at 138(2015); see also Yuka Fukunanga, *Standard of Review and ‘Scientific Truths’ in the WTO Dispute and Investment Arbitration*, J. Int. Disp. Settlement 3 (2012).

⁸¹ See generally *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB (AF) 97/1, Final Award at 28, available at

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC542_En&caseId=C155; Lucian J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United States of Mexico*, 10 Min J. Global Trade 209 (2001); Charles N. Brower & Sadie Blanchard, *What’s in a Meme? The Truth about Investor-State Arbitration: Why it Need Not, and Must Not, Be Repossessed by States*, Nov. 2014 at 749.

⁸² Yuka Fukunanga, *Standard of Review and ‘Scientific Truths’ in the WTO Dispute and Investment Arbitration*, 2012 at 569. (*Citing* Charles N Brower, *Evidence Before International Tribunals: The Need for some Standard rules* (1994 28 Int’l Law 47. Cf Ruth Teitelbaum, ‘recent fact-finding Developments at the International Court of Justice (2007) 6 Law & Prac Int’l Cts & Tribunals).

⁸³ ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) Rule 34.1 (1986).

that occurred within the EU. When the European Union was in its infancy, it was not uncommon for countries to impose tariffs or outlaw certain goods and justify these laws based on environmental concerns or the public good.⁸⁴ In these cases, The Court of Justice of the European Union, formerly European Court of Justice, evaluated whether these measures were legitimately protecting environmental or public policy concerns, or if they were protectionist and discriminatory against foreign investors or goods.⁸⁵ In an era of increasingly globalized trade and investment, the reduction of barriers will take a similar route. There will be many cases in the future that will look into whether these environmental policies are legitimate or not. For this critique to be dealt with, there needs to be a system that allows barriers to lower without compromising the ability of nations to enact their own laws to protect the environment. The discretion associated with this critique, even if past cases demonstrate a level of environmental deference, is enough to worry environmentalists.

There are a few cases that demonstrate how arbitrators in practice have handled claims that involve national environmental policies. In *S.D. Myers v. Canada*, the arbitrators applied NAFTA (North American Free Trade Agreement) rules giving the governmental act a “high level of deference” in regards to their environmental policy.⁸⁶ Chapter 11 of NAFTA mandates that tribunals “do not have an open-ended mandate to second guess government decision

⁸⁴ See generally *Commission of European Communities v. Ireland*, Case 249/81 (1982); *Procureur du Roi v. Benoît and Gustave Dassonville*, Case 8/74 (1974). For a general discussion on EU protectionism and protection see *N. Countouris & S. Engleblom, 'Protection or Protectionism?' - A Legal Deconstruction of the emerging false dilemma in European Integration*, UCL Working paper 1/2015.

⁸⁵ *Commission of European Communities v. Federal Republic of Germany*, Case 178/ 84 (1987). (This case analyzed a German law that impacted the sale of foreign beers in Germany. Germany argued this law was in place for the public good; the court in its analysis determined that this was not a legitimate public interest law and therefore was contrary to EU Law).

⁸⁶ Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth about Investor-State Arbitration: Why it Need Not, and Must Not, Be Repossessed by States*, Nov. 2014 at 752 (Stating The determination must be made in the light of the high measures of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders).

making.”⁸⁷ In this dispute, the arbitrators found that for the investor to prevail against this policy, he or she must prove that he or she had been treated in an unjust or arbitrary manner.⁸⁸ In *Methanex v. U.S.*, it was found that California’s ban on Methyl Tertiary Butyl Ether was a legitimate public health policy of the state. This tribunal found that in cases where the science involved was disputed, deference must be given to the state that enacted the disputed policy.⁸⁹ Other tribunals have taken a less deferential approach and have required more of a balancing test between the state and investor’s interests.⁹⁰ One tribunal required that “a weighing of the claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interest of the other.”⁹¹

Cases such as these give some legitimacy to this critique. There is a concern that this level of arbitral discretion will not guarantee the right of a state to protect its environmental interests.⁹² This can be solved simply by adding a requirement, as done under chapter 11 disputes described above, that dictates a level of deference must be given to national regulation.⁹³

D. Quality of Arbitrators

Does the current scheme of choosing arbitrators not do enough to ensure that the chosen

⁸⁷ *S.D. Myers inc. v. Canada*, P 263 (Nov. 13, 2000) (Stating when interpreting and applying the “minimum standard”, a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision making).

⁸⁸ Charles N. Brower & Sadie Blanchard, *What’s in a Meme? The Truth about Investor-State Arbitration: Why it Need Not, and Must Not, Be Repossessed by States*, Nov. 2014 at 724

⁸⁹ In the Matter of an International Arbitration under Chapter 11 of the North America Free Trade Agreement and the Uncitral Arbitration Rules between Methanex and United States of America (Explaining that when a policy regulates fairly and does not discriminate it does not require reparations).

⁹⁰ Yuka Fukunanga, *Standard of Review and ‘Scientific Truths’ in the WTO Dispute and Investment Arbitration*, Sep. 2012 (Citing Partial Award (17 March 2006), *Saluka Investments BV (The Netherlands) v. Czech Republic*, para. 306.)

⁹¹ *Id.*

⁹² Yuka Fukunanga, *Standard of Review and ‘Scientific Truths’ in the WTO Dispute and Investment Arbitration*, 2012 at 3.

⁹³ Chapter 11 disputes are disputes bought under the North American Free Trade Agreement (NAFTA). For a complete description of these rules are available at <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Overview-of-the-Dispute-Settlement-Provisions>.

arbitrators are well qualified and able to handle the disputes brought before them? To answer this question, the arbitral selection rules from UNCITRAL, ICSID, and NAFTA will be examined. UNCITRAL model rules are silent as to the qualification of the arbitrators and suggest that the parties either agree on a solo arbitrator, or use a three-arbitrator system.⁹⁴ The three-arbitrator system dictates that each party selects an arbitrator and those two arbitrators agree on a third.⁹⁵ In regards to qualifications, ICSID rules simply require the parties send the Secretary General a list of their chosen arbitrators' qualifications.⁹⁶ NAFTA rules provide that arbitrators shall possess "good character, high standing and repute and have been chosen strictly on the basis of objectivity, reliability, sound judgment, and with a general familiarity with international trade law."⁹⁷ While these rules provide little guidance, practitioners rely on these rules to pick those who are experienced in international trade and commercial disputes.⁹⁸ Parties to these disputes often comment that they feel more comfortable with the judgment of an arbitrator who is experienced in international commercial disputes over a standard national judge.⁹⁹

E. No Appealability

Does lack of appeal options take away a vital safeguard to ensure that disputes are properly handled? Traditional commercial arbitration has few avenues for appeal.¹⁰⁰ Investor

⁹⁴ United Nations Commission of International Trade Law, UNCITRAL arbitration Rules (2010) article 8-10 at 8.

⁹⁵ *Id.*

⁹⁶ International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules (2006) article 21 at 65-6.

⁹⁷ North American Free Trade Agreement, U.S.- Can.- Mex., Dec. 17, 1992, 32 I.L.M. 289, annex 1901.2.

⁹⁸ Brower & Blanchard, *supra* 86.

⁹⁹ Stephen M. Schwebel, Comments on Investor State Arbitration, Fordham Law School International Law Society Conference (Oct. 2 2015).

¹⁰⁰ United Nations Conference on Commercial Arbitration, Convention on the Recognition and Enforcement and Foreign Arbitral awards (1958) article 5 (Describing situations where an arbitral award may be challenged).

state arbitration, which commonly uses ICSID, has even fewer.¹⁰¹ Appealability is normally put aside to ensure that the arbitration process is efficient. Many studies and practitioners believe that an appeals process would not slow down the arbitration process. To the contrary, recent comparisons between World Trade Organization (WTO) disputes and ICSID disputes demonstrate that appeals do not inherently slow down the legal process. WTO disputes, which experience appealability, are still on average shorter than ICSID arbitrations.¹⁰² The investor state arbitration system would benefit from a more defined appeals system. Furthermore, an appeals system will help create a system of precedent that is currently lacking in the investor state arbitration system.

The legitimate critiques are lack of transparency, fear of arbitral deference against national policies, and a lack of an appeals system. These three critiques are not unique to TTIP and as discussed above have already been dealt with by different initiatives of the international arbitration system. With respect to transparency, bodies such as UNCITRAL are beginning to enact laws of transparency. In regards to deference towards national policies, many individual investment treaties, such as NAFTA, already include provisions regarding a nation's right to regulate. The appeals process is in a younger stage of development but it is already recognized as a potential positive shift for investor state arbitration.¹⁰³ The Commission Proposal, discussed in Section III, looks to massively deviate from traditional ISDS clauses but in truth the critiques that are legitimate may be handled well within the ISDS system.

¹⁰¹ Yenkong Ngangjoh-Hodu, *ICSID Annulment Procedure and the WTO Appellate System: The case for an Appellate System for International Arbitration*, 6 J. Int. Disp. Settlement 308 (2015).

¹⁰² *Id.* at 312.

¹⁰³ Yenkong Ngangjoh-Hodu, *ICSID Annulment Procedure and the WTO Appellate System: The case for an Appellate System for International Arbitration*, 2015.

V. The Proposed System as a Solution

This section takes the five proposal revisions from above (Section III) and evaluates if they accomplish what they claim to accomplish. This Commission Proposal deviates from traditional ISDS clauses in many fundamental ways. While proponents of this Commission Proposal believe that this will create a new, fairer, and more efficient way to handle investor state dispute settlement, many are skeptical that this tribunal system makes any real improvements to the current system and if enacted would harm investor state relations. This note concludes that the aspects of this Proposal that are worth keeping are already being implemented in the investor arbitration world and therefore this Proposal is not necessary. Rather, TTIP should implement an ISDS clause that includes such modifications as more transparency, concrete assurance of deference to national policies, and a limited appeals process.

a. Arbitral Bias

The Commission Proposal fails to adequately improve upon the existing system of investor state dispute settlement. The thought process behind the Proposal is simple: if the parties are unable to select the judges on the tribunal, and a strict ethics code is engrained into the Proposal, then no risk of bias exists.

Under the traditional arbitration system, the parties to the dispute choose a three-person arbitration panel.¹⁰⁴ Traditionally, each party picks one arbitrator and the two arbitrators agree on a third.¹⁰⁵ Under this new system, the judges on the tribunal are picked by the state, and are up for a new term six years after their appointment. Proponents of this Proposal claim that these

¹⁰⁴ Brower & Blanchard, *supra* note 86.

¹⁰⁵ *Id.*

judges will not favor the investor, as they have no relation to the investor. This Proposal swings the pendulum in the opposite direction, as now all the judges have relationships with the states. This aspect of the Proposal does not make any positive changes to ISDS clauses. With little proof that today's ISDS system is unfairly biased toward investors, this system works more to bias dispute settlement in favor of states. This aspect of the Proposal does too much to change regular ISDS clauses and should not be part of the final agreement.

b. Transparency

The transparency mechanism set forth in this Proposal is a good change to traditional ISDS clauses. The idea of transparency in international arbitration is not unique, and case law has developed in several jurisdictions in regards to when documentation from arbitration may be made public.¹⁰⁶ This sentiment is even stronger when investor state disputes are considered. The UNCITRAL rules that are mentioned in the Proposal are a good way to ensure a certain level of transparency when dealing with investor state arbitration. This change helps deal with the public fear that the government is sacrificing the wellbeing of its people by agreeing to arbitration. Furthermore, transparency is a way to increase public awareness of the truth about arbitration without sacrificing the benefits derived from investor state arbitration.

c. The ability of nations to regulate

In a recent panel on investor state arbitration, former President of the International Court of justice Stephen M. Schwebel vocalized confusion at the need to expressly include provisions regarding the ability to regulate in the Proposal.¹⁰⁷ During this panel Justice Schwebel, as well as other panelists, discussed that it was already common practice in the arbitration world to give a

¹⁰⁶ European Commission, *supra* note 5.

¹⁰⁷ Stephen M. Schwebel, Comments on Investor State Arbitration.

level of deference to national policies made to protect the public good. To practitioners in the field, the express inclusion of these provisions provide more comfort than any actual substantial changes to the investor state dispute settlement system.¹⁰⁸ Under NATO Chapter 11 claims, as demonstrated by the cases above, tribunals have shown deference to national policies, even when the science forming the basis of the policy is not universally agreed upon. The inclusion of this provision is beneficial in that it will help insure that a certain level of deference is always given to national policies. Currently, deference is common but not always mandated.¹⁰⁹ The inclusion of a deference clause will insure that deference is always given, and public fears regarding this matter will be dealt with.¹¹⁰

The inclusion of the non-disputing parties is something that deviates from the traditional dispute resolution process as it widens the included parties beyond those directly involved in the dispute. One of the benefits of international arbitration is that it is supposed to minimize the time and cost of the settlement, and the inclusion of non- disputing parties is contrary to this.¹¹¹ This is similar to transparency in the sense that before this Proposal the role of third parties has been considered in cases where third party interests are implicated.¹¹² In regards to investor state arbitration, there are times where the European Union, an EU member state, or the United States may be impacted by the outcome of a dispute, but may not be a direct party to the dispute.¹¹³ The inclusion of these provisions should be applied in a limited matter. The inclusion of these provisions would not drastically deviate from traditional ISDS clauses and may help protect the valid interests of the non-disputing parties listed above.

¹⁰⁸ *Id.*

¹⁰⁹ Slater, *supra* note 80.

¹¹⁰ *Id.*

¹¹¹ UNCITRAL *supra* note 94.

¹¹² Brower & Blanchard, *supra* note 86 at 717. (Describing the various mechanisms that already make investor state arbitration more public friendly).

¹¹³ European Commission, *supra* note 5 at 11.

d. Qualifications

The change in qualifications is perhaps the most drastic change from traditional ISDS clauses. Under traditional ISDS clauses the parties are normally given a loose set of rules to follow in regards to the qualifications of the arbitrators. This Proposal sets up a tribunal system in which the qualifications of the judges are mandated. The Proposal bases the requirements of the tribunal judges on the national requirements for jurists from each nation. This debate over qualifications is not unique to investor state arbitration, but is at the very heart of a debate that has existed from the beginning of arbitration. When two parties submit to arbitration the parties often do so because they believe the arbitrators are better qualified than many regular judges.¹¹⁴ In the United States, many judges are elected and may not have a background in international investor disputes. When arbitrators are chosen, they are chosen from a group of professors, practitioners, and experts.¹¹⁵ There is an ongoing debate whether national judges or these chosen arbitrators are best to overhear these disputes. This Proposal ends this debate by dictating that those possessing the qualifications of national judges are used. There is too little evidence of the superiority of national judges to mandate such a drastic change from the current system. Furthermore, national judges are more likely to be well versed in national law and may apply it to cases where different law should govern.

e. Appealability

The ability to appeal arbitration is another idea that is frequently discussed. The idea of appealability is mostly contrary to traditional notions of arbitration as it slows down what is

¹¹⁴ *S.D. Myers V. Canada*, *supra* Note 87.

¹¹⁵ Brower & Blanchard, *supra* note 86.

meant to be a very efficient process. This idea of appeals slowing down arbitration to the point that it makes the process moot is unfounded. The WTO system allows for an appeals process and on average those cases settle as quickly if not quicker than the arbitration proceedings before ICSID.¹¹⁶ The idea of appealability should be included in any agreement between the US and the EU, but in a limited manner to ensure appeals are not just used in an attempt to delay payment. It should also be noted that if the WTO system is to be used as a model, appeal rates would be very high.¹¹⁷ The idea of precedent in investor state arbitration benefits the current system by creating a more predictable investor state arbitration system, as well as benefits arbitrators with a body of case law to follow.

VI. Conclusion

This Proposal is ambitious in scope but in truth does little to actually change the current methods of investor state dispute settlement. The changes endorsed in this note are changes that are already occurring within the investor state arbitration world. The rejected suggestions are those that do too much to deviate from traditional ISDS clauses with little benefit.

The EU and U.S. should agree on provisions that make traditional ISDS more transparent, require deference to public policy, and include limited methods for appeal. The idea of transparency is argued by many practitioners and is already in the process of being adopted. Deference towards national policies also have become commonplace through various model BITs and agreements such as NAFTA. Finally, the principle of appealability, while still in its infancy in investor state arbitration, is beginning to become more accepted. These changes are simply modifications to existing trade agreements and do not require a complete overhaul. The

¹¹⁶ Ngangjoh- Hodu, *supra* note 103 at 4.

¹¹⁷ *Id.*

changes that are considered complete overhauls in the Proposal will now be discussed.

This Proposal attempts to put into place a court system that replaces arbitrators with a panel of judges. The idea of shifting from arbitrators to judges is meant to increase the overall quality of investor state dispute settlement. There is no evidence that these national judges will be better qualified than their arbitral counterparts.¹¹⁸ Without evidence it would be unwise to deviate from what practitioners and states have come to rely on as the norm in investor state conflict.

This Proposal ambitiously places itself as a “new” type of investor state mechanism. The simple truth is that most of the proposed changes are already occurring or have occurred within the international arbitration world. The drastic changes do not present adequate benefits to justify such departure from traditional ISDS clauses. The EU and the U.S. should introduce a modified version of an ISDS clause with the changes discussed above, and not make unnecessary changes to a system that is already implemented in a vast majority of investment agreements.¹¹⁹

When investors place their interests in the jurisdiction of foreign states there is always a chance that a conflict will arise. When the state becomes involved with the interests there is always a level of uncertainty for the investor as to whether there is a forum for the investor to have disputes settled. With this fear came hundreds of ISDS clauses and agreements that involve investors and foreign states. TTIP, the largest free trade agreement in history, is nearing completion. An ISDS clause with these modifications will ensure a system that insures quality and fairness for all parties involved. ISDS clauses are not an evil force as the public has been taught to believe, but instead, an investor state dispute mechanism that with some modifications will provide a fair system for investor state disputes under the TTIP.

¹¹⁸ *Supra* Section IV, on standard ISDS clauses.

¹¹⁹ TTIP Advisory Group, *supra* note 20.