

# *Fordham International Law Journal*

---

*Volume 39, Issue 5*

2016

*Article 8*

---

## Investor-State Arbitration Mechanism Negotiations in the TTIP: An Unpopular Endeavor into the Potential Politicization of Dispute Settlement

Chiara Coppotelli\*

\*

Copyright ©2016 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

## COMMENT

# INVESTOR-STATE ARBITRATION MECHANISM NEGOTIATIONS IN THE TTIP: AN UNPOPULAR ENDEAVOR INTO THE POTENTIAL POLITICIZATION OF DISPUTE SETTLEMENT

*Chiara Coppotelli\**

INTRODUCTION .....	1356
I. TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: FREE TRADE AGREEMENT AND INVESTMENT CHAPTER .....	1360
A. The Transatlantic Trade and Investment Partnership .....	1360
B. Free Trade Agreements.....	1363
II. GENERAL OVERVIEW OF INVESTOR STATE ARBITRATION AND THE INVESTOR STATE DISPUTE SOLUTION CLAUSE IN THE TTIP .....	1364
A. Bilateral Investment Treaties and the Main Provisions of International Investment Agreements .....	1364
1. Provisions Regarding the Jurisdiction of the Tribunal.....	1365
2. Provisions Regarding Substantive Rights of the Investor .....	1368
3. Parallel Proceedings .....	1376
B. European Union and United States Approaches during the Negotiations of the TTIP .....	1377
1. European Union Background .....	1378
2. United States Background.....	1379

---

\* LLM in International Business and Trade law from Fordham University, and Double Degree student from Luiss Guido Carli in Rome. The author would first like to thank Stephanie Torkian and Thomas Callahan for their help, advice, and time through the multiple drafts of this work. Finally, the Author would like to especially thank Alastair Baird for his support and help in staying motivated during the entire writing process. This Comment is dedicated to the person who has always been an inspiration in writing, Giuseppe Coppotelli.

3. The United States and European Union on the Twelve Issues.....	1380
a. Scope of the Substantive Investment Protection Provisions .....	1380
b. Non-Discriminatory Treatment for Investors .....	1380
c. Fair and Equitable Treatment.....	1381
d. Expropriation .....	1381
e. Ensuring the Right to Regulate and Investment Protection.....	1382
f. Transparency in ISDS.....	1382
g. Multiple Claims and Relationship to Domestic Courts.....	1383
h. Arbitrator Ethics, Conduct and Qualifications.....	1383
i. Reducing the Risk of Frivolous and Unfounded Cases.....	1384
j. Allowing Claims To Proceed (Filter) .....	1384
k. Guidance by the Parties on the Interpretation of the Agreement.....	1385
l. Appellate Mechanism and Consistency of Rulings.....	1385
III. ANALYSIS OF THE US AND THE EUROPEAN UNION APPROACHES TO THE TTIP.....	1386
CONCLUSION.....	1388

### *INTRODUCTION*

On June 17th 2013, representatives for the European Union and the United States gathered at the G8 Summit in Northern Ireland and announced their commitment to the Transatlantic Trade and Investment Partnership (the “TTIP”) for the first time.<sup>1</sup> That day represented a special moment for relations between the European

---

1. See President Obama, European Commission President Barroso, and European Council President Van Rompuy, Remarks on the Transatlantic Trade and Investment Partnership (June 17, 2013), <https://www.whitehouse.gov/the-press-office/2013/06/17/remarks-president-obama-uk-prime-minister-cameron-european-commission-pr>; *Presidents Barroso and Obama Announce Launch of TTIP Negotiations*, DELEGATION E.U. TO U.S. (Jan. 11, 2014), <http://www.euintheus.org/press-media/ttip-launch-with-president-obama-at-g8-a-powerful-demonstration-of-our-determination-to-shape-an-open-and-rules-based-world-says-president-barroso/> (discussing how politicians have stressed the importance of TTIP).

Union and the United States.<sup>2</sup> The TTIP, if ever realized, will integrate two of the most developed, sophisticated, and certainly largest economies in the world.<sup>3</sup> Since its ideation, both parties recognized that concluding the TTIP did not represent an easy task, but they promised to find convincing answers to legitimate concerns and solutions to thorny issues.<sup>4</sup>

The purpose of the TTIP is to reaffirm the strong partnership and the shared values of democracy and individual freedom held by the European Union and the United States in a common commitment to create jobs and sustainable growth.<sup>5</sup> These parties aim to build their common wealth and a safer, more prosperous world for future generations.<sup>6</sup>

If ratified, the TTIP would feature a chapter on investments and an investor-state arbitration clause.<sup>7</sup> Investments play a central role in any modern economy and today, investments are commonly made across borders.<sup>8</sup> When companies invest they create new trade benefits, jobs, and income.<sup>9</sup> International investors need provisions that ensure certain protections, such as assurances that they will be treated in the same manner as domestic investors.<sup>10</sup> Sometimes, domestic courts are not appropriate to resolve trans-border investment disputes, especially when the investor is victim to expropriation without proper compensation, is the subject of discrimination, or is deprived of due process.<sup>11</sup> In such cases, the collection of protections known as Investor-State Dispute Solutions (“ISDS”) is important as it provides for a neutral forum for resolving these international

---

2. *See supra* note 1 (addressing the relevance of the episode).

3. *See id.* (stating the importance of the TTIP).

4. *See id.* (referring to the understaking of the parties).

5. *Joint Statement EU-US Summit*, E.U. EXTERNAL ACTION (Mar. 26, 2014), [http://www.eeas.europa.eu/statements/docs/2014/140326\\_02\\_en.pdf](http://www.eeas.europa.eu/statements/docs/2014/140326_02_en.pdf).

6. *See id.* (describing the final aim of the parties).

7. *See* European Commission, *Investment Protection and Investor-to-State Dispute Settlement (ISDS) in European Union Agreements*, EUROPA (Mar. 2014), [http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc\\_152273.pdf](http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152273.pdf); Mark Weaver, Comment, *The Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation, and Future Trade Implications*, 29 EMORY INT'L L. REV. 225, 235-36 (2014) (specifying the contents of the TTIP).

8. *See supra* note 7 (articulating the relevance of foreign investments).

9. *See id.* (disclosing the advantages of investments).

10. *See id.* (revealing what investors need).

11. *See id.* (explaining why domestic courts are not apt for cross border investment dispute).

disputes.<sup>12</sup> This means that the parties agree to give governments the right to regulate in the public interest, to define terms like “indirect expropriation” and “fair and equitable treatment,” and to prevent abuse of the system and conflicts of interest in arbitrators by establishing a code of conduct.<sup>13</sup> Investment arbitration can be formulated by bilateral treaties (international agreements between two parties), multilateral treaties (an international agreement between several parties), and foreign investment law enacted by states at the national level.<sup>14</sup>

The ISDS represents a critical aspect within the TTIP.<sup>15</sup> Opponents to the TTIP argue that bilateral investment treaties (“BITs”) and ISDS give foreign investors “special rights” unavailable to domestic firms.<sup>16</sup> Since foreign nationals are empowered to challenge a sovereign state, opponents affirm that they can easily attack a government’s policy and deter governments from enacting sound policies. For example, critics allege that states will fail to benefit the environment or to improve the health or safety of their populations, fearing that those policies might trigger an ISDS action from a foreign investor.<sup>17</sup>

The ISDS system constitutes one of the most discussed topics in the modern era.<sup>18</sup> The number of suits filed against countries at the International Centre for Settlement of Investment Disputes (“ICSID”)

12. *See id.* (stating one characteristic of the ISDS).

13. *See id.* (clarifying what an ISDS clause usually provides for).

14. *See* CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION* 26 (2008); *International Investment Agreements Navigator*, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA/IiasByCountryGrouping#iiaInnerMenu> (laying out where investment arbitration can usually be found).

15. *See* Michael Robinson, *Is democracy threatened if companies can sue countries?*, BBC (Mar. 31 2015), <http://www.bbc.com/news/business-32116587>; *Europeans Don’t Want Investor State Dispute Settlement in Trade Agreements*, STOP TTIP, <https://stop-ttip.org/europeans-dont-want-investor-state-dispute-settlement-trade-agreements/>; Marley Weiss, *Investor-State Dispute Settlement*, OUTSOURCING JUSTICE (Mar. 12, 2015), <http://www.outsourcingjustice.com/investor-state-dispute-settlement/> (introducing critical aspects of the ISDS clause in the TTIP).

16. *See generally* Scott Miller and Gregory N. Hicks, *Investor-State Dispute Settlement: A Reality Check*, CSIS (Jan. 2015), [http://csis.org/files/publication/150116\\_Miller\\_InvestorStateDispute\\_Web.pdf](http://csis.org/files/publication/150116_Miller_InvestorStateDispute_Web.pdf); *see also* *Investor-state dispute settlement: special rights for investors, serious threat to our climate*, TRANSNAT’L INST. (Nov. 12, 2015), <https://www.tni.org/en/event/investor-state-dispute-settlement-special-rights-for-investors-serious-threat-to-our-climate> (discussing foreign investors rights in investor state arbitration).

17. *See* Stop TTIP, *supra* note 15; Weiss, *supra* note 15 (introducing critical aspects of the ISDS clause in the TTIP and analyzing some criticism of the ISDS clause).

18. *See supra* note 7 (analyzing what the ISDS represents in the modern society).

is now around 600, and it grows an average of one case per week.<sup>19</sup> Concerns come especially from civil society. One of the latest examples is that, after the twelfth round of TTIP negotiations, 280 civil society organizations from across Europe (with the support of US and Canadian groups) issued a statement calling on the European Commission and the United States Trade Representative to eliminate the ISDS from the TTIP and all other trade agreements.<sup>20</sup> The main concerns relate not only to criticisms of the exclusive rights granted to foreign investors and their ability to challenge the public policy of a sovereign state, but also the lack of democratic principles, the impossibility to change the rules after the treaty will be signed, and the absence of local remedies.<sup>21</sup> Finally, the statement questions whether TTIP's ISDS provisions provide any actual use, since parties usually have legal systems perfectly capable of handling disputes with foreign investors without referring to these mechanisms.<sup>22</sup> Even if it is important to consider the strong concerns over the ISDS in the TTIP and in general, this Comment will focus primarily on legal aspects, trying to speculate on possible future developments in the negotiation of the TTIP.

This Comment first analyzes the structure of the possible ISDS provision in the TTIP. Part I represents an overview of the TTIP, by laying out what this free trade agreement entails and by discussing the agreement's investment chapter, which constitutes one of the twenty-four chapters contained in the proposal and included in the Rules. Part II will consider the typical features and structure of International Investment Agreements ("IIAs"), as well as United States and European Union positions, outlining the differences and the similarities between the United States' and European Union's approach to IIAs. Part III will discuss the negotiation of TTIP and some of the provisions that have been subject to public consultation in Europe. This Comment concludes that the United States' and

---

19. See 280 organizations from Europe, Canada and the US denounce the inclusion of investors' rights in TTIP, SEATTLE TO BRUSSELS NETWORK (Feb. 22, 2016), <http://www.s2bnetwork.org/isds-statement-feb2016/> [hereinafter 280 organizations]; Claire Provost and Matt Kennard, *The obscure legal system that lets corporations sue countries*, GUARDIAN (June 10, 2015), <http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid> (stating some data related to ISDS system).

20. See 280 organizations, *supra* note 19 (introducing Statement against Investor Protection in TTIP, CETA, and other trade deals).

21. See *id.* (listing some criticisms of ISDS analyzed by the statement).

22. See *id.* (wondering about the real utility of these systems).

European Union's positions are similar, and that conflicts between the two approaches are even potentially reconcilable.

*I. TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP:  
FREE TRADE AGREEMENT AND INVESTMENT CHAPTER*

This Part explores the current status of the TTIP, defines the main aspects of this agreement and describes the rationale behind the agreement's investment chapter. Part I.A discusses the actual negotiations on the TTIP as well as its main purpose and structure. Part I.B briefly outlines what free trade agreements ("FTAs") are, and distinguishes them from other similar agreements— in particular from BITs.

*A. The Transatlantic Trade and Investment Partnership*

The TTIP is a proposed FTA currently under negotiation between the United States and European Union.<sup>23</sup> The TTIP deals with three different areas: market access, regulatory components, and rules.<sup>24</sup> Concerning the area of market access, the TTIP's goal is to increase market access through the elimination of barriers to trade and investment in goods, services, and agriculture, as well as the further opening of government procurement markets. Currently, the average tariffs between the United States and the European Union are already relatively low, at an average rate of about 3.5% *ad valorem* for the United States and about 5.5% for the European Union.<sup>25</sup> However, there are higher tariffs on certain import-sensitive product categories such as dairy, sugar and confectionery, beverages and tobacco, fish and fish merchandises, and textiles and apparel.<sup>26</sup> Given the

---

23. See generally Shayerah Ilias Akhtar & Vivian C. Jones, CONG. RESEARCH SERV., R43158, PROPOSED TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP): IN BRIEF (2013); European Commission, *The Transatlantic Trade and Investment Partnership (TTIP): TTIP explained*, EUROPA (Mar. 19, 2015) [http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152462.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152462.pdf) [hereinafter European Commission].

24. See Akhtar & Jones, *supra* note 23, at 1; European Commission, *supra* note 23, at 1 (analyzing the main parts of the TTIP).

25. See Akhtar & Jones, *supra* note 23, at 6; European Commission, *supra* note 23, at 1 (outlining how US-European Union market works and how tariffs currently stand).

26. See Akhtar & Jones, *supra* note 23, at 6; *The Transatlantic Trade and Investment Partnership (TTIP) TTIP explained*, *supra* note 23, at 1 (discussing which products feature higher tariffs between United States and European Union).

magnitude of the transatlantic relationship, further elimination and reduction of tariffs could yield significant economic gains.<sup>27</sup>

In relation to the regulatory issues, the TTIP aims to enhance regulatory coherence and cooperation between the United States and European Union.<sup>28</sup> The crux of the TTIP, as regarded by many commentators, hinges on regulatory issues.<sup>29</sup> Fundamental sectors of interest include automobiles, chemicals, cosmetics, information communication technologies, medical devices, pesticides, and pharmaceuticals.<sup>30</sup> However, there is disagreement on whether a comprehensive agreement on regulatory issues will actually be reached, as stark differences between the United States and European Union still exist.<sup>31</sup> First, the United States and European Union have been discussing various regulatory disparities, and although many have been resolved, a number of issues still remain.<sup>32</sup> Second, some of the regulatory differences depend on divergent public preferences and values.<sup>33</sup> For example, European consumers usually prefer “naturally produced” foods, while American consumers are inclined to accept products developed by alternative forms of agricultural production, such as genetically modified organisms (“GMOs”).<sup>34</sup> Third, while the European Union has a preventative decision-taking approach in the case of risk management (known as the “precautionary principle”), some United States enterprises think that this approach can adversely impact businesses since it may lead to

---

27. See Akhtar & Jones, *supra* note 23, at 6; *The Transatlantic Trade and Investment Partnership (TTIP) TTIP explained*, *supra* note 23, at 1 (addressing that a change of the tariffs could have a strong economic impact).

28. See Akhtar & Jones, *supra* note 23, at 7; European Commission, *supra* note 23, at 1 (affirming what the regulatory chapter will realize).

29. See Akhtar & Jones, *supra* note 23, at 7; see generally Irving A. Williamson et. al., *Trade Barriers that U.S. Small And Medium-sized Enterprises Perceive as Affecting Exports to the European Union*, USITC (March 2014), <http://www.usitc.gov/publications/332/pub4455.pdf> (elucidating that the regulatory chapter is often considered the most important part of the TTIP).

30. See Akhtar & Jones, *supra* note 23, at 7; see generally *supra* note 29. (listing the main areas of the regulatory chapter).

31. See Akhtar & Jones, *supra* note 23, at 7; See generally *supra* note 29. (noting that there will be difficulties in finalizing the agreement).

32. See Akhtar & Jones, *supra* note 23, at 7; See generally *supra* note 29 (addressing problems related to the regulatory chapter).

33. See Akhtar & Jones, *supra* note 23, at 7; See generally *supra* note 29 (stating that some of the differences between United States and European Union relate to preferences and values).

34. See Akhtar & Jones, *supra* note 23 at 7; See generally *supra* note 29 (illustrating an example of different preferences between United States and European Union consumers).



stringent regulatory limitations.<sup>35</sup> The European Union is discussing these regulatory standards with the United States on the strict condition that no concession is made regarding the levels of protection currently in Europe, such as health shields, environmental safeguards, and consumer protections.<sup>36</sup> Regulatory calibration and mutual recognition will only be possible if confluence on the safety and environmental standards is assured.<sup>37</sup>

Finally, the TTIP will develop new rules in areas such as foreign direct investment, intellectual property rights, labor, the environment, and emerging areas of trade.<sup>38</sup> Many trade rules are already regulated by the World Trade Organization (“WTO”), of which both the United States and European Union are members, which means that both parties will probably refer to them.<sup>39</sup> Other trade-related rules, while not addressed in the WTO, have become a standard part of United States and European Union FTAs with other countries.<sup>40</sup> The negotiations could also break new ground on other issues that are not heavily featured (or even present) in prior FTAs and multilateral agreements, such as rules concerning state-owned enterprises.<sup>41</sup>

An agreement on market access, regulations and rules is fundamental because it represents an opportunity to boost transatlantic economic growth.<sup>42</sup> Both limitations on market access and differences on rules and regulation often cost time and money.<sup>43</sup>

---

35. See Akhtar & Jones, *supra* note 23 at 7; See generally *supra* note 29 (clarifying that while European Union prefers a precautionary approach, United States disagrees, considering the impact on small-business activities). Concerning the precautionary principle look at article 191 TFEU.

36. European Commission, *supra* note 23, at 2 (describing the conditions imposed by European Union for the negotiation of regulatory measures).

37. See *id.* (noting which guarantee will probably be necessary for reaching the agreement).

38. See Akhtar & Jones, *supra* note 23, at 8; see generally Clara Weinhardt & Fabian Bohnenberger, *TTIP vs. WTO: Who sets global standards?*, EURACTIV (Jan. 13, 2016), <http://www.euractiv.com/section/sustainable-dev/opinion/ttip-vs-wto-who-sets-global-standards/> (demonstrating the scope of the TTIP).

39. See *supra* note 38 (commenting that TTIP rules may be similar to some already established practices).

40. See *id.* (asserting that some rules, not contained in the WTO are considered standards).

41. See *id.* (arguing that the TTIP could potentially create new standards).

42. See Akhtar & Jones, *supra* note 23, at 1; European Commission, *supra* note 23, at 1 (stressing that the TTIP can represent).

43. See *What's TTIP?*, U. DENV. <http://www.du.edu/korbel/ceuce/publications/blog/2014/lambert-what-is-ttip.html> (last visited May 19, 2016); Klint Alexander, *The Proposed Transatlantic Trade and Investment Partnership (TTIP) and its Implications for U.S.*

This is why if the TTIP is finalized, the United States and European Union could make real savings for their businesses, create jobs, and bring better value for consumers.<sup>44</sup>

### *B. Free Trade Agreements*

The TTIP is being negotiated as a FTA and it must be distinguished from BITs.<sup>45</sup> A BIT is a treaty between only two states that governs the codification of rules and handling of investment disputes between a member state (a country party to such an international agreement) and the individuals and companies of the other member state.<sup>46</sup> An FTA is a trade arrangement between two or more countries and serves to provide all parties to the deal preferential treatment in trade by removing tariffs and nontariff barriers between members of the agreement.<sup>47</sup> Consequently, while FTAs may often be similar in effect to BITs, the basic objectives of FTAs and BITs differ.<sup>48</sup> BITs seek to promote investment between a pair of countries by providing investors with confidence in foreign regulatory environments.<sup>49</sup> FTAs are mechanisms for trade liberalization that aim to eliminate discrimination against imports by removing tariffs and other restrictions on the trade of goods.<sup>50</sup>

In the past, BITs and FTAs were two separate and parallel legal instruments that had to address issues in different fields.<sup>51</sup> Nowadays, there are more and more FTAs being concluded and it is quite common for FTAs to have an investment chapter.<sup>52</sup> Trade and

---

*Business, CORP. COMPLIANCE INSIGHTS* (Dec. 11, 2013), <http://corporatecomplianceinsights.com/the-proposed-transatlantic-trade-and-investment-partnership-ttip-and-its-implications-for-us-business/> (addressing problems of barriers in trade).

44. See *supra* note 43 (stating what the TTIP can bring in the world economy).

45. See Russell Thirgood, *Bilateral Investment Treaties*, GLOBAL LEGAL POST (Jan. 7, 2014), <http://www.globallegalpost.com/global-view/bilateral-investment-treaties-providing-unlimited-opportunities-58721287/>; Weaver, *supra* note 7, at 228. (stating that BITs are different from FTAs).

46. See *supra* note 45 (defining what a BIT is).

47. See *id.* (specifying what a FTA is).

48. See *id.* (noting that even if similar the BITs and the FTAs have different objectives).

49. See *id.* (discussing the scope of the BITs).

50. See *id.* (describing the general scope of FTAs).

51. See LEON E. TRAKMAN & NICOLA W. RANIERI, REGIONALISM IN INTERNATIONAL INVESTMENT LAW 22 (2013); Chang-fa Lo, *A Comparison of Bit and the Investment Chapter of Free Trade Agreement*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 147, 168(2008) (discussing how BITs and FTAs were considered in the past).

52. See *supra* note 51 (considering that the content of FTA has changed).

investment are more integrated, encompassing various emerging elements of international commerce: exports, imports used in exports, use of foreign affiliates for sale, globalized production and distribution in foreign direct investments.<sup>53</sup>

## *II. GENERAL OVERVIEW OF INVESTOR STATE ARBITRATION AND THE INVESTOR STATE DISPUTE SOLUTION CLAUSE IN THE TTIP*

This Part discusses how investor-state arbitration works and how the European Union and United States approach the negotiation of the TTIP. Part II.A explains how BITs are structured, discusses their main provisions, and compares them to the typical standards of investor-state arbitration. Part II.B describes the European Union and United States's background on the TTIP and the actual approach to the investor-state clause in the agreement in question.

### *A. Bilateral Investment Treaties and the Main Provisions of International Investment Agreements*

The first BIT was signed in 1959 between Germany and Pakistan.<sup>54</sup> Many followed suit and exponentially increased to reach a global total of 2,928 BITs in 2015.<sup>55</sup> A BIT is typically structured to include the following sections: a preamble, definitions, admission, substantive rights (fair and equitable treatment, most favored nation, national treatment, umbrella clause and full protection and security, protection from expropriation), compensation for losses, free transfer of payments, settlement of disputes, subrogation, state to state dispute and duration.<sup>56</sup> This Part will explore the main provisions of a BIT and investor-state arbitration generally, as well as some procedural aspects.

---

53. *See id.* (stating that trade and investments are two connected subject).

54. *See* Treaty for the Promotion and Protection of Investments, Pak.-Ger., Nov. 25, 1959, 457 U.N.T.S. 24.

55. *See* UNCTAD, *supra* note 14.

56. *See* McLachlan, Shore & Weiniger, *supra* note 14, at 52; Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes*, 14 *Geo. Mason L. Rev.* 135, 141 (explaining how a BIT is constructed).

### 1. Provisions Regarding the Jurisdiction of the Tribunal

A tribunal has jurisdiction under a BIT only if three elements are met: the notions of investor, investment, and the duration of the treaty.<sup>57</sup> A crucial component of how BITs define investors involves nationality, and when a person or corporation can be defined as a national of a foreign state. Likewise, questions regarding investment involve how broad that definition is. Finally, issues concerning the duration of a BIT look to what happens when the treaty expires.

Concerning the concept of nationality, before the development of international investment treaties nationality was relevant to determine whether a state could bring a claim of an injured alien under diplomatic protection.<sup>58</sup> In particular, customary international law allowed a State to confer nationality upon a person only if there was a “genuine link” between that person and the state of nationality.<sup>59</sup> The relevance of the state nationality, at the time of the diplomatic protection, was highlighted in a famous case, *Belgium v. Spain*, where Belgium claimed that Spain should be held accountable for an injury to a Canadian corporation operating in Spain. It was found that only the State from where the company came from can exercise this right to seek payment.<sup>60</sup> No such law had been established for shareholders.<sup>61</sup> If a wrong was done to a company that resulted in harm to its shareholders, then only the State (representing the company) had the authority to seek compensation.<sup>62</sup> The court found that Belgium did not have the right to bring Spain to court since the company was located in Canada.<sup>63</sup>

Now under investor-state arbitration, in nearly every case, only nationals of a contracting State other than the host State in which the

---

57. See McLachlan, Shore & Weiniger, *supra* note 14, at 29; Alexandre de Gramont & Maria Gritsenko, *Key Issues and Recent Developments in International Investment Treaty Arbitration*, CROWELL & MORING LLP 6 (2007), <https://www.crowell.com/documents/Key-Issues-and-Recent-Developments-in-International-Investment-Treaty-Arbitration.pdf>.

58. See *supra* note 57 (stating which was the function of the nationality definition when there were no international investment agreements).

59. Nottebohm Case (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 23.

60. Case Concerning the Barcelona Traction Light and Power Co, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 38, ¶ 53 (specifying how diplomatic protection worked).

61. See *id.* (noting that shareholders do not have the right to bring a claim).

62. See *id.* (explaining that the state entitled to bring a claim was the state in which the company has nationality).

63. See *id.* (determining which country could bring the claim).

investment is made can be protected by a treaty's provisions.<sup>64</sup> Usually natural persons are considered nationals of a state when they are citizens.<sup>65</sup> However, it is more complex to identify the nationality of a corporation.<sup>66</sup> Usually BITs use one or a combination of the three following tests: incorporation, which refers to the nationality of the company via the State under the laws of which it is organized; control, where an investor that has the nationality of one BIT party is entitled to protection only of investment in the territory of the other BIT party that it owns or controls; and/or management of the company, which ascribes nationality to the State where the company investor has its place of business.<sup>67</sup>

One of the main cases concerning the nationality tests for a corporation is *Tokios Tokelés v. Ukraine*, where the International Centre for Settlement of Investment Disputes Tribunal discussed whether jurisdiction existed to hear claims brought by Tokios Tokelés.<sup>68</sup> The Tribunal, interpreting Article 25 of the ICSID Convention, established that the nationality of a corporation must be decided in accordance with the place of incorporation in the absence of an express "control provision."<sup>69</sup> Consequently, although ninety-nine percent of Tokios was owned by a Ukrainian national, the Tribunal determined that it was a Lithuanian corporation.<sup>70</sup> In his dissenting opinion, Professor Weil proposed a more flexible approach.<sup>71</sup> He suggested that it was necessary to look at the origin of capital, not a company's formal incorporation. To avoid that, in contrast with the purpose of the ICSID system, the ICSID mechanism

---

64. See McLachlan, Shore & Weiniger, *supra* note 14; Alexandre de Gramont & Maria Gritsenko, *supra* note 57 (2007) (clarifying that the investment agreement protects foreign nationals and the nationality represents the subject matter jurisdiction).

65. See Nottebohm Case, *supra* note 59, at 23.

66. McLachlan, Shore & Weiniger, *supra* note 14, at 52; ANDRÉS RIGO SUREDA, INVESTMENT TREATY ARBITRATION: JUDGING UNDER UNCERTAINTY 43 (2012) (affirming that it is easier to identify the nationality of a natural person than the nationality of a corporation).

67. See SUREDA, *supra* note 66 (listing the different tests which can be used to identify the nationality of a corporation).

68. See *Tokelés v. Ukraine*, ARB/02/18, Decision on Jurisdiction, ¶ 23 (Apr. 29 2004) (introducing the case regarding Tokios Tokelés, a Lithuanian corporation, with no substantial business activities in Lithuania, 99 percent of its shares in the corporate entity owned by Ukrainian nationals, managerial control of the company vested in Ukrainian nationals, and capital originating in Ukraine).

69. *Id.* (discussing the application of the incorporation test).

70. See *id.* (explaining the finding of the Tribunal).

71. See *id.* (introducing the dissenting opinion).

would be applied to national investments (“veil piercing doctrine”).<sup>72</sup> The case is relevant because the Tribunal established that the doctrine of “veil piercing” should not override the terms of the BIT, resulting in the Tribunal’s declining jurisdiction.<sup>73</sup> Finally, it is important to point out that the ICSID Tribunals established that the corporation must possess home-state nationality continuously from the date of injury to the date of official commencement of the arbitration request.<sup>74</sup>

Considering the concept of investment, almost all BITs adopt a similar formula for satisfying the definition of investment, which usually includes a widely inclusive phrase as well as a list of specific categories such as property, shares contracts, and intellectual property rights.<sup>75</sup> One of the most well-known definitions of “investment” is provided by the ICSID Tribunal in *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, where two Italian companies claimed damages against Morocco.<sup>76</sup> The Tribunal determined that investments are comprised of four elements: contributions to the economic development of the host State, monetary contribution, certain duration of performance for a contract, and a participation in the risks of the transaction.<sup>77</sup>

Notwithstanding, the notion of investment is broad. Tribunals usually consider pre-contract costs as separate to the investment unless a State consents otherwise.<sup>78</sup> Tribunals also usually recognize indirect investment and consequently they generally consider the claims brought by shareholders, whether they are controlling shareholders or not, as valid ultimate beneficiaries.<sup>79</sup>

---

72. *See id.* (explaining the control test).

73. *See id.* (explaining the relevance of the case).

74. *See The Loewen Group, Inc. and Raymond L. Loewen v. U.S.*, ARB(AF)/98/3, Award, ¶ 225 (June 26, 2003) (discussing a case where the chairman of a Canadian corporation involved in the death-care industry filed claims seeking damages for alleged injuries arising out of litigation in which the company was involved in Mississippi state courts).

75. *See Energy Charter Treaty*, art. 1(6), Dec. 17, 1994, 34 ILM 360, 2080 U.N.T.S. 95, (addressing the notion of investment).

76. *See Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ARB/00/4, Decision on Jurisdiction, [insert pincite] (July 23, 2001) (describing the foremost definition of investment).

77. *See id.* (describing the foremost definition of investment).

78. *See Milhaly Int’l Corp. v. Sri Lanka*, ARB/00/2, Award, ¶ 61 (Mar. 15, 2002) (explaining that pre-investment is generally not considered part of the investment).

79. *See McLachlan, Shore & Weiniger, supra* note 14, at 184-91; Inna Uchkunova, *Indirect Investments Through Chain of Intermediary Companies: A Philosopher’s Stone or*

Finally, the tribunal can have jurisdiction only if the BIT temporally covers the investment.<sup>80</sup> However, an investment can possibly be protected even if a BIT came into force after the investment was made, as many treaties include a retroactive provision that expressly establishes this.<sup>81</sup> In addition, an investment can also be covered under a treaty when the treaty ceases to exist.<sup>82</sup> BITs generally provide for a fixed duration of at least ten years.<sup>83</sup> However, the treaties usually continue in force until a State provides specific notice of its intent to withdraw.<sup>84</sup> Moreover, after termination, there is usually a period during which investments originally covered by the BIT continue to retain protections provided under the treaty.<sup>85</sup>

## 2. Provisions Regarding Substantive Rights of the Investor

BITs always provide foreign investors with standard benefits, which, despite some exceptions, are considered common features of all investment treaties.<sup>86</sup> In particular, some of the most important substantive rights include: the fair and equitable standard, protections in case of expropriation, full protection and security, national treatment, and the most favored nation treatment.

---

*Not Any More?*, KLUWER ARB. BLOG (Jul. 3, 2013), <http://kluwerarbitrationblog.com/blog/2013/07/03/indirect-investments-through-chain-of-intermediary-companies-a-philosophers-stone-or-not-any-more/> (stating that the notion of investment regularly includes indirect investments).

80. See generally Johan Billiet, *International Investment Arbitration: A Practical Handbook* (2016); Alexandre de Gramont & Maria Gritsenko, *supra* note 57.

81. See *Tradex Hellas S.A. v. Alb.*, ARB/94/2, Decision on Jurisdiction, ¶ 192 (Dec. 24, 1996) (noting that investments may be protected retrospectively).

82. See *Mondev Int'l Ltd. v. U.S.*, ARB(AF)/99/2, Award, ¶ 68 (Oct. 11, 2002) (observing that investments are covered post-cessation).

83. See McLachlan, Shore & Weiniger, *supra* note 14, at 128; UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, [http://unctad.org/en/docs/iteiia20065\\_en.pdf](http://unctad.org/en/docs/iteiia20065_en.pdf) (clarifying the duration of a BIT).

84. See *supra* note 83.

85. See McLachlan, Shore & Weiniger, *supra* note 14, at 92; Patricio Grané, *Umbrella Clause Decisions: The Class of 2012 and a Remapping of the Jurisprudence*, KLUWER ARB. BLOG (Jan. 17, 2013), <http://kluwerarbitrationblog.com/2013/01/17/umbrella-clause-decisions-the-class-of-2012-and-a-remapping-of-the-jurisprudence/> (discussing the protection after the termination of the BIT).

86. See *The Basics of Bilateral Investment Treaties*, SIDLEY, <http://www.sidley.com/experience/the-basics-of-bilateral-investment-treaties>; MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 240 (2d ed., 2012) (introducing the standard rights of BITs).

The fair and equitable treatment standard is recognized as part of customary international law.<sup>87</sup> This standard is a non-contingent right, usually formulated with vague and imprecise language.<sup>88</sup> This contributes in large part to the controversy surrounding this standard, mainly because many of its imprecise formulations provide for different interpretations of its content.<sup>89</sup> Generally, this standard relates to the treatment of investors by the host State's courts and to the administrative decision-making of the host State.<sup>90</sup>

Considering the role of a host State's courts, the ICSID Tribunal in *Azinian v. Mexico* opined that a failure to entertain a suit, undue delay, inadequate administration of justice, or a clear and malicious misapplication of the law can cause a breach of the fair and equitable treatment standard and, in particular, a denial of justice.<sup>91</sup> An example of how a national court may be sanctioned for breach of fair and equitable treatment is represented by *Loewen*, a famous case pertaining to the American legal system.<sup>92</sup> In *Loewen*, the Canadian claimant alleged that the jury ruling which awarded its American competitor US\$500 million in damages was unfair and discriminatory.<sup>93</sup> The Tribunal found that the judicial process "amounted to an international wrong" because local procedural rules required Loewen to post a bond of 125 percent of the amount of the judgment in order to secure a stay of execution pending appeal.<sup>94</sup>

---

87. See *CMS Gas Transmission Co. v. Arg.*, ARB/01/8, Award, ¶ 284 (May 12, 2005) (affirming that the fair and equitable standard under domestic law is not different from the one under international law). According to the Tribunal, the "treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law." *Id.*

88. See generally Mahnaz Malik, *Bulletin #3: Fair and Equitable Treatment*, IISD (Sept. 2009), [http://www.iisd.org/pdf/2009/best\\_practices\\_bulletin\\_3.pdf](http://www.iisd.org/pdf/2009/best_practices_bulletin_3.pdf); Stephan W. Schill, Book Review, 20 *EUROPEAN J. OF INT'L L.* 236, 236 (2009) (reviewing Ioana Tudor's *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* and introducing the fair and equitable treatment standard).

89. See Malik, *supra* note 88, at 9; Schill, *supra* note 88, at 236 (addressing a problem regarding the fair and equitable treatment standard).

90. See Malik, *supra* note 88, at 9; McLachlan, Shore & Weiniger, *supra* note 14, at 226 (introducing the context in which a fair and equitable treatment issue can arise).

91. See *Robert Azinian, Kenneth Davitian, & Ellen Baca v. Mex.*, ARB (AF)/97/2, Award, ¶ 102-03 (Nov. 1, 1999).

92. See Malik, *supra* note 88, at 10; McLachlan, Shore & Weiniger, *supra* note 14, at 227 (introducing two cases in which domestic courts have been sanctioned for violation of the fair and equitable treatment standard).

93. See *supra* note 74.

94. *Id.*



Another category of cases involving the standard of fair and equitable treatment consider the review of administrative conduct.<sup>95</sup> Tribunals usually refer to two factors that determine whether an investor has been treated fairly by an administrative decision: legitimate expectations and due process.<sup>96</sup> Legitimate expectations concern the treatment afforded to an investor by reference to the law of the host State at the time of the investment.<sup>97</sup> Meanwhile, due process depends on whether administrative decisions have been reached through a fair process, or if the host State acted according to improper purposes within its administrative powers.<sup>98</sup> In terms of legitimate expectations, the ICSID Tribunal in *Tecmed v. Mexico* defined the scope of the fair and equitable treatment standard based on an autonomous interpretation under the Spain-Mexico BIT.<sup>99</sup> It stated that the fair and equitable treatment provision requires the Contracting Parties to provide international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.<sup>100</sup> According to the Tribunal, the foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparent in its relations with the foreign investor.<sup>101</sup>

The second factor that determines the treatment of the investor is due process in administrative decision-making.<sup>102</sup> Proper due process bars arbitrary and discriminatory decisions against non-nationals, requires transparent proceedings, prohibits use of improper purposes, forbids inconsistency of conduct vis-a-vis the investor, and also forbids coercion or harassment by State authorities and bad faith.<sup>103</sup>

---

95. See Malik, *supra* note 88; Schill, *supra* note 88.

96. See Malik, *supra* note 88, at 11; McLachlan, Shore & Weiniger, *supra* note 14, at 233-34 (clarifying the two ways in which the administrative conduct can violate the fair and equitable treatment).

97. See McLachlan, Shore & Weiniger, *supra* note 14, at 234 (explaining what the legitimate expectation is).

98. See *id.* (identifying the concept of due process).

99. See *Tecnicas Medioambientales Tecmed S.A. v. Mex.*, ARB (AF)/00/2, Award, ¶ 155 (May 29, 2003).

100. See *id.* ¶ 99 (defining when the concept of legitimate expectations is violated).

101. See *id.*

102. See Malik, *supra* note 88, at 13-15; McLachlan, Shore & Weiniger, *supra* note 14, at 239 (introducing the importance of due process).

103. See McLachlan, Shore & Weiniger, *supra* note 14, at 239-43; Malik, *supra* note 88, at 14-15 (defining the concept of due process).

A second standard of protection in favor of the investor involves full protection and security,<sup>104</sup> which concerns a State's failures to protect an investor's property from actual damage caused by either corrupt State officials or by the actions of others where the State has failed to exercise due diligence.<sup>105</sup> It is thus principally concerned with the exercise of police power.<sup>106</sup>

According to the ICSID Tribunal a State has an obligation to take reasonable steps to protect its investors against harassment by third parties and/or State actors.<sup>107</sup> However, the ICSID Tribunal has rejected the argument that the full protection and security standard creates absolute liability.<sup>108</sup> One of the most contested issues with respect to the standard of full protection and security is whether or not it extends beyond situations where the physical security of the investor is compromised, including damages to intangible assets.<sup>109</sup>

The concept of national treatment is considered in the North American Free Trade Agreement ("NAFTA") article 1102.<sup>110</sup> It ensures that each party shall accord to the investments of foreign investors treatment no less favorable than that it accords to investments of its own investors.<sup>111</sup> In particular, the ICSID Tribunal has held that the treatment accorded a foreign-owned investment should be compared with that accorded a domestic investment in the same business or economic sector.<sup>112</sup>

---

104. See 2012 U.S. Model Bilateral Investment Treaty, USTR art. 5(2) [hereinafter U.S. Model BIT].

105. See *id.*, at art. 5(2)(b) (defining the concept of the full protection and security standard).

106. See *id.* (addressing the link between the full protection and security standard and the police power).

107. See generally AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Hung., ARB/07/22, Award, (Sept. 23, 2010).

108. See Asian Agric. Products Ltd. (AAPL) v. Sri Lanka, ARB/87/3, Final Award, ¶ 48 (June 27, 1990).

109. See Jeffery Commission, *The Full Protection and Security Standard in Practice*, KLUWER ARB. BLOG (Apr. 16, 2009), <http://kluwarbitrationblog.com/2009/04/16/the-full-protection-and-security-standard-in-practice/>; Mahnaz Malik, *The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?*, IISD. (Nov. 2011) 6-7, [http://www.iisd.org/pdf/2011/full\\_protection.pdf](http://www.iisd.org/pdf/2011/full_protection.pdf) (addressing the problem of physical security).

110. See North American Free Trade Agreement, Can.-Mex.-U.S., art. 1102(2), Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

111. See *id.*

112. See Pope & Talbot Inc. v. Can., Interim Award, ¶ 64-105 (June 26, 2000), <http://www.italaw.com/sites/default/files/case-documents/ita0674.pdf>.

The most favored nation treatment is also recognized as an international customary law clause.<sup>113</sup> The International Law Commission (“ILC”) has defined the most favored nation treatment as “treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State,” which must not be “less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.”<sup>114</sup>

In relation to expropriation, when a State seized an investor’s assets without compensation as part of a program of economic reform in the past, the classic reaction was that the investor, in search of compensation, could only seek diplomatic protection.<sup>115</sup> Consequently, States would only select to honor claims motivated by political concerns.<sup>116</sup> This claim has expanded with the proliferation of investment treaties.<sup>117</sup> An expropriation is a governmental taking of property, for which compensation is usually required.<sup>118</sup> In addition to tangible property, intangible property rights, such as shareholder and contractual rights, can also be expropriated.<sup>119</sup> Thus, in *SPP v. Egypt*, the Tribunal rejected the argument that the term “expropriation” applies only to property rights.<sup>120</sup> The primary concern here is that the

---

113. See *Draft Articles on Most-Favored-Nation Clauses with Commentaries*, [1978] 2 Y.B. Int’l L. Comm’n 15, art. 5.

114. *Id.*

115. See Christoph Schreuer, *Investment Protection and International Relations*, in *THE LAW OF INTERNATIONAL RELATIONS* 345, 345 (A. Reinisch & U. Kriebaum eds., 2007), [http://www.univie.ac.at/intlaw/wordpress/pdf/87\\_investment\\_protect.pdf](http://www.univie.ac.at/intlaw/wordpress/pdf/87_investment_protect.pdf); TODD WEILER, *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* 94 (2005) (addressing the problem of the diplomatic protection for investments).

116. See *id.* (explaining the investor’s protection in the past).

117. See Schreuer *supra* note 116, at 345-46; Weiler, *supra* note 116 (noting that expropriation claims increased along the growth of the international investment agreements).

118. See Bassant El Attar et. al., *Expropriation Clauses in International Investment Agreements and the Appropriate Room for Host States to Enact Regulations: A Practical Guide for States and Investors*, GRADUATE INSTITUTE 5-9 (June 2009), <http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Research%20Projects/Trade%20Law%20Clinic/Expropriation%20clauses%20in%20International%20Investment%20Agreements%20and%20the%20appropriate%20room%20for%20host%20States%20to%20enact%20regulations,%202009.pdf>; McLachlan, Shore & Weiniger, *supra* note 14, at 266; Uchkunova, *supra* note 79 (defining the concept of expropriation).

119. See *Southern Pac. Prop. (Middle East) Limited v. Egypt*, ARB/84/3, Award, ¶ 164 (May 20, 1992) (explaining which rights can be subject to expropriation).

120. See *id.* (quoting the Tribunal in *SPP v. Egypt*).

definitions of expropriation included in investment treaties is so general that they are not of any practical use for parties or tribunals.<sup>121</sup>

The model Canada BIT contains a typical provision that prohibits expropriation without just compensation.<sup>122</sup> Article 13.1 of the model Canada BIT expresses that a State cannot expropriate an investment “except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.”<sup>123</sup>

The intent to expropriate is not usually considered a requirement in order to identify an expropriation (the “sole effective doctrine”).<sup>124</sup> A common problem involves distinguishing between lawful and unlawful expropriation.<sup>125</sup> Some authorities believe illegal takings require higher compensation, including damages.<sup>126</sup> Moreover, it is important to distinguish nationalization and expropriation. Usually, nationalizations involve large-scale takings, while expropriation refers to single state acts.<sup>127</sup>

Expropriation is usually distinguished as being either direct or indirect. Direct expropriation refers to a mandatory legal transfer of the title of property or its outright physical seizure operated by a formal law or decree or physical act.<sup>128</sup> On the other hand, indirect expropriations do not have a clear or unequivocal definition; they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets but actually

---

121. It has been said of NAFTA, art. 1110 (1) that its “language is of such generality as to be difficult to apply in specific cases.” *Marvin Feldman v. Mex.*, ARB(AF)/99/1, Award, ¶ 98 (Dec. 16, 2002).

122. *See* Canada Model Bilateral International Treaty art. 13, ¶ 1.

123. *Id.*

124. *See* Weiler, *supra* note 116, at 615; McLalchlan, Shore & Weiniger, *supra* note 14, at 270 (clarifying that the intent to expropriate is not necessary to identify an expropriation).

125. *See* Weiler, *supra* note 116, at 631; Cameron McKenna, *Tribunal weighs on unlawful expropriation*, LEXOLOGY (Mar. 30, 2015), <http://www.lexology.com/library/detail.aspx?g=1d18d9b9-778a-4041-ab4b-5ec6c4db6871> (noting the difference between lawful and unlawful expropriation).

126. *See supra* note 110 (addressing the difference between lawful and unlawful expropriation).

127. *See* Weiler, *supra* note 116, at 607-08; McLalchlan, Shore & Weiniger, *supra* note 14, at 296 (describing the difference between expropriation and nationalization).

128. *Expropriation*, UNCTAD (2003), [http://unctad.org/en/Docs/unctaddiaeia2011d7\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf) [hereinafter UNCTAD Expropriation]; “*Indirect Expropriation*” and the “*Right to Regulate*” in *International Investment Law*”, (OECD, Working Paper No. 2004/04, 2004), <http://dx.doi.org/10.1787/780155872321>; Suzy H. Nikiéma, *Best Practices: Indirect Expropriation*, IISD (Mar. 2012). [http://www.iisd.org/pdf/2012/best\\_practice\\_indirect\\_expropriation.pdf](http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf) (defining direct expropriation).

have that effect.<sup>129</sup> ICSID Tribunals have held that there is no expropriation when there is only an omission of state action; rather, an intentional act must occur.<sup>130</sup> Moreover, there is no expropriation when the investor consents to the expropriatory measure, as expropriation must be a compulsory transfer.<sup>131</sup>

There are different forms of indirect expropriation, such as creeping expropriation and measures tantamount to expropriation.<sup>132</sup> Creeping expropriation is not the result of a single state action, but results from a number of actions that gradually result in expropriation.<sup>133</sup> A measure tantamount to expropriation is a state action that is not superficially intended to expropriate, but is still considered a type of expropriation.<sup>134</sup> According to the arbitral decision in *S.D. Meyers v. Canada*, “[t]he primary meaning of the word ‘tantamount’ given by the Oxford English Dictionary is ‘equivalent,’ both words require a tribunal to look at the substance of what has occurred and not only the form.”<sup>135</sup>

States often conclude contracts with investors. However, not every breach of such contracts constitutes an expropriation.<sup>136</sup> The most important criterion for distinguishing between a simple breach of contract and the expropriation of contract rights is whether the State acts in its commercial role as a party to the contract or in its sovereign capacity.<sup>137</sup> Not all government measures entitle the investor to compensation. Often, if the deprivation of ownership is not

129. See *Tecnicas Medioambientales Tecmed S.A. v. Mex.*, ARB (AF)/00/2, Award, ¶ 114 (May 29, 2003).

130. See *Eudoro Armando Olguin v. Para.*, ARB/98/5, Award, ¶ [insert para. #] (July 26, 2001).

131. See *Tradex Hellas S.A. v. Alb.*, ARB/94/2, Decision on Jurisdiction, ¶ 135 (Dec. 24, 1996).

132. See Peter D. Isakoff, *Defining the Scope of Indirect Expropriation for International Investments*, 3 *GLOBAL BUS. L. REV.* 189, 195 (2013); Christoph Schreuer, *The Concept of Expropriation under the ETC and other Investment Protection Treaties* 5-6 (May 20, 2005), [http://www.univie.ac.at/intlaw/pdf/csunpublpaper\\_3.pdf](http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf) (listing the different forms of indirect expropriation).

133. See Isakoff, *supra* note 132, at 195-96; Schreuer *supra* note 132, at 4-5 (defining creeping expropriation).

134. See Isakoff *supra* note 132, at 193-94; Schreuer *supra* note 132, at 5-6 (giving the definition of measure as tantamount to expropriation).

135. *S.D. Myers, Inc. v. Can.*, Partial Award, ¶ 285 (Nov. 13, 2000).

136. See Schreuer, *supra* note 132, at 1; UNCTAD Expropriation, *supra* note 128, at 26 (outlining the difference between a breach of a contract and an expropriation).

137. See *id.* (explaining how to identify when a breach of contract implies an expropriation).

radical, fundamental, in significant part, substantial, or serious, no compensation can be claimed because the act represents merely a regulatory measure.<sup>138</sup> Nowadays, most investment treaties contain a provision in which the host State agrees to comply with any obligation undertaken with respect to investments of the other State; the effect of which is to elevate contract breaches to actual treaty violations.<sup>139</sup> It is vital to distinguish between contract claims and treaty claims.<sup>140</sup> Contract claims arise when there is a breach of contract, whereas treaty claims deal with violations of a treaty.<sup>141</sup> Not only will the jurisdiction differ for each claim, but the applicable law will also vary.<sup>142</sup> In contract claims, the tribunal will apply the applicable law for the contract, which is usually chosen by the parties; in treaty claims, the tribunal will apply relevant international law.<sup>143</sup> Moreover, a tribunal may be jurisdictionally limited in determining claims of treaty breach, or may have jurisdiction over the contractual rights if the parties agree to it.<sup>144</sup> This distinction is not present if a treaty contains a so-called “umbrella clause.”<sup>145</sup> For instance, Article II.2(c) of the United States-Argentina BIT provides that “[e]ach party shall observe any obligation it may have entered into with regard to

---

138. See Weiler, *supra* note 116, at 621; Andrew Paul Newcombe, *Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory and When Should Compensation Be Paid?* 73 (1999) (Master of Laws thesis, University of Toronto), <http://www.italaw.com/documents/RegulatoryExpropriation.pdf>.

139. See *Société Générale de Surveillance S.A. v. Pak.*, ARB/01/13, Objection to Jurisdiction, ¶ 163 (Aug. 6, 2003); McLalchlan, Shore & Weiniger, *supra* note 14, at 92; Grané, *supra* note 85 (defining the umbrella clause).

140. See McLalchlan, Shore & Weiniger, *supra* note 14, at 127; see generally Emmanuel Gaillard, *Treaty-Based Jurisdiction: Broad Dispute, Resolution Clauses*, 234 N.Y. L. J. 1 (2005), [http://www.shearman.com/~media/Files/NewsInsights/Publications/2005/10/TreatyBased-Jurisdiction-Broad-Dispute-Resolutio\\_/Files/Download-PDF-TreatyBased-Jurisdiction-Broad-Disp\\_/FileAttachment/IA\\_100605.pdf](http://www.shearman.com/~media/Files/NewsInsights/Publications/2005/10/TreatyBased-Jurisdiction-Broad-Dispute-Resolutio_/Files/Download-PDF-TreatyBased-Jurisdiction-Broad-Disp_/FileAttachment/IA_100605.pdf) (specifying that there is a difference between contract claims and treaty claims).

141. See JAN OLE VOSS, *THE IMPACT OF INVESTMENT TREATIES ON CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS* 166 (2011); Schreuer, *supra* note 132 (discussing the difference between contract claims and treaty claims).

142. See Voss, *supra* note 141, at 165-67; Schreuer *supra* note 132 (articulating the consequences of the difference between contract claims and treaty claims).

143. See *id.* (discussing applicable law).

144. See *id.* (referring to the jurisdiction of the Tribunal).

145. See McLalchlan, Shore & Weiniger, *supra* note 14, at 92; Grané, *supra* note 85, (specifying the function of the umbrella clause).

investments.”<sup>146</sup> However, there is no consistency in how these cases have been decided.<sup>147</sup>

In *SGS v. Pakistan*, the Tribunal rejected the notion that a contract claim could be transformed into a treaty claim by virtue of an umbrella clause.<sup>148</sup> A few months later, the same Tribunal interpreted another umbrella clause differently in *SGS v. Philippines*, stating that “each Contracting Party shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT.”<sup>149</sup> Arbitral tribunals generally interpret these clauses differently, so it is likely that umbrella clauses will remain one of the most controversial areas of international investment law.<sup>150</sup>

### 3. Parallel Proceedings

If an investment treaty does not expressly provide for it, there is no requirement to exhaust local remedies as condition precedent to the invocation of a tribunal’s jurisdiction.<sup>151</sup> Moreover, the pursuit of local remedies will not preclude the investor from subsequent invocation of a treaty claim unless prohibited by an express treaty provision.<sup>152</sup> This could require an election in remedies or a treaty provision requiring the waiver of all claims as a condition of valid invocation of treaty arbitration.<sup>153</sup> Sometimes agreements contain a

---

146. Treaty between U.S. and Arg. Concerning the Reciprocal Encouragement and Protection of Investment, U.S-Arg., art. 2(c), Nov. 14, 1991, <http://www.state.gov/documents/organization/43475.pdf>.

147. See Gramont & Gritsenko, *supra* note 57, at 51; McLachlan, Shore & Weiniger, *supra* note 14, at 111 (addressing a problem related to the umbrella clause).

148. See Société Générale de Surveillance S.A. v. Pak., ARB/01/13, Objection to Jurisdiction, ¶ 167 (Aug. 6, 2003).

149. Société Générale de Surveillance S.A. v. Phil., ARB/02/6, Objection to Jurisdiction, ¶¶ 115, 119 (Jan. 29, 2004).

150. See Granè, *supra* note 85; Gramont & Gritsenko, *supra* note 57, at 53 (noting that the umbrella clause represents an issue in investment arbitration).

151. See Memorandum from Bahakal Yimer, Nicolas Cisneros, Laura Bisiani & Rahul Donde, Graduate Inst. Int’l Dev. 9 (June 10, 2011), [http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/Memoranda%202011/UNCTAD\\_Memo.pdf](http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/Memoranda%202011/UNCTAD_Memo.pdf); McLachlan, Shore & Weiniger, *supra* note 14, at 128 (specifying that the exhaustion of local remedies is usually not required).

152. See LUIZ EDUARDO SALLES & AZEVEDO SETTE, FORUM SHOPPING IN INTERNATIONAL ADJUDICATION: THE ROLE OF PRELIMINARY OBJECTIONS 245 (2016); McLachlan, Shore & Weiniger, *supra* note 14, at 129; Memorandum from Yimer, et. al., *supra* note 151 (defining the fork in the road and the waiver).

153. See Salles, *supra* note 120; McLachlan, Shore & Weiniger, *supra* note 14, at 29; Memorandum from Yimer, et. al., *supra* note 151.

“cooling-off period” provision.<sup>154</sup> This is intended to encourage disputants to engage in consultation and negotiation, generally for a period of three to six months, and to give them the opportunity to amicably and confidentially reach a possible solution on their own.<sup>155</sup>

Where the same underlying dispute gives rise to claims under two different investment treaties, each tribunal is faced with a potential problem of parallel proceedings within the same legal order, which may give rise to issues under the doctrines of *res judicata* and *lis pendens*.<sup>156</sup> The doctrine of *res judicata* applies to the decisions of international arbitral tribunals as a general principle of law, common to most nations.<sup>157</sup> In applying the doctrine to another arbitral award, the tribunal must consider whether there is sufficient identity of parties, subject matter, and cause of action in order to arbitrate.<sup>158</sup> On the other hand, the concept of *lis pendens*—the existence of proceedings before another international tribunal over a dispute related to a substantially same matter—entitles the tribunal to stay its proceedings as an exercise of its discretion.<sup>159</sup>

#### *B. European Union and United States Approaches during the Negotiations of the TTIP*

This Part will focus on the United States and the European Union as Contracting Parties to the TTIP. Part B.1 describes the EU background, competence, available drafts released to the public, and the main provisions of the proposed agreement. Part B.2 considers the United States Model BIT, the principal source establishing the United States’ point of view. Part B.3 outlines the twelve issues

---

154. See Joel Dahlquist, *Emergency Arbitrators in Investment Treaty Disputes*, KLUWER ARB. BLOG (Mar. 10, 2015), <http://kluwerarbitrationblog.com/2015/03/10/emergency-arbitrators-in-investment-treaty-disputes/>; see also Memorandum from Yimer, et al., *supra* note 151, at 12 (introducing the cooling off period).

155. See *supra* note 154.

156. See Pedro J. Martinez-Fraga and Harout Jack Samra, A Defense of Dissents in Investment Arbitration, 43 U. MIAMI INTER-AM. L. REV. 445 (2012); McLalchlan, Shore & Weiniger, *supra* note 14, at 130 (addressing the problems of *res judicata* and *lis pendens*).

157. See Fraga & Samra *supra* note 156; McLalchlan, Shore & Weiniger, *supra* note 14, at 130 (clarifying the concept of *res judicata*).

158. See *id.* (discussing the problem of *res iudicata* in investment arbitration).

159. See McLalchlan, Shore & Weiniger, *supra* note 14, at 121; Elisa D’Alterio, *From judicial comity to legal comity: A judicial solution to global disorder?*, 9 INT’L J. CONSTITUTIONAL LAW 394, 404 (2011) (considering the concept of *lis pendens* and how it works in investment arbitration).



discussed during the European Union's consultation, from both European Union and United States perspectives.

### 1. European Union Background

With Article 207 of the Lisbon Treaty, the European Union has acquired the right to regulate foreign direct investment.<sup>160</sup> Consequently, the European Union can exercise the exclusive authority provided by the Lisbon Treaty and reform the regime of the existing treaties signed by its Member States.<sup>161</sup> In June 2012 a first draft text for a European Union-wide regulation establishing a framework for the management of financial responsibility for investor-state dispute settlement tribunals ("the European Union Draft") was released.<sup>162</sup> The European Commission's Trade Policy Committee released initial negotiating objectives for the TTIP ("European Union Directive") in June 2013 in a private correspondence with Member States.<sup>163</sup>

The ISDS clause found in the TTIP initiated debate in the European Union Commission and, as a result, the Commission organized a public consultation on twelve issues between March 27 and July 13, 2014.<sup>164</sup> The consultation outlined a possible unified EU approach in order to achieve a balance between the protection of investors and the European Union's and Member States' right to regulate.<sup>165</sup> Obviously, all the documents related to TTIP (according to the European Court of Justice) will be subject to European Union transparency procedures.<sup>166</sup>

---

160. See Consolidated Version of the Treaty on the Functioning of the European Union art. 207, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]; *Commission Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to which the European Union is Party*, at 3, COM (2012) 335 final (May 6, 2012) [hereinafter European Union Draft].

161. See TFEU art. 207; European Union Draft, *see supra* note 160, at 3.

162. See generally European Union Draft, *supra* note 160.

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

164. See European Commission Press Release IP/14/292, European Commission launches public online consultation on investor protection in TTIP (Mar. 27, 2014) (emphasizing the role of public opinion in EU rulemaking) [hereinafter EU Press Release].

165. See *id.* (stating the value of the public consultation).

166. See Case C-350/12 P, Council v. Int'l Veld, 2014 EUR-Lex CELEX LEXIS 2039 (Jul 3, 2014), ¶ 89 (clarifying the role of transparency in EU).

In November 2015, the European Commission completed its new approach to investment protection and investment dispute resolution for the TTIP, proposing the creation of an Investment Court System.<sup>167</sup> The Investment Court System would replace all the ISDS mechanisms in European Union agreements, aiming to create a permanent mechanism in investment dispute solution if the other party of the European Union agreement will accept it.<sup>168</sup>

## 2. United States Background

While the European Union has publicly stated its desire to release an official public text of the European Union position on the ISDS provision in the TTIP, the United States does not want to publicly release any information regarding these closed-door negotiations.<sup>169</sup> To understand the United States approach, it is necessary to refer to the Model United States BIT adopted in 2004 and revised by the Obama administration in 2012.<sup>170</sup> Like its predecessor (the 2004 Model BIT), the 2012 Model BIT provides strong investor protections and preserves the government's ability to regulate in favor of the public interest.<sup>171</sup> The Obama administration made several important changes to the text of the Model BIT to enhance transparency and public participation, sharpen the disciplines

---

167. See *EU finalises proposal for investment protection and Court System for TTIP*, EUROPEAN COMMISSION (Nov. 12, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396> [hereinafter EU finalises proposal]; *European Union Proposal for Transatlantic Trade and Investment Partnership: Trade In Services, Investment And E-Commerce, Chapter II* (Nov. 12, 2015) [hereinafter European Union Proposal on the Investment Permanent Court] [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf) (introducing the investment permanent court).

168. See *supra* note 167.

169. See Weaver, *supra* note 7, at 258–59; James Crisp, *US to open TTIP reading rooms across EU*, EURACTIV (Apr. 29, 2015), <http://www.euractiv.com/sections/trade-society/us-open-ttip-reading-rooms-across-eu-314175> (providing a detailed account of the reading rooms set-up in U.S. embassies to provide information to the EU citizens).

170. See U.S. Model BIT, *supra* note 104; see generally European Union Proposal on the Investment Permanent Court, *supra* note 167 (introducing the main source in order to identify the United States view on investor-state arbitration).

171. See generally Press Release, Off. U.S. Trade Representative and U.S. Dep't St., United States Concludes Review of Model Bilateral Investment Treaty, (Apr. 2012), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2012/april/united-states-concludes-review-model-bilateral-inves>.

that address preferential treatment to state-owned enterprises, and strengthen protections relating to labor and the environment.<sup>172</sup>

### 3. The United States and European Union on the Twelve Issues

The twelve main questions that have been subject to public consultation in Europe regard the main classical provisions in a BIT. These issues are a starting point for comparison between United States and European Union perspectives on the TTIP. This Part will analyze differences and similarities between these perspectives and consider the United States Model BIT, the European Union drafts, and other relevant public documents.

#### a. Scope of the Substantive Investment Protection Provisions

Both the United States and the European Union have a very broad definition of investment modeled in accordance with the *Salini* case, discussed above.<sup>173</sup> In *Salini*, this definition included contributions to the economic development of the host State, monetary contributions, a certain duration of performance for a contract, and participation in the risks of the transaction.<sup>174</sup> The United States Model BIT and European Union Proposal on the Investment Permanent Court also provide similar lists of examples of investment, which include enterprise, shares, stocks and other forms of equity participation in an enterprise, bonds, debentures and other debt instruments of an enterprise, loans to an enterprise, and others.<sup>175</sup>

#### b. Non-Discriminatory Treatment for Investors

Both the European Union Proposal on the Investment Permanent Court and United States Model BIT stipulate that foreign investors

---

172. *See id.* (stating the differences between the U.S. Model BIT of 2004 and the U.S. Model BIT of 2012).

173. *See Salini, supra* note 76.

174. *See id.* at 622 (“The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.” [citation omitted]).

175. *See* U.S. Model BIT, *supra* note 104, art. 1; European Union Proposal on the Investment Permanent Court, *supra* note 167 (defining “investment” in the preamble to its chapter II).

should not be discriminated against.<sup>176</sup> At the same time, the aforementioned materials recognize that in certain rare cases, discrimination against investors may need to be envisaged.<sup>177</sup> While the United States Model BIT is silent, the European Union includes exceptions for differences in treatment between investors and investments where necessary to achieve public policy objectives (the protection of health, the environment, consumers, etc.).<sup>178</sup>

### c. Fair and Equitable Treatment

Concerning the fair and equitable treatment standard, the main objective of the European Union proposal is to clarify the standard in a way that a State may be held responsible only for breaches of a limited set of basic rights.<sup>179</sup> These include the denial of justice; the disregard of the fundamental principles of due process; manifest arbitrariness; targeted discrimination based on gender, race, or religious belief; and abusive treatment, such as coercion, duress or harassment.<sup>180</sup> In contrast, the United States Model BIT describes this provision only referring to the concept of the denial of justice and due process.<sup>181</sup>

### d. Expropriation

On the topic of expropriation, the United States and European Union approaches are very similar, as they refer to the typical definition of expropriation.<sup>182</sup> One difference between the two documents is that the European Union draft is more detailed on public

---

176. See U.S. Model BIT, *supra* note 104, art. 3, annex B (considering the non-discrimination clause).

177. See European Union Proposal on the Investment Permanent Court, *supra* note 167, art. 2; U.S. Model BIT, *supra* note 104, annex B (analyzing the exception to the non-discrimination clause).

178. See European Union Proposal on the Investment Permanent Court, *supra* note 167, art. 2; U.S. Model BIT, *supra* note 104, annex B (explaining the specificity of the European Union provision).

179. See European Union Proposal on the Investment Permanent Court, *supra* note 167, art. 3 (addressing the objective of European Union regarding the fair and equitable treatment).

180. See *id.* (mentioning the main rights linked to the fair and equitable treatment).

181. See U.S. Model BIT, *supra* note 104, art. 5 (considering the United States point of view in the fair and equitable treatment).

182. See *id.* art. 6; European Union Proposal on the Investment Permanent Court, *supra* note 167, art. 5 (considering in general the position of the Contracting Parties on the expropriation clause).

welfare objectives.<sup>183</sup> The United States considers public welfare objectives to include public health, safety, and the environment.<sup>184</sup> Meanwhile, the European Union considers non-discriminatory measures taken for legitimate public purposes to include the protection of public health, safety, environment or public morals; social or consumer protection; or promotion and protection of cultural diversity.<sup>185</sup>

#### e. Ensuring the Right to Regulate and Investment Protection

Article 2 of the European Union Proposal on the Investment Permanent Court contains specific language describing permissible regulatory measures.<sup>186</sup> The objective is to achieve a balance between the protection of investors and the Member States' right to regulate.<sup>187</sup> The European Union plans to safeguard the Member States' right to regulate as a basic underlying principle so that investment protection standards cannot be interpreted by arbitral tribunals in a manner that would detrimentally affect the right to regulate. Meanwhile, the European Union would ensure that all the necessary safeguards and exceptions are in place.<sup>188</sup> There is no specific United States provision on this issue.<sup>189</sup>

#### f. Transparency in ISDS

Both the United States Model and the European Union Proposal on the Investment Permanent Court aim to ensure transparency and openness in the ISDS system under the TTIP, making hearings open and all documents available to the public.<sup>190</sup> The European Commission also proposed to include the 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-State-Arbitration as

---

183. See U.S. Model BIT, *supra* note 104, annex 1 (explaining how the European Union provision is more detailed).

184. See U.S. Model BIT, *supra* note 104, annex B (discussing the United States provision on expropriation).

185. See European Union Proposal on the Investment Permanent Court, *supra* note 167, Annex 1 (considering the European Union provision on expropriation).

186. See *id.* art. 2 (introducing the concept of regulatory measure).

187. See EU Press Release, *supra* note 164 (discussing the aim of the EU).

188. See *id.* (analyzing the objective of the EU).

189. See U.S. Model BIT, *supra* note 104 (underlying that there is not a provision on the right to regulate in the U.S. Model BIT).

190. See EU Press Release, *supra* note 164, at 19; U.S. Model BIT, *supra* note 104, art. 29 (describing the purpose of the European Union and U.S.).

mandatory within the TTIP.<sup>191</sup> These rules would “contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance.”<sup>192</sup>

#### g. Multiple Claims and Relationship to Domestic Courts

Both the United States and the European Union address the problem of multiple claims since investors are able to either seek to obtain redress in domestic courts or to submit a claim to the relevant Investment Tribunal.<sup>193</sup> They also require a cooling-off period, where before seeking arbitration the parties must engage in consultation or mediation.<sup>194</sup> Nevertheless, no mandatory exhaustion of local remedies is required.<sup>195</sup>

#### h. Arbitrator Ethics, Conduct and Qualifications

The US Model BIT suggests that an arbitration tribunal be comprised of three arbitrators: one appointed by each party and the third appointed by agreement of the disputing parties.<sup>196</sup> In contrast, the European Union proposes a Permanent Investment Court system, an innovative composition involving a tribunal of first instance, composed by fifteen judges — five nationals of a Member State of the European Union, five nationals of the United States, and five nationals of third countries.<sup>197</sup> The EU text also affirms that it is desirable that the arbitrator will have expertise in international

---

191. See European Union Proposal on the Investment Permanent Court, *supra* note 167, art. 18 (analyzing the European Union proposal).

192. See Rules on Transparency in Treaty-based Investor-State-Arbitration, UNCITRAL (2014), prmb1 (clarifying the object of the rule).

193. See European Union Proposal on the Investment Permanent Court, *supra* note 167, at 14; U.S. Model BIT, *supra* note 104, art. 23 (introducing the multiple claim issue).

194. See European Union Proposal on the Investment Permanent Court, *supra* note 167, arts. 2-5; U.S. Model BIT, *supra* note 104, art. 23 (addressing the cooling-off period clause).

195. See European Union Proposal on the Investment Permanent Court, *supra* note 167; U.S. Model BIT, *supra* note 104, art. 24 (discussing the absence of the exhaustion of local remedies provision).

196. See U.S. Model BIT, *supra* note 104, art. 27 (describing how the tribunal should be composed according to the U.S. Model BIT).

197. See Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce, art. 9 (Nov. 2015), [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf) (introducing the tribunal of first instance and analyzing the European Union proposal).

investment law, international trade law, and the resolution of disputes arising under international investment or international trade agreements.<sup>198</sup> The European Union also aims to realize a roster of qualified experts to ensure that both the European Union and the United States have agreed to and vetted the arbitrators, ensuring their abilities and independence.<sup>199</sup>

#### i. Reducing the Risk of Frivolous and Unfounded Cases

The European Union proposes the introduction of instruments to easily dismiss frivolous claims.<sup>200</sup> For instance, the European Union is proposing that the losing party to any arbitration case should bear all reasonable costs of the proceedings if a disputing party has acted improperly by raising manifestly frivolous objections, improper preliminary objections, or unfounded claims.<sup>201</sup> The US Model BIT only refers to the possibility that the tribunal considers the claimant's claim or the respondent's objection in order to verify whether or not it is frivolous.<sup>202</sup>

#### j. Allowing Claims To Proceed (Filter)

The European Union intends to introduce a specific mechanism called a filter.<sup>203</sup> A filter grants a party to the agreement the possibility to intervene and dismiss claims in particular cases that involve measures taken for prudential reasons, in order to protect the overall stability and integrity of the financial system.<sup>204</sup> The protection of the financial system is also considered in the US Model BIT, establishing a sovereign right to regulate for the United States in certain areas.<sup>205</sup>

---

198. *See id.*, art. 9.4 (considering the requirements for an arbitrator according to the European Union proposal).

199. *See id.* (explaining the selection process in the European Union proposal).

200. *See* EU Press Release, *supra* note 164 (stating the European Union proposal on frivolous claim).

201. *See* European Union Proposal on the Investment Permanent Court, *supra* note 167, art. 28.2 (explaining the European Union proposal).

202. *See* U.S. Model BIT, *supra* note 104, art. 28 (describing the United States provision).

203. *See* EU Press Release, *supra* note 164 (introducing the European Union proposal on claims).

204. *See id.* (discussing the European Union proposal).

205. *See* U.S. Model BIT, *supra* note 104 (noting the lack of any filter in the US model Bit on the same topic).

k. Guidance by the Parties on the Interpretation of the Agreement

The United States and the European Union have an identical approach on interpretation.<sup>206</sup> They agree on the binding interpretation that ISDS Tribunals must respect to limit undesirable interpretations by ISDS Tribunals.<sup>207</sup> Moreover, the parties agree to establish that the non-disputing party may invite written or oral submissions on issues relating to the interpretation of the Agreement.<sup>208</sup>

l. Appellate Mechanism and Consistency of Rulings

One of the main criticisms in international investment arbitration is the lack of an appellate mechanism.<sup>209</sup> The European Union aims to establish a bilateral appellate mechanism in the TTIP, in order to allow review of the investor state arbitration awards investor state dispute solution rulings.<sup>210</sup> The proposed appellate body would exist as a permanent Appeal Tribunal composed of six Members: of whom two shall be nationals of a Member State of the European Union, two of the United States, and two of third countries.<sup>211</sup> The Appeal Tribunal Members would be appointed for a six-year term, renewable once.<sup>212</sup> It is implicitly required that the Members of the Appeal Tribunal shall possess the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognized competence.<sup>213</sup>

The introduction of this body would help ensure consistency in the interpretation of the TTIP and would provide both the government and the investor with the opportunity to appeal against awards and to correct arbitrator errors.<sup>214</sup> The European Union proposes that the

---

206. *See id.* art. 30.3; European Union Proposal on the Investment Permanent Court *supra* note 167, art. 13 (analyzing similarities between United States and European Union).

207. *See id.* (describing the approach of United States and European Union on interpretation).

208. *See* U.S. Model BIT, *supra* note 104, art. 28; European Union Proposal on the Investment Permanent Court, *supra* note 167, art. 22.3 (observing that the parties can submit questions related to the interpretation of the Agreement).

209. *See generally* Concept Paper, Investment in TTIP and beyond – the path for reform (May 2015), [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF) (analyzing a criticism in investor-state arbitration).

210. *See* EU Press Release, *supra* note 164 (addressing the objective of the EU).

211. *See id.* (debating the European Union proposal).

212. *See id.* (specifying the tribunal term).

213. *See id.* (describing the qualities of the panel).

214. *See id.* (analyzing the benefit of an appellate tribunal); European Comm'n Staff, *Online public consultation on investment protection and investor-to-state dispute settlement*



appellate body will have jurisdiction over the following alleged errors: interpretation or application of applicable law; appreciation of the facts, including the appreciation of relevant domestic law; or, those provided for in Article 52 of the ICSID Convention.<sup>215</sup> Although there is no appellate mechanism in the US Model BIT, the United States has acknowledged the possibility of developing one under other institutional arrangements, while always guaranteeing transparency.<sup>216</sup>

### *III. ANALYSIS OF THE US AND THE EUROPEAN UNION APPROACHES TO THE TTIP*

This Part analyzes how the negotiation will likely play out between the United States and the European Union, and whether or not the differences could prevent the realization of the TTIP. The text concerning the definition of “investment” will be negotiated between the two sides without significant difficulty.<sup>217</sup> Regarding discriminatory treatment, while the European Union texts seem to be more specific, the two proposals are quite similar, indicating that no significant disagreements should arise.<sup>218</sup> Concerning fair and equitable treatment, the United States provision is not as specific as the EU Drafts and the other official EU texts.<sup>219</sup> The presence of public pressure in Europe may result in narrowing the United States general rule.<sup>220</sup>

During the negotiation procedures, it is likely that an issue may arise on the TTIP’s expropriation provision.<sup>221</sup> In particular, the role of the regulatory measures is fundamental, and this means that the parties should negotiate in order to understand which areas must be

---

*(ISDS) in the Transatlantic Trade and Investment Partnership Agreement* (European Commission, Working Paper SWD (2015) 3, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf) (analyzing the advantages in creating the appellate body).

215. See European Union Proposal on the Investment Permanent Court, *supra* note 167, art. 10 (stating which the competence of the tribunal should be).

216. See U.S. Model BIT, *supra* note 104, art. 28 (describing the provision related to the appellate body in the U.S. Model BIT).

217. See generally *supra* notes 173-75 (discussing the negotiation on the definition of investment).

218. See generally *supra* notes 176-78 (debating on non-discrimination treatment).

219. See generally *supra* notes 179-81 (analyzing the difference on fair and equitable treatment between the US and EU).

220. See *supra* note 164 (referring to the problem of public opinion).

221. See generally *supra* notes 182-85 (discussing expropriation).

considered legitimate for non-compensation.<sup>222</sup> Even though there is not a specific provision on the right to regulate in the US Model, the relevant texts of the European Union and United States do not appear to have any major differences.<sup>223</sup> Considering the issue of transparency, even if both parties agree on most of the provisions, many criticisms arise, and will continue to arise, on three overlapping problems that must be considered further: the main characteristics of arbitration in confidentiality; the right of public knowledge, considering that citizens will have the burden of the compensation resulting from citizen's awards; and the possibility that an appointed arbitrator's decision-making will be influenced if the result is publicized.<sup>224</sup>

Another problem could be presented by the multiple claim system.<sup>225</sup> On the one hand this is normal, considering that the idea behind ISDS is to create a "de-politicized" national court and the delay that arises from a double level of jurisdiction.<sup>226</sup> On the other hand, requiring the exhaustion of local remedies could effectively favor the domestic courts, avoiding the possibility of parallel proceedings.<sup>227</sup> And even if the contracting parties do not have substantial differences on the relationship between domestic and international courts, neither the United States nor European Union have considered all aspects or potential issues, as stressed by public opinion in Europe.<sup>228</sup>

The European Union's proposal of an Investment Permanent Court could represent a problem for the negotiation.<sup>229</sup> This

---

222. See generally *supra* notes 186-89 (addressing the problem of regulatory measure).

223. See *id.* (considering the position of the contracting parties on regulatory measure).

224. See generally *supra* notes 190-92 (introducing new criticism on transparency).

225. See generally *supra* notes 193-95 (introducing a possible problem on multiple claims).

226. See generally *supra* notes 196-99 (considering a disadvantage of the exhaustion of local remedies).

227. See generally *supra* notes 200-02 (taking into account an advantage of the exhaustion of local remedies).

228. See *supra* note 164 (introducing the problem of public opinion on multiple claims).

229. See Stephan Schill, *The TTIP Negotiations: US Versus EU Leadership in Global Investment Governance*, KLUWER ARB. BLOG (Mar. 5, 2016), <http://kluwerarbitrationblog.com/2016/03/05/the-ttip-negotiations-us-versus-eu-leadership-in-global-investment-governance/>; Mirjam van de Hel-Koedoot, *The Proposed New Investment Court System for TTIP: The Right Way Forward?*, EFILA BLOG (Oct. 14, 2015), <http://efilablog.org/2015/10/14/the-proposed-new-investment-court-system-for-ttip-the-right-way-forward/> ("[T]he U.S. Chamber of Commerce announced on the day of publication of the

mechanism is not present in the US Model BIT and, since the publication of European Union document, the United States has still not officially expressed an opinion.<sup>230</sup>

Even if the US Model BIT does not contain a specific filter for frivolous claims, it is plausible for the negotiations to reach a compromise on this matter.<sup>231</sup> The filter mechanism will depend on a political compromise between the parties. Meanwhile, interpretation of norms should not create a debate, given the congruence between US and EU understandings.<sup>232</sup> Finally, considering the TTIP's appellate system, the question remains whether this body will resemble a judicial proceeding or an arbitration proceeding.<sup>233</sup>

### *CONCLUSION*

It is dubious whether the TTIP will come to fruition, but in the event that it does, it holds the potential to revolutionize the global economy.<sup>234</sup> The United States and the European Union, two huge modern economies, have the chance to create a completely new system that it will make trade and investment between them much simpler.<sup>235</sup> However, numerous concerns exist in relation to all the chapters within the TTIP.<sup>236</sup> In particular, within the chapter pertaining to investment a number of obstacles must first be overcome.<sup>237</sup> As explained earlier, the European Union has proposed a public consultation on twelve main issues, the resolution of which deals with most of these concerns.<sup>238</sup>

---

Proposal that 'the proposal is deeply flawed' and that the US 'cannot in any way endorse today's European Union proposal as a model.'").

230. See *supra* note 229 and accompanying text (considering the US position).

231. See *generally supra* notes 203-05 (proposing a solution of the filter mechanism).

232. See *generally supra* notes 206-09 (stating that the political compromise is the solution).

233. See *generally supra* notes 209-16 (addressing few problems that could arise from the creation of an appellate body).

234. See *supra* Part I(A); Michael Beckerman, *The Future of the Global Economy Depends on the U.S.-EU Trade Deal*, HUFFINGTON POST, (Sept. 11, 2013), [http://www.huffingtonpost.com/michael-beckerman/the-future-of-the-global-\\_b\\_3562595.html](http://www.huffingtonpost.com/michael-beckerman/the-future-of-the-global-_b_3562595.html) (analyzing the consequences of the TTIP).

235. See *supra* Introduction (addressing which area the TTIP focus on).

236. See *supra* note 4 (affirming that the realization of the TTIP represents a difficult task).

237. See *supra* notes 18-22 (considering the general issues of the investment chapter).

238. See *supra* note 164 (taking into account the role of the public opinion).

The aim of this Comment is neither to provide a political analysis, nor a social one. Rather, this Comment analyzes the main issues concerning the TTIP's investor-state arbitration dispute solution provisions, looking exclusively at US and EU texts for guidance. The resulting discovery is that upon dissection, the US and EU positions on law are not as far apart as they initially seem. Moreover, they seem reconcilable.<sup>239</sup>

The United States and European Union have similar points of view across the scope of the substantive investment protection provisions, including: non-discriminatory treatment for investors; fair and equitable treatment; expropriation; multiple claims; the relationship to domestic courts; reducing the risk of frivolous and unfounded cases; and guidance by the parties on the interpretation of the agreement.<sup>240</sup> While the United States and European Union agree on many issues, it remains unclear how the parties might agree on the following: the proposed Investment Permanent Court; an appellate mechanism and consistency of rulings mechanisms; transparency in ISDS ensuring the right to regulate; and investment protection.<sup>241</sup> However, with diligence and compromise, these can most likely be resolved if the parties are willing.<sup>242</sup> In conclusion, the fate of the two of the biggest economies in the world will likely turn on the political and diplomatic choices made in the course of the TTIP negotiations.<sup>243</sup>

---

239. See *supra* Part III (affirming that the position between the US and EU are not different).

240. See *supra* Part III (clarifying which points the US and EU have in common).

241. See *supra* Part III (stating on which point the US and EU have a different view).

242. See generally Hans Von Der Burchard, *French trade minister: US must move, or TTIP is dead*, POLITICO (Mar. 11, 2016, 3:16 PM), <http://www.politico.eu/article/french-trade-minister-us-must-move-or-ttip-is-dead/>; Owen E. Herrstadt, *Labor Rights, Manufacturing, and the Transatlantic Trade and Investment Partnership*, ECON. POL'Y INST. (Sep. 3, 2013) (stating the role of the negotiations).

243. See *supra* note 242 (clarifying which elements are crucial for the negotiations).

