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Sebastian Sampallo

Investor-state dispute settlement in the TTIP

A fair dispute resolution mechanism or the bane of democracy?

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Supervisor: Michael Bogdan

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Summary

On July 8, 2013, the United States and the European Union started negotiations for the Transatlantic Trade and Investment Partnership (TTIP). The TTIP is a proposed international trade and investment agreement (IIA) that aims to create the largest free trade area in the world. Despite the promises of the TTIP, including job opportunities and economic gains of over €100 billion in the EU alone, there have been massive protests against the TTIP. The TTIP is according to some critics a *"threat to democracy, the environment, consumers and labour standards"*. The most contentious issue with the TTIP has been the inclusion of an investor-state dispute settlement (ISDS) provision. An ISDS provision grants investors the right to submit a claim against a state to an investment tribunal if the state has caused the investor damage by breaching an IIA entered into with the home state of the investor.

The subject of this thesis is international investment law and the main purpose of it is to examine arguments for and against the inclusion of an ISDS provision in the TTIP and how such an ISDS provision could be altered to avoid some of the potential downsides with ISDS. Furthermore, the thesis will discuss the proposal put forth by the European Commission to establish the Investment Court System (ICS). The thesis will conclude with a recommendation for or against ISDS in the TTIP as well as for or against the ICS.

Foreign direct investment is sometimes called the life blood of global economy. Attracting foreign capital is positive for states in many regards. For investors there are some risks associated with investing in a foreign state. Expropriations and discriminating treatment by the host state are such potential risks faced by the foreign investor. International investment protection has evolved over history, from gunboat diplomacy in the 1800s to a system based on BITs and other IIAs in modern time. Modern IIAs protect the investor by providing protection standards such as fair and equitable treatment and most favourable nation treatment, as well as ISDS.

Common arguments against ISDS are that ISDS is a threat to state sovereignty and the state's right to regulate, that investment tribunals are biased in favour of the investors, that ISDS lacks fundamental procedural protections and that it is not transparent enough. While there are some issues with ISDS, for instance a lack of an appeal mechanism, much of the criticism against ISDS is based on misunderstandings and misrepresentations of the system. The conclusion of the thesis is that ISDS is the most effective and fair dispute resolution mechanism available for the TTIP.

While the ICS is an interesting proposal which remedies some of the issues associated with ISDS, such as the lack of an appeal mechanism, it is doubtful whether the need for such a system is pressing enough. ICS might lead to proceedings that are even more costly and lengthy than ISDS, which is undesirable. The thesis concludes that the potential downsides outweigh the potential gains with the proposal. Unless the ICS is modified to deal with some of these downsides it should not replace ISDS in the TTIP.

Abbreviations

ACIA	ASEAN Comprehensive Investment Agreement
BIT	Bilateral investment treaty
CETA	Comprehensive Economic and Trade Agreement
Commission	European Commission
Congress	United States Congress
Council of Ministers	Council of the European Union
EC Treaty	Treaty of Rome
ECT	Energy Charter Treaty
EU	European Union
FCN	Treaty of Friendship, Commerce, and Navigation
FDI	Foreign direct investment
FET	Fair and equitable treatment
FPS	Full protection and security
FTA	Free trade agreement
GATT	General Agreement on Tariffs and Trade
Guidelines	Guidelines on the Treatment of Foreign Investment
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Dispute
IIA	International trade and investment agreement
ISDS	Investor-state dispute settlement
IT	Investment tribunal
MAI	Multilateral Agreement on Investment
MFN	Most favoured nation
NAFTA	North American Free Trade Agreement
New York Convention	New York Convention on Recognition and Enforcement of Arbitral Awards
NGO	Non-governmental organisation

NT	National treatment
OECD	Organisation for Economic Co-operation and Development
TEC	Transatlantic Economic Council
TNC	Transnational corporation
Tribunal	The Tribunal of First instance
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TPA	Trade Promotion Authority Act
TPP	Trans-Pacific Partnership Agreement
TTIP	Transatlantic Trade and Investment Partnership
TTIP-draft	Investment section draft of the TTIP released on September 16, 2015.
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
US	United States
WTO	World Trade Organization

1. Introduction

1.1 Background

In Washington D.C, on July 8, 2013, the European Union (EU) and the United States (U.S.) held the first round of negotiations for the Transatlantic Trade and Investment Partnership (TTIP).[1] The TTIP is a proposed international trade and investment agreement (IIA) that strives to create the largest free trade area in the world, which would encompass about 50 % of global economic output, 30 % of global trade and 20 % of global foreign direct investment (FDI).[2] The purpose of the TTIP is to improve access to the U.S. market for companies from the EU member states, and vice versa. The purpose is also to facilitate exports through regulatory cooperation and decreased bureaucracy as well as establishing new rules and legislation that will facilitate transatlantic trade.[3] According to an independent study, made by the Centre for Economic Policy Research in London, the TTIP could bring a potential economic gain of €119 billion a year for the EU and a potential economic gain of €95 billion a year for the U.S. In addition to this it is believed that the TTIP might have potential impact on world trade and incomes, increasing global income by almost €100 billion. The same study also claims that the TTIP would benefit the labour markets in both the U.S. and the EU, by increasing overall wages and by creating job opportunities for workers of both high and low skill. [4]

Despite all the promises associated with the TTIP there has been fierce critique against it, both in the U.S. and in the EU. In Europe big protests have been held against the TTIP, claiming it to be a *"threat to democracy, the environment, consumers and labour standards"*[5]. More than 3.5 million EU citizens have signed an online petition against the TTIP, whereas more than 1.6 million of these signatures originate from Germany alone.[6] A

[1] Akthar & Jones (2013) *Proposed Transatlantic Trade and Investment Partnership (TTIP) in brief,* Current Politics and Economics of Europe, Volume 24, Number 1/2. p. 111.
[2] Weaver (2014) *The Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation, and Future Trade Implications,* Emory International Law Review, Volume 29, issue 1, p. 227.
[3] Webpage of the European Commission retrieved 2015-11-05 from http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/contents/.
[4] Francois (2013) *Reducing Transatlantic Barriers to Trade and Investment – an economic assessment*, Final Project Report, March 2013, Prepared under implementing Framework Contract TRADE10/A2/A16, p. vii.
[5] Webpage of the European Initiative against TTIP and CETA, retrieved 2015-11-05 from https://stop-ttip.org/.
[6] Ibid.

very contentious issue has been the inclusion of an investor-state dispute settlement (ISDS) provision. An ISDS provision grants investors the right to submit a claim against a state to an investment tribunal (IT). The IT can remunerate the investor for losses suffered through the action of the state, if that state through an IIA, or otherwise, have given the investor a guarantee that it will be protected against such action.[7]

Media attention surrounding certain cases has dominated the public debate and has given voice to criticism claiming, among other things, that ISDS is an undue limitation of the state's sovereign power to legislate.[8] One case in Europe that has stirred up strong emotions, especially in Germany, is the case of Vattenfall v. Germany. Vattenfall is a Swedish electricity generation and distribution company that is fully owned by the Swedish state. After the Fukushima catastrophe, where a tsunami led to a Japanese nuclear power plant being compromised, the German government decided to phase-out nuclear power and to forbid electricity generation in certain nuclear power plants owned by, among others, Vattenfall. As a result of this Vattenfall filed a claim against the German Federal Government under the provisions of the Energy Charter Treaty (ECT), demanding compensation for their loss.[9]

The high media coverage of controversial cases, such as Vattenfall v. Germany, has affected the TTIP negotiations and a debate whether it is reasonable that a private company should be able to challenge a decision made by a sovereign state and claim damages for their loss have been raging in Europe and the U.S., not only among the general public, but also among politicians and scholars. The Social & Democrat group, which is the second largest group in the European Parliament, stated in January, 2015, that "there are some red lines we cannot give way on", one such red line being the inclusion of ISDS in the TTIP.[10] This attitude is also shared by other political parties and for instance the Swedish Green party, Miljöpartiet, is categorically against the inclusion of ISDS in the TTIP and considers it a threat against environmental protection and consumer rights.[11] There are strong voices in favour of ISDS in the TTIP as well. The Swedish member of the European parliament, Christofer Fjellner, which

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[7] Blackaby, Partasides, Redfern & Hunter (2015) *Redfern and Hunter on International Arbitration* p. 444.
[8] Fabry & Garbasso (2015) *"ISDS" in the TTIP – The Devil is in the Detail,* p. 3.
[9] Bernasconi-Osterwalder & Hoffmann (2012) The *German Nuclear Phase-out Put to the Test in International Investment Arbitration? Background to the new dispute Vattenfall v. Germany (II),* p. 1-2.
[10] Webpage of the S&D group in the European Parliament retrieved 2015-11-05 from http://www.socialistsanddemocrats.eu/newsroom/sds-want-speed-agreement-ttip-without-giving-red-lines.
[11] Webpage of Miljöpartiet, retrieved 2015-11-05 from http://www.mp.se/just-nu/ttip-ett-handelsavtal-som-hotar-miljoskyddet.

is part of the European's People Party, issued an ISDS-challenge on his blog on May 5, 2015. He vowed to *"single-handedly take on the anti-ISDSers, their arguments and their flawed examples."* and *"for every case that the anti-ISDSers present, that supposedly is a sign of evil corporations undermining our democracy, I'll give them two cases in return that clearly show the need for ISDS. A quid pro quo squared, so to speak"*[12].

After the conclusion of the North American Free Trade Agreement (NAFTA) in 1994 there was a shift of attitudes in the U.S. regarding ISDS provisions in IIAs, and it was strongly criticised by media, politicians and environmental advocacy groups.[13] ISDS provisions are still subject to heated debate in the U.S. and the negotiation of the TTIP has fueled the on-going discussions. In March, 2015, more than 100 distinguished law professors and scholars signed a letter issues by the Alliance of Justice, addressed to the leaders of the U.S. Congress (Congress) and to the U.S. Trade Representative, opposing the inclusion of ISDS in the TTIP and urging them to *"protect the rule of law and the nation's sovereignty by ensuring ISDS is not included"*[14]. As a response to Alliance of justice's letter in April, 2015, more than 50 renowned Law professors and scholars in the investment law field signed an open letter to Congress and the U.S. Trade Representative strongly supporting "*a robust, even-handed, and careful discussion about investment treaty arbitration (ITA), which is sometimes referred to as investor-state dispute settlement (ISDS). We believe, however, that the discussion should be based on facts and balanced representations, rather than on errors or skewed information"*[15]*.*

To summarise, it would not be an understatement to brand ISDS in the TTIP as a controversial issue. This thesis will deal with this issue and examine the arguments for and against ISDS as the preferred dispute resolution mechanism in the TTIP.

1.2 Subject and purpose

The subject of this thesis is international investment law. After an introduction to the history, development and the sources of international investment law, the focus of this

[12] Blog of Christofer Fjellner, retrieved 2015-11-05 from http://www.fjellner.eu/the-isdschallenge-single-handedly-taking-on-the-anti-isdsers/.
[13] Park (2006) *Arbitration of International Business Disputes – Studies in Law and Practice,* p. 323-324.
[14] Webpage of Alliance for Justice, *Letter opposing ISDS* retrieved 2015-11-05 from http://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf.
[15] Mcgill University webpage, *An open letter about investor-state dispute settlement,* retrieved 2015-11-05 from https://www.mcgill.ca/fortier-chair/isds-open-letter.

thesis will be on ISDS and whether an ISDS provision should be included in the TTIP. The purpose of this thesis is to examine the most common arguments for and against the inclusion of an ISDS provision in the TTIP and how such an ISDS provision in the TTIP could be altered to avoid the negative consequences put forth by the adversaries of ISDS. This thesis will also discuss the proposal put forth by the European Commission (The Commission) to establish the Investment Court System (ICS) that would have exclusive jurisdiction over any investment disputes under the TTIP. This thesis will discuss how the ICS would function and analyze the pros and cons with such an institution. This thesis will conclude with a recommendation either for or against an ISDS provision in the TTIP and whether the ICS should be established or not.

1.3 Outline

This thesis is divided into five sections.

The first section will introduce and describe the subject of international investment law. It will start with a brief historical journey into the subject and will describe how international investment law and FDI have developed over time. This section will also introduce the reader to the sources of international investment law and to the concept of ISDS and how that method of dispute resolution has been used in the U.S. and in the EU.

In the first section a basic understanding of the international investment law area as a whole will be given to the reader. The second section will discuss IIAs in more depth and describe the different substantive protection standards usually included in IIAs. This will give a better understanding of how IIAs function and what protection IIAs grant the investor.

The third section will introduce the reader to the TTIP and the TTIP negotiations. This section will briefly describe what the TTIP is and what the purpose of it is. It will also give some insight into the negotiation starting positions of the parties.

The fourth section will examine the most common arguments for and against including an ISDS provision in the TTIP. This section will include a comprehensive discussion of ISDS and whether it must be improved in order for it to be an appropriate dispute resolution mechanism in the TTIP.

The fifth section will focus solely on the ICS proposal put forth by the Commission. This section will examine how the ICS is proposed to work and the pros and cons of the proposal.

1.4 Delimitations

International investment law is a very broad area that is shaped by, among other things, thousands of IIAs, domestic legal orders and arbitral case law. Thus, giving a complete insight in to the area is not possible. Both international investment law and the TTIP are subjects that are intensively discussed on many different levels and there are strong positions on many issues. Trying to cover all these positions and to examine every critical argument against TTIP and ISDS would be impossible and I have therefore limited the studies in some aspects.

Regarding the discussion of the TTIP I will only deal with arguments for and against an ISDS provision in the TTIP and whether or not an investment court should be established. There are other issues in the TTIP that are subject to criticism, but these issues are outside of the scope of this thesis. There is a plethora of arguments both for and against ISDS in the TTIP and not all of these arguments can be covered by the thesis. Instead I will focus on the arguments that, in my opinion, are the most important and interesting. The arguments for and against ISDS in IIAs are quite similar and only differs slightly depending on what IIA is subject to discussion. My main focus will be on arguments concerning an ISDS provision in the TTIP, but arguments raised for or against ISDS in general will also be considered to assist with creating a bigger picture.

Although there are certain interesting human rights issues relating to property that could be examined in relation to this subject this will be outside of the scope of this thesis. The thesis will also disregard any potential private law solutions to the issue of investment protection as well as international law relating to confiscation, most notably public international law regarding confiscation developed during and following World War II.

1.3 Method and material

The method used when writing this thesis was traditional dogmatic method. The main sources for the first two sections consist mainly of doctrine and decisions made by investment tribunals. Material from UNCTAD (United Nations Conference on Trade and Development) has been very helpful to describe the development of FDI and the

international investment law area. *Principles of International Investment Law* by Dolzer & Schreuer gave good insight into the fundamentals of international investment law and proved to be very helpful in describing the basic issues. Many articles and books have been written on the area of international investment law and finding material did not cause any problems.

For the third section the main sources were newspaper articles and documents released by the Commission, such as the negotiation directives given to the Commission and drafts of the investment chapter of the TTIP. The website of the Commission was very insightful.

The sources for the fourth section differs somewhat since the nature of the discussion taking place resemble legal policy rather than traditional legal dogma. ISDS in IIAs is a very controversial subject and many articles voicing strong opinions could be found. These articles are discussing issues of legal policy and hence can be perceived as non-neutral sources. However, since the purpose of the thesis is to examine arguments for and against an ISDS provision in the TTIP I did not find this to be a problem; on the contrary the large amount of available material was a great asset.

The fifth section focuses on the brand new ICS proposal and the available material, except the proposal in itself, is quite meager. The main source was the proposed draft from the Commission, but articles and reactions to this proposal as well as other literature dealing with earlier proposals to establish an investment court were also examined.

2. History, development and sources of international investment law and ISDS

2.1 Creating wealth through foreign direct investment

The Organisation for Economic Co-operation and Development (OECD) defines FDI as follows: *"Foreign direct investment reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise"*[16]. FDI is a key element in globalization and provides a way of creating direct, stable and lasting links between economies.[17]

The positive consequences of FDI are well-documented and studies show that FDI contributes to both factor productivity and income growth in the country that is the target of the investment.[18] Developing countries that are host states for FDI also gain other advantages. Their economy gets more integrated with the world economy, which facilitates trade and leads to more imports and exports. FDI also often bring technology transfers, which is very important for developing nations, as well as the creation of jobs and human capital enhancement. The human capital enhancement occurs both as a result of the effort of the state trying to attract FDI by being able to offer a competent work force, but also as a result of training and experience once the foreign company has been established.[19] To exactly what extent these positive effects follow from FDI and how they differ from domestic investments in that regard is subject to discussion, but it is clear that, in general, it is desirable for a state to attract FDI.[20]

According to classical economic theory, money should flow from rich developed nations to poor developing nations. Developing countries have a lower level of capital per worker

[16] OECD (2008) *Benchmark definition of foreign direct investment,* p. 48.
[17] Ibid. p. 14.
[18] OECD (2002) *Foreign direct investment development – maximising benefits, minimising costs*, p. 9.
[19] Ibid. p. 10-14.
[20] For a more in-depth discussion about the effects of FDI on developing countries, see OECD (2002) *Foreign direct investment development – maximising benefits, minimising costs.*

which leads to cheaper labor costs, which in its turn leads to higher returns on investments made in a developing state than an equivalent investment made in a developed state. Despite this surprisingly little capital flow from developed states to developing states. This paradox is in economic theory called the Lucas paradox.[21] Both Lucas and subsequent authors argued that one of the explanations for this paradox is the political risks associated with investing in a developing country. Weak protection of property rights, corruption and unstable institutions are all factors that present a great risk for an investor and prevents FDI.[22]

There is no obligation under customary international law for a state to admit FDI into their territory. If a state decides to accept FDI into its territory it has a right to regulate the investment. These rights of the state are an expression of state sovereignty and the ability to enter treaties with other states, thereby potentially relinquishing some of its rights, also stems from the concept of state sovereignty. If a state admits FDI into its territory, then it is bound by customary international law to treat the investor according to an international minimum standard. Each state has a sovereign prerogative to enter into IIAs which demands a higher level of protection for investments, should they wish to do so. Considering the positive effects that FDI seems to have on a country, it is understandable that a state might want to attract FDI by offering a high level of protection for the investor.[23]

Exactly how the availability of an IIA and the possibility of ISDS affect the rate of FDI is not entirely clear. A working paper from the World Trade Organization (WTO) concluded that while trade liberalisation promoted FDI it seemed like ISDS played a minor role in the promotion of FDI.[24] There are some obvious problems with empirically researching this issue though, and due to the lack of empirical evidence it is hard to say to a certainty what effect IIAs and ISDS have on the promotion of FDI.

As an investor there are some issues and risks related to FDI that needs to be addressed prior to the investment decision. Investing in a foreign country requires other considerations

[21] Lucas (1990) *Why doesn't capital flow from rich to poor countries,* The American Economic Review, Vol 80, no. 2. p. 92-93.
[22] Ibid. p 94-96; Alfaro, Kalemli-Ozcan & Volosovych (2008) *Why doesn't capital flow from rich to poor countries? An empirical investigation,* The Review of Economics and Statistics, Vol. 90, issue 2, p. 364-365.
[23] Dolzer & Schreuer (2012) Principles of International Investment Law p. 22-23.
[24] Berger, Busse, Nunnekamp & Roy (2010) *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box,* WTO Economic Research and Statistics division, p. 18.

by the investor than when taking part of other of international deals, such as international trade transactions. In international trade the deal usually consists of an exchange of goods against money. Sometimes there is only a one-time exchange, and sometimes there are multiple series of exchanges over a long time. However, when investing abroad the investor creates a long-term relationship between itself and the host country. This relationship can last for decades and is usually contingent on the investor initially investing a large amount of resources into the project, with the expectation to earn its money back over the course of the investment. It is crucial for the investor to do an assessment of the risks that are inherent in such a long-term commercial relationship and to choose a business concept and a legal structure that will minimize these risks.[25]

The investor will almost always bear the commercial risks of an investment, like for example changes in the market, emerging competitors, exchange rates and likewise. Political risks, for instance the risk of future intervention from the host state by expropriation, changes in labor, environmental or tax laws and how to settle disputes relating to the investment must however be dealt with. These are the risks that are often dealt with through IIAs, but if there is no applicable IIA the investor must address these issues with the host state. Once the investor has invested its resources into a country power tends to shift to the host state. There is always a risk that the host state changes its position in a way that alters the conditions on which the investment was made. For every change of government in the host state this risk grows. Thus, having a legal recourse in case the host state should take measures which causes damage to the investment is crucial for the investor.[26]

2.2 The history of foreign direct investments and international investment law

"There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of another country in friendship with their own to the protection of its sovereign by all efforts in his power"[27].

– John Adams on investment protection in 1796.

[25] Dolzer & Schreuer (2012) p. 21-22.
[26] Ibid.
[27] Ibid. p. 1.

2.2.1 Early developments

In the early nineteenth century international law was mainly focused on allocating jurisdiction between states, and issues related to FDI were usually treated as a matter of national law. International law dealt only with issues related to FDI in extraordinary cases and then by the means of diplomatic protection.[28] FDI was at this time uncommon, and indirect foreign investments, such as loans and floating of government bonds, played a substantially larger role for states and for the international economy. The FDI that existed at this time usually consisted of exploitation of natural resources such as mines and plantations. Considering the relative absence of FDI at this time, it is not surprising that it was quite rare for states to control or restrict international private transactions.[29]

Two principles were dominating public international law during this period of time; the principle of territorial sovereignty, which gave states full and exclusive jurisdiction over persons, property and events within the state's borders, and the principle of nationality, which expresses the interest of a state to make sure that their citizens are treated appropriately when abroad.[30] The nineteenth century was the era of industrialization and industrialized Western European countries and the U.S. began to generate large surpluses which would be invested abroad, usually in countries overseas that had been colonized. These investments would be governed by the colonial law of the colonial power, and no significant developments in international investment law emerged out of these investments. Later into the nineteenth century investments started flowing from industrialized nations to non-colonized countries, most notably countries in South and Central America that were no longer under Spanish rule.

The state practice of this period was characterised by a substantial imbalance of power between the wealthy capital-exporting western states and the newly established host states that were still instable. In regards to investment protection the Western powers point of view consisted of two parts, with the emphasis being on the principle of nationality. The Western states held that their nationals should be subjected to a certain minimum standard of treatment by the host state, even if that minimum standard was not upheld in relation to the state's own citizens. Furthermore they held that states had a right to afford diplomatic

[28] UNCTAD (2004) *International investment agreements: key issue,* Volume 1, p. 5.
[29] Ibid.
[30] Ibid. p. 5-6.

protection to their nationals should such minimum standard of treatment not be given to them.[31]

There was no individual right for an investor who had been wronged to sue a host state in any international forum, which meant that the aggrieved investor had to petition its home state to take up its case on its behalf. If the state chose to accept the case, thereby protecting their citizen, then they exercised diplomatic protection. Diplomatic protection was based on “the Vattelian fiction”, which was written in 1758 by a Swiss jurist and states: *“Whoever uses a citizen ill, indirectly offends the state, which is bound to protect the citizen. The sovereign of the latter should avenge his wrongs, oblige the aggressor, If possible, to make full reparation or punish him; since otherwise the citizen would not obtain the great end of the civil association, which is safety”*[32]. However, there were some flaws with the system of diplomatic protection. First of all, it subjected the investor to the goodwill of the home state; the dispute got politicized and if the investors home state had other interest trumping the interest of protecting their citizen, then there were no other recourses for the investor. Secondly, diplomatic protection did usually not lead to a decision on whether the host state’s actions were lawful or not, and a dispute resolved through diplomatic protection did not give any legal protection in the future.[33]

The Western powers were aggressive in exercising diplomatic protection and sometimes used it as a pretext for coercion and abuse of power against a foreign state. Diplomatic protection often took the form of threats or use of force in order to fully vindicate their national and to make sure that the host state paid reparations, or otherwise remunerated their citizen. Especially Great Britain was infamous for often resorting to military action in order to vindicate their citizens.[34] These interventions later on came to be referred to as “gunboat diplomacy”.[35] In Latin America, which was the area most frequently subjected to gunboat diplomacy, the Western powers conduct lead to a legal backlash. In Latin America

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[31] Johnson & Gimblett (2011) *From Gunboats to BITs: the Evolution of modern international investment law”,* Yearbook on international Investment law policy 649, p. 650-651.
[32] Vattel (1758) *Le droit des gens ou principes de la loi natureller,* cited by Vermeer Künzli (2007) *As if: the legal fiction in diplomatic protection,* the European Journal of International Law, Vol 18 no. 1, p. 38.
[33] Lowe (2007) *International law*, p. 197-199.
[34] Johnson & Gimblett (2011) p. 651.
[35] Gunboat diplomacy is defined by Sir James Cable (1971) in *Gunboat diplomacy: political applications of limited naval force, p. 21* as follows: “*Gunboat diplomacy is the use of threat of limited naval force, otherwise than as an act of war, in order to secure advantage, or to avert loss, either in the furtherance of an international dispute or else against foreign nationals within the territory or the jurisdiction of their own state”.*

there came to be a strong emphasis on the principle of territorial sovereignty, and most notably Carlos Calvo expressed the sentiment that foreign investors had no right to be treated any better than nationals of the host state.[36]

The Calvo doctrine proclaims that international law shall be understood as giving the host state a right to diminish the protection of property belonging to foreign investors as long as the same reduction of protection is made in regard to nationals of the host state. The Calvo doctrine does not in itself demand neither strong nor weak protection of investments; it only states that the level of protection should be the same for foreign and domestic investors and that the sovereign host state decides the level of protection, without meddling, military or otherwise, from foreign states. Furthermore, the Calvo doctrine claims that a foreign investor, in case of a dispute, must assert its right in a domestic court and that they may not get any diplomatic protection from their home state nor have any access to international tribunals.[37] The Calvo doctrine must be regarded against the background of gunboat diplomacy and similar practices, and the threat against the sovereignty of states such practices represented. The Calvo Doctrine is a reaction to capital-exporting countries imposing their interests and view of international law on foreign states by threat of force.[38]

The objective of gunboat diplomacy was not the use force itself; there was no intrinsic value in using force or threats of force. The objective was to encourage adjudication of the claims subject to diplomatic protection under standards acceptable for the state using the gunboat diplomacy. As the nineteenth century progressed this objective was instead met by mixed claims tribunals. These mixed claim tribunals became more common and mainly resolved claims where either the U.S. or the United Kingdom was the claimant, and a Latin American country respondent. However, claims between the U.S. and the United Kingdom were also tried, most notably in the Alabama Claims Arbitration. The success of these mixed arbitration boards, especially in the Alabama Claims Arbitration has been credited with facilitating the subsequent movement for international arbitration.[39]

The mixed claimed tribunals were the beginning of a shift from solving disputes with violence and threat of violence to solving disputes by legal means. This was further solidified

[36] Salacuse (2010) *The law of Investment Treaties* p. 49.
[37] Dolzer & Schreuer (2012) p. 1-2.
[38] ibid.
[39] Johnson & Gimblett (2011) p. 653-654.

at the 1899 Peace Conference at The Hague when the signatories of the convention for the Pacific Settlement of International disputes, which was the same convention that established the Permanent Court of Arbitration at The Hague, stated that arbitration was *"the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle*[40]*"*. This shift from use of force to using legal means to solve disputes was once again consolidated in 1907 when the Drago-Porter Convention was adopted by the Second International Hague Conference. This convention prohibited the use of armed force for recovery of public debt in certain circumstances.[41] Only if the debtor state refused to refer the dispute to arbitration, if they accepted arbitration but prevented any compromise being reached or if they refused to carry out an arbitral decision, would military interventions be allowed.[42]

In the end of the nineteenth century up until 1914 there was a large increase of FDI. This economic development was due to states opening up their economic frontiers by the means of national legislation. Other important factors were, among other things, technical and legal development in the area of telecommunication and transportation which facilitated international trade. This surge of FDI was abruptly halted as World War I raged through Europe and the world.[43] Considerable Insecurity and instability followed WWI and the FDI flows did not recover instantly. The Russian revolution revived the Calvo doctrine in a practical manner and the Soviet Union expropriated property without any compensation, both domestic and foreign, justifying the expropriations with the national treatment standard set up by the Calvo Doctrine. This led to arbitration in 1930, where the Soviet Union was required to pay compensation to the claimant.[44]

In 1938 Mexico started nationalizing natural resources, which led to a dispute between Mexico and the U.S. Mexico relied on the principle of territorial sovereignty and the fact that there was no established rule in international law requiring compensation in case of nationalization or expropriation. In the diplomatic connections between the countries the

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[40] Ibid.

[41] UNCTAD (2004) p. 5.

[42] See the Convention between the United States and Other Powers Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (signed 18 October 1907, entered into force 26 January 1910).

[43] Dolzer & Schreuer (2008) *Principles of international investment law*, p. 1.

[44] Dolzer & Schreuer (2012) p. 2.

U.S. Secretary of State, Cordell Hull, wrote that international law allowed expropriation of foreign property, but only against compensation that is prompt, adequate and effective, a requirement that is known today as the "Hull formula".[45] Around this time, as a consequence to the various disputes, an international minimum standard for treatment of foreign citizens started to develop. This minimum standard of treatment however, was not clearly related to property of the foreign citizen at that time, and it would still take some time until international law relating to foreign investments would develop.[46]

2.2.2 Developments following World War II

After 1945, and at the end of all the turmoil related to World War II, the international economy slowly started to recover. FDI once again became more frequent, albeit that the growth happened quite slowly. The first post-war years were characterised by large-scale nationalization of key industries owned by both foreign and domestic firms. This development did not only take place in Eastern Europe and in the socialistic bloc, but also in Western Europe and Iran. As more colonized territories became independent the expropriation of property owned by foreign citizens and corporations multiplied. One important goal for the emerging states was to regain control over the economy and their national resources. The number of nationalizations or expropriations that took place increased worldwide and reached its peak in the 1970s. The different tribunals that had been established prior to World War II had decided quite few cases, and there were still outrageous conduct against foreign citizen in certain countries. When the U.S.-Iran tribunal was established there were once again a steady flow of decisions being made. This tribunal, however, only dealt with claims made by U.S. citizens. Many other abuses committed by states, mainly by the Soviet Union, were never tried in any tribunals. The international Court of Justice (ICJ) in The Hague was created in 1945, but many developing countries and the Soviet Union did not accept the compulsory jurisdiction of the ICJ. Furthermore, there was a large discrepancy between the Socialistic bloc and the West concerning their views on the importance of property rights, and the Soviet Union had no interest in giving a third party power to decide over their conduct.[47]

[45] Johnson & Gimblett (2011) p. 661-664; UNCTAD (2004) p. 6.
[46] Dolzer & Schreuer (2012) p. 3.
[47] Johnson & Gimblett (2011) p. 667-671.

In the first three decades following World War II FDI was mainly focused on natural resources and key industries.[48] The attitudes of host states slowly developed towards realising the needs and potential gains of FDIs flow to their countries. This realization in combination with the conviction that national controls and limitations were needed for FDI dominated the discussion prior to the 1970s. This attitude was also expressed by the United Nations (UN) and its work to find appropriate methods to increase the FDI flow from developed nations to developing nations. In 1962 a resolution was adopted by the UN General Assembly which recognized the right of peoples and nations to exert control over the natural resources of their country, including the right to exercise control over investments affecting such natural resources and to nationalize such investments.[49] However, the resolution also required payment of appropriate compensation for any expropriation of property and provided for agreements between foreign investors and governments to be observed in good faith.[50]

The main legal concern for investors during this period time was the extreme measures taken by states, such as expropriation. However, there was little focus on other kinds of measures that complicated FDI, such as control of the entry of foreign firms and routine treatment after establishment. These issues were left to domestic law and thus were not regulated by international law. In fact, quite elaborate administrative machinery to control incoming foreign investments was common, especially in developing states, but also to some degree in developed states. The purpose of this control was to exclude foreign investments in certain industries to benefit domestic investors. During the same period, in the early 1960s, developed countries began a process of investment liberalisation.[51] This process happened through two codes adopted by the OECD; the code of Liberalisation, of Capital Movements and the code of Current Invisible operations. The purpose of these codes was, and still is, to *"constitute legally binding rules, stipulating progressive, non-discriminatory liberalisation of capital movements, the right of establishment and current invisible transactions"*[52]. Furthermore, the creation of the European Economic Community in 1957

[48] UNCTAD (2004) p. 7.
[49] United Nation's resolution 1803 (XVII) (1962): Permanent sovereignty over natural resources.
[50] UNCTAD (2004) p. 7-8.
[51] Ibid. p. 8.
[52] OECD webpage; retrieved 2015-10-07 from http://www.oecd.org/investment/investment-policy/codes.htm.

started a movement towards regional economic integration which was followed by other groups of countries.[53]

The increased FDI activity led to a pressing need for investors to be protected. The legal structure for investments was deficient in several aspects and did not offer very strong protection for investors. Customary international law was severely lacking in many areas. There were, for example, no rules about the investor's right to transfer money out of the host country, and there were not yet any clear rules regarding the payment of compensation upon expropriation by the state of the foreign investor's property. There was no agreement among developed nations and developing nations on what international law actually demanded of host states relating to foreign investments, and there was disagreement whether there existed a "minimum standard of protection" or not. There was no effective mechanism of dispute resolution either. The International Centre for Settlement of Investment Dispute (ICSID) had been established in 1965, but it did not try any cases until 1972.[54]

It was clear that customary international law alone did not give enough protection, which is the reason why states started to conclude international treaties among themselves to ascertain that a certain level of protection would be granted to their citizens when investing in a country with which such a treaty had been entered.[55] In the late 1950s states started negotiating bilateral investment treaties (BITs). The first BIT concluded was between the Federal Republic of Germany and Pakistan on November 25, 1959.[56] Germany proceeded to negotiate and enter similar treaties, and was shortly followed by Switzerland, the Netherland, The United Kingdom, France and Belgium.[57] Efforts made to include investment protection in broader, more general, international multilateral treaties, most notably the Havana Charter of 1948 were unsuccessful. BITs which only focused on investment protection and promotion on the other hand were more successful, although it was not until in the late 1980s and 1990s that true proliferation of BITs took place.[58]

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[53] UNCTAD (2004) p. 8-9.
[54] Salacuse & Sullivan (2005) *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain,* 46 HARV. INT'L L. J. 67, p 68-69.
[55] Ibid. p. 76.
[56] Treaty for the Promotion and Protection of Investments, Pak.-F.R.G. Nov. 25, 1959, 457 U.N.T.S. 23.
[57] Salacuse & Sullivan (2005) p. 73.
[58] UNCTAD (2004) p. 9.

2.2.3 Developments during the 1970s to the 1990s

The energy crisis of the 1970s had a strong impact on the international environment for development and FDI. Developing countries were given more influence in international economic organisations for a while and got to set the agenda. This newfound power was due to a coalition of developing countries who held control over energy resources. During this period of international crisis the developing countries were able to emphasize the legitimacy of their interests and perceptions on different areas, among others the area of FDI. As a direct consequence of the energy crisis the Conference on International Economic Cooperation was created. Between 1975 and 1977 it met in Paris to conduct negotiations about energy, trade and financing, including FDI. No common ground was met in several critical areas.[59]

Meanwhile, a movement was started by developing countries who demanded a restructuring of the trading and financial system of the world, which lead to the creation of the New International Economic Order. One important point of focus for this movement was to demand economic independence for developing states.[60] In 1974 the Charter of Economic Rights and Duties of States was adopted. This resolution had several important provisions regarding FDI, and stressed the sovereignty of host states and their right to regulate and exercise authority over FDI.[61] The state's right to nationalize and expropriate foreign owned property was also reemphasized and such nationalization and expropriation was allowed under this resolution, as long as the state paid appropriate compensation.[62]

The attitudes towards transnational corporations (TNCs) during this time period differed a lot. While some regarded the presence of TNCs in a country as something positive and as a means of improving the welfare of the state, especially through the transfer of technology and creation of jobs, others saw TNCs as a threat. States were concerned that the TNCs with their vast size and competitive advantages through better technology and know-how would make it harder for domestic competitors to compete on the market. This would bring economic dislocation and dependency of the TNC. Furthermore, some regarded TNCs as a threat to local political and cultural freedoms, since the TNC's size and wealth gave them a

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[59] Ibid.
[60] Ibid.
[61] Resolution 3281 (XXIX) art. 2 (a).
[62] Resolution 3281 (XXIX) art. 2 (c).

lot of influence. The views of TNCs at this time were very polarized, and there was no clear picture of the costs and benefits of FDI.[63]

Efforts were made to create standards of conduct for TNCs which led to negotiations for adoption of legally non-binding international codes of conduct. Three main documents were created. In 1972 the Guidelines for international investment was adopted by the International Chamber of Commerce.[64] In 1976 the OECD states adopted the Declaration on International Investments and Multinational Enterprises[65] and in 1977 the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy was adopted by the International Labor Organization.[66] All these documents emphasized the positive effects of TNCs and FDI and their main concern was to integrate the activities of the TNCs into the national economic and social system of the host states. The goal was for TNCs to respect the policy goals of the host states and their aims and priorities regarding social and economic progress, as well as cooperating with the local community and local business interests.[67] The UN also attempted to create a framework for the conduct of TNCs, but despite extensive negotiations this code of conduct was never adopted by the UN General Assembly. Even though these adopted codes of conduct were not legally binding, and even though the UN's code of conduct was never adopted, they played an important role in identifying common grounds in how TNCs were to act and to be treated. The idea that international rules were appropriate when dealing with FDI became more accepted, which has helped form the current framework of international investment law.[68]

In the 1980s the general climate towards FDI started to become more positive due to national and international development, which led to increased FDI activity. One important development was the change of the international economy. The international economy changed in a way that resulted in the main interests for FDI not being only exploitation of natural resources and petroleum anymore. Instead focus shifted to manufacturing, services

[63] UNCTAD (2004) p. 9-10.
[64] International Chamber of Commerce, *Guidelines for International Investment*, 1972.
[65] Organization for Economic Cooperation and Development, *Declaration of International Investments and Multinational Enterprises,* 1976.
[66] International Labor Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 1977.
[67] Horn (1980) *International rules for multinational enterprises: the ICC, OECD, and ILO initiatives,* The American University Law Review, Vol 30:923, p. 928.
[68] UNCTAD (2004) p. 11.

and technology. The international political arena had also changed. Developing nations lost their strong bargaining position as developed nations recovered from the energy crisis of the 1970s. This in combination with the onset of the debt crisis in developing nations made attracting FDI more desirable, this since FDI did not burden the country with additional debt and FDI brought other additions to the economy, such as know-how and technology transfers. Additionally, the collapse of the socialistic bloc and the end of the Cold War strengthened market-oriented attitudes and market-oriented approaches became more common in the national policies of developing nations.[69]

These developments led to large reforms in national laws and policies in regard to FDI and investment liberalisation. Screening requirements and other procedures that investors had to go through prior to investing were softened or removed. Restrictions on movement of profits and capital were removed, which facilitated repatriation for investors. All these changes and developments led to a much more FDI-friendly environment.[70] The tide turned, and instead of trying to make it harder for foreign investors, the new capital-importing states instead attempted to attract FDI by granting stronger protection than was required by customary international law, by the means of IIAs.[71]

2.2.4 Recent developments

The amount of BITs concluded between states grew vastly over time. In 1969 there were 72 BITs. In 1979 that amount had more than doubled to 165 BITs. In 1989 that amount had more than doubled yet again, to 385 BITs. However, it was between 1990 and 2000 that the true proliferation of BITs took place. By the end of the twentieth century there were 1 857 BITs entered into by states. This means that the amount of BITs more than quadrupled during the 1990s.[72] In 2014 there were 3271 IIAs entered into by states worldwide.[73] An equivalent development took place in regards to FDI, which also quadrupled during this time. This was as a result of the above mentioned developments, but also as a result of further technological development and cheaper transportation costs.[74] In 1990 the total amount of FDI inflows worldwide amounted to $208 billion. In 2005 that amount had

[69] Ibid. p. 12.
[70] Ibid. p. 13.
[71] Dolzer & Schreuer (2012) p. 5.
[72] Johnson & Gimblett (2011) p. 685.
[73] UNCTAD (2015) *World Investment Report*, p. xi.
[74] Dolzer & Schreuer (2008) p. 1.

increased to $986 billion. The record was set in 2008 when the worldwide inflow of FDI reached the astounding amount of $1 771 billion.[75] The following economic and financial crisis affected the TNCs operations abroad significantly, which led to decreasing inflows of FDI. In 2014 the total amount of FDI inflows worldwide was $1 230 billion.[76]

There have been some attempts to find a multilateral solution for investment protection in the last decades. While some multilateral instruments, such as the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), directly or indirectly relate to investments, there have been no multilateral instruments dealing directly with investments issues.[77] Some important regional economic integration instruments did however address FDI and investment issues. Perhaps the most notable of these is NAFTA which was entered into by the U.S., Canada and Mexico in 1992. NAFTA is a free trade agreement (FTA), but it does also contain, among other things, an ISDS provision. [78] Another interesting treaty is the ECT, which is a multilateral framework for cross-border operations in the energy industry and has been signed by more than fifty states and the EU.[79] The ECT contains provisions on investment protection, investment liberalisation and dispute resolution in the energy sector.[80]

A recent trend in international investment law has been to create regional IIAs, often included in a broader FTA.[81] Both the U.S. and the EU have been active parties in the creation of such IIAs. One such IIA is the TTIP, but other notable agreements that have been concluded, or are currently under negotiation, are the Comprehensive Economic and Trade Agreement[82] (CETA) between the EU and Canada and the Trans-Pacific Partnership Agreement[83] (TPP) negotiated by twelve countries in the Pacific Ocean, among others the US, Canada, Japan and Australia. Traditionally IIAs were concluded by one capital-exporting country, a developed country, and one capital-importing country, a developing country. In this way the major developed countries built extensive network of IIAs with developing

[75] UNCTAD (2010) *World Investment Report*, p. 16.
[76] UNCTAD (2015) p. 2.
[77] UNCTAD (2004) p. 13.
[78] See NAFTA part five, chapter 11 for provisions relating to investments.
[79] Hobér (2013) *Selected writings on Investment Treaty Arbitration,* p. 217.
[80] Dolzer & Schreuer (2012) p. 15.
[81] Ibid. p. 14.
[82] Webpage of the Commission, retrieved 2015-10-21 from http://ec.europa.eu/trade/policy/in-focus/ceta/.
[83] Webpage of the Office of the Unites States Trade Representative, retrieved 2015-20-21 from https://ustr.gov/tpp/#what-is-tpp.

economies or economies in transition. In recent years this has changed somewhat, and it is now common that developing countries conclude IIAs with other developing countries, but also that developed countries conclude IIAs among themselves. These treaties differ somewhat from traditional IIAs, but they are by large quite similar to the existing legal framework.[84]

Until the early 1990s there were barely any case law in international investment law area, this has however changed over the years. By the 1990s ICSID had become the main forum for settling investment disputes, and the case law started stacking up. This increase of activity was a direct consequence of the large amount of BITs entered into, but it was especially due to the incorporation ISDS in BITs as the preferred way of solving investor-state disputes.[85] Until 1996 there were no more than two known ISDS claims. This had increased to 16 known ISDS claims in 2001. By 2008 around 300 known cases had been tried under investment treaties.[86] 42 new ISDS cases were brought in 2014, bringing the total amount of known claims brought under investment treaties to 608.[87]

2.3 The sources of international investment law

The principles governing foreign investments have developed over time and it is clear that international investment law today is to be considered an area of law separate from international economic law and international trade law. The nature of investments makes international investment law stand out from international law in general in regards to its nature, structure and purpose.[88] The legal structure is based on a foundation of customary international law as well as domestic laws and regulations. The substantive content though is primarily formed by international treaties between states.[89] This section will briefly examine the most important sources of international investment law.

2.3.1 Domestic law

Domestic law is often underestimated as a formal source of international investment law, this since most investment disputes are solved by ITs and not by domestic courts. However,

[84] UNCTAD (2004) p. 14.
[85] Dolzer & Schreuer (2012) p. 9-11.
[86] Johnson & Gimblett (2011) p. 686-687.
[87] UNCTAD (2015), p. xi.
[88] Ibid p. 19.
[89] UNCTAD (2004) p. 14.

most ITs treat domestic law as applicable law concurrently with international law and domestic law play an important role in several ways.[90] First of all, some states have certain laws which specifically deal with FDI. These laws deal with issues such as admission and regulation of foreign affiliates and promoting FDI through special treatments, like tax incentives. These laws are obviously of great importance. A country's entire legal system, including its commercial law, labour law, civil procedure law and constitutional law also plays an important role since these laws create the legal environment for the foreign investor and its company. Whether a contract has been formed under international law might depend on the conditions for validity of a contract in domestic law. The legal environment can also be crucial in interpreting certain key concepts such as what legitimate expectations an investor might have. Furthermore, many legal concepts that are used in international law are based on domestic law, such as what a "corporation" is or who is considered to be a "national" of a state. [91] Sometimes there is an express renvoi to domestic law in IIAs, turning domestic law into applicable law for the whole IIA or parts of it. This is often the case regarding the definition of "investment".[92]

2.3.2 Customary international law

International investment law is dominated by treaties, but customary international law still plays a crucial role since it constitutes the background for understanding and considering any international legal rule or treaty.[93] Even if there is a treaty, for instance a BIT, governing a specific investment and a legal dispute arising out of it, this BIT will still be understood and interpreted in the context of customary international law. A BIT will, in case it is not sufficiently clear, be interpreted in accordance with the Vienna Convention on the law of Treaties which provides that when treaties are interpreted *"any relevant rules of international law applicable in the relations between the parties' shall be taken in account"*[94]. Customary international law can also be used in order to complete the provisions of an applicable IIA. There are some rules of customary international law that have been identified in international investment law, one being the Hull Formula, prohibiting expropriation unless

[90] Douglas, Pauwelyn & Viñuales (2014) *The Foundations of International Investment Law: Bringing Theory into Practice*, p. 222.
[91] UNCTAD (2004) p. 14.
[92] Douglas, Pauwelyn & Viñuales (2014) p. 223.
[93] UNCTAD (2004) p. 14.
[94] VCLT Art. 31 (3) (c).

prompt, adequate and effective compensation is given.[95] Customary international law is also highly relevant in the practice of investment arbitration with rules on attribution, state responsibility, damages and on the nationality of the investor.[96] However, customary international laws usefulness in practice is constrained by the fact that the rules are often not specific enough and the rules may normally only be invoked at a state level, requiring the involvement of the investor's home state.[97]

2.3.3 Bilateral investment treaties

Contemporary debate and development in international investment law is mainly focused on IIAs, the most important among these treaties being BITs.[98] Worldwide about 3000 BITs have been concluded among states. Some states, such as Germany and China, have concluded more than 100 BITs.[99] A BIT is a treaty concluded between two states which strive to accomplish three goals. The first, and arguably the most important goal, is investment protection. In lack of a BIT, or another IIA, a foreign investor is forced to rely on the host state and its judicial system for investment protection as well as on international customary law, which does not offer very strong protection due to the lack of consensus among states regarding the degree of protection it offers . By concluding a BIT providing well-defined rules and effective dispute resolution mechanisms investors would get stronger protection for their investment. The second goal is investment and market liberalisation. BITs are used to facilitate entry and operation of investments by impelling host countries to remove impediments in their legal system, leading to a liberalisation of the state's economy in whole. The third goal is to promote FDI, which is the end of the bargain traditionally sought by developing countries. By concluding BITs developing countries hope to attract FDI and the positive consequences that this entails, such as increased capital flow and transfer of technology.[100]

BITs protect investments by incorporating certain standards of protection, such as fair and equitable treatment (FET), most favourable nation (MFN), full protection and security (FPS)

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[95] Douglas, Pauwelyn & Viñuales (2014) p. 221.
[96] Dolzer & Schreuer (2012) p. 17.
[97] UNCTAD (2004) p. 16.
[98] Hobér (2013) *Investment Treaty Arbitration,* p. 11.
[99] Dolzer & Schreuer (2012) p. 13.
[100] Salacuse & Sullivan (2005) p. 75-78.

and rules regarding expropriation.[101] There is quite a considerable uniformity in the fundamental principles of most of the BITs concluded. However, BITs have shown a good capability of adapting to different type of situations. Traditionally BITs were entered between a developed country and a developing country, but it has shown to be an efficient instrument even in agreements between developing countries, economies in transition and between developed countries.[102]

2.3.4 Multilateral agreements

In this section a multilateral agreement is defined as a treaty that is open to the participation of all or most countries, and serves as the closest equivalent to legislation in international investment law. These agreements usually have institutional machinery to handle applications to join the treaty as well as review and development of the treaty. There is no multilateral agreement covering the whole area of international investment law and efforts to create such an instrument have failed. Certain important multilateral agreements such as the GATT and TRIPS include provisions that are important for FDI.[103] One important multilateral agreement affecting international investment law is the ICSID convention. The ICSID convention provides a procedural framework for dispute settlement and a majority of investment disputes are brought under the ICSID convention. In 2012 there were 148 signatory states to the ICSID convention. ICSID was created to promote economic development by creating a favourable climate for investments and exclusively deals with investor-state disputes. The ICSID convention only provides procedural rules and institutional support for solving dispute and thus does not contain any substantive rules for investment protection.[104]

2.3.5 Sectorial and regional treaties

In the last two decades several sectorial and regional treaties have been negotiated and ratified in different parts of the world. These treaties are important sources for international investment law.[105] Some of the most important treaties in this regard will be discussed in this section.

[101] Douglas, Pauwelyn & Viñuales (2014) p. 218; Dolzer & Schreuer (2012) p. 13.
[102] UNCTAD (2004) p. 19-20.
[103] UNCTAD (2004) p. 17.
[104] Dolzer & Schreuer (2012) p. 238.
[105] Douglas, Pauwelyn & Viñuales (2014) p. 219.

2.3.5.1 The Energy Charter Treaty

A very important sectorial treaty which includes provisions relating to investment protection is the ECT. The ECT was born out of a desire of states in Europe to cooperate with Russia and the newly developed states in Eastern Europe and Central Asia. Any state committed to establishing cooperation and an international legal framework for the energy sector was allowed to join the ECT.[106] The ECT was signed in December, 1994, and entered into force in April, 1998. It is the only binding multilateral instrument that deals with cooperation between states in the energy sector. The ECT includes provisions regarding, among other things, transit of energy, energy efficiency and, most notably in this case, investment protection, as well as dispute resolution.[107] The ECT establishes binding obligations for the contracting states in the post-investment phase which is similar to provisions that can be found in BITs, including standards such as FET and MFN.[108]

There are several dispute resolution mechanisms in the ECT. An investor must first try to settle the dispute amicably. If such a resolution to the dispute is not possible the investor may choose to submit the dispute either to a national court in the host country, to a previously agreed dispute settlement mechanism or to international arbitration. If the investor chooses international arbitration it may also choose under what arbitral regime the arbitration will take place. Arbitration under ICSID is one possibility, but the investor can also choose to submit the dispute to an ad hoc arbitral tribunal under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, or to submit the dispute to the arbitration institute of the Stockholm Chamber of Commerce.[109]

2.3.5.2 NAFTA

NAFTA is a treaty between the US, Canada and Mexico which was concluded in 1994. It is a FTA which also includes provisions on investment protection. The purpose of the treaty was free movement and liberalisation of goods, services, people and investments. The provisions concerning trade are largely based on the rules of the WTO. The substantive rules pertaining to investment protection are similar to equivalent provisions found in BITs and the ECT. The rules regarding expropriation and the minimum standard of treatment has received the most

[106] Dolzer & Schreuer (2012) p. 15.
[107] Hobér (2013) p. 216-217.
[108] Ibid. p. 218, 222-228.
[109] Ibid. p. 229-230.

attention and have led to multiple investment disputes. There are separate dispute resolution mechanisms for trade disputes and investment disputes, and only a foreign investor can bring a claim to arbitration. Under chapter 11 of NAFTA there is a possibility for an investor to submit a dispute to arbitration either under ICSID, under the ICSID Additional Facility Rules or under UNCITRAL arbitration rules.[110] In 2014 in total 61 claims had been filed under chapter 11 of NAFTA.[111]

2.3.5.3 Other regional treaties

An important treaty in South America is the Colonia Investment Protocol of Mercado Común Del Sur, with Argentina, Bolivia, Brazil, Paraguay, Uruguay and Venezuela being members. It contains rules for treatment of foreign investments as well as procedural rules for arbitration.[112]

Another important regional treaty is the Comprehensive Investment Agreement (ACIA) entered by the members of the Association of South East Asian Nations. It seeks to promote investment in the area by facilitating cooperation among the countries in the region to liberalise investment regulations as well as by providing treatment in accordance to the national treatment standard and by providing an interstate dispute settlement mechanism.[113] ACIA also contains substantive provisions for investment protection which are similar to BITs, such as the MFN and FET standards. [114]

2.3.6 Precedents

Precedents play an important role in many legal systems. Especially in countries such as the U.S. and the United Kingdom, which are common law countries, the court's case law is extremely important. This is not the case in international investment law. ITs are usually decentralized and render ad hoc decisions based on the relevant factors in every single case.[115] There is no formally binding principle of stare decisis in international investment law, which has been confirmed by IT case law. In AES v. Argentina the IT stated that *"each decision or award delivered by an ICSID tribunal is only binding on the parties to the dispute*

[110] Dolzer & Schreuer (2012) p. 15-17.
[111] Douglas, Pauwelyn & Viñuales (2014) p. 220.
[112] Ibid.
[113] UNCTAD (2004) p. 18.
[114] Douglas, Pauwelyn & Viñuales (2014) p. 220.
[115] Douglas, Pauwelyn & Viñuales (2014) p. 223.

settled by this decision or award. There is so far no rule of precedent in general international law; nor is there any within the specific ICSID system"[116].

Despite not being formally bound by precedents ITs will still put a lot of weight on earlier decisions. The Tribunal in AES v. Argentina stated that even though every tribunal remains sovereign, it may still look at earlier tribunals' decisions if dealing with the same or with very similar issue in order to compare its own position with the position of earlier tribunals. Should they share the same view then they may adopt the same solution.[117] The issue is controversial, which can be seen in Burlington v Ecuador. The majority here thought that an IT must "*pay due regards to the earlier decisions of international courts and tribunals […] it has a duty to adopt solutions established in a series of consistent cases […] it has a duty to seek to contribute to the harmonious development of investment law, and thereby meet the legitimate expectations of the community of states and investors towards the certainty of rule of law"*[118]. The minority however believed that it is the arbitrator's duty to decide each case independently and on its own merits, without taking jurisprudential trends into account.[119]

Accordingly, whether an IT will follow precedents cannot be stated to a certainty. Sometimes a tribunal will follow precedents, sometimes it will adopt an entirely different solution and sometime it will explicitly distance itself from an earlier decision if it is not convinced by the reasons put forth by the earlier tribunal. Precedents do play an important role though; even if it is not formally binding precedents have persuasive authority.[120] It can be noted that the statue for the ICJ, which can be considered to constitute customary international law, considers precedents to be a subsidiary means for determining the content of international law.[121]

[116] AES Corp v Argentina, Decision on Jurisdiction, 26 April 2005, paras 17-33.
[117] Ibid. para 36.
[118] Burlington Resources Inc v. Republic of Ecuador, Decision on Liability, 14 December 2012, para 187.
[119] Ibid.
[120] Dolzer & Schreuer (2012) p. 33-34.
[121] Statute of the International Court of Justice, art. 38 d.

2.4 Investor-state dispute settlement

2.4.1 Dispute resolution mechanisms other than investment-state dispute settlement

Historically there was no right for an individual or a corporation who had been wronged to sue a host state for a breach of customary international law. The aggrieved party would have to petition its government to espouse the claim on its behalf.[122] If a state decided to espouse the claim it meant that it assumed the claim under its own name, thereby granting the aggrieved party diplomatic protection. There are certain requirements for diplomatic protection to be granted to an investor. The investor has to be a national of the state granting diplomatic protection and must have been a national to the state continuously from the time of the injury until the claim is presented to the state, or possibly even until the dispute has been settled. The investor must also exhaust all local remedies in the host state prior diplomatic protection being granted. The investor has no right to diplomatic protection and it is up to the discretion of investor's home state's government to decide whether diplomatic protection will be granted to the investor or not.[123]

This was confirmed by the ICJ in the Barcelona Traction case, which stated as follows. *"The state must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by consideration of political or other nature, unrelated to the particular case"*[124]*.* Considering this, it is quite clear that diplomatic protection from the perspective of the investor is not a desirable system of investment protection and dispute resolution. From the perspective of the state there are also some serious disadvantages with granting diplomatic protection, the most important being possible disruption in international relations, which could lead to prolonged disputes and in extreme cases even armed conflict. It is worth noting that the use of armed force is not a permitted means of protecting the rights of a foreign investor.[125]

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[122] Blackaby, Partasides, Redfern & Hunter (2015) p. 441.
[123] Dolzer & Schreuer (2012) p. 232.
[124] Barcelona Traction, Light and Power Co Ltd (Belgium v. Spain), Judgement, 5 February 1970, ICJ Reports (1970) para 44.
[125] Dolzer & Schreuer (2012) p. 232-233.

A foreign investor will usually have to depend on the host state's courts in case of a dispute regarding to its investment, unless there is an agreement saying otherwise. This is due to conflict of law rules which will most often point to the host state's courts since the dispute usually has the closest connection to the state in which the investment is made. This is, from the investor's perspective, undesirable since there is a risk that the judiciary will be impartial and biased in favour of the state. Especially when dealing with states where the legal system is not as well-developed this risk is immediate. Even if the court would decide in favour of the investor the executive branch of the host government might ignore the court's decision.[126] The home state of the investor will usually lack jurisdiction over a dispute arising from a foreign investment, since the investment is made in another state. Even if a domestic court other than the court of the host state would have jurisdiction, rules of state immunity is a serious obstacle to overcome, rendering most lawsuits arising from investment disputes in another country unsuccessful, unless there is a waiver of immunity from the host state.[127] Due to these disadvantages and problems both in regards to diplomatic protection and the use of domestic courts, alternative methods were developed to settle disputes, most notably international investment arbitration. This development was made possible by reforms in the dispute settlement provisions of BITs and by the conclusion of the ICSID convention.[128]

2.4.2 General points on investor-state dispute settlement

International investment arbitration deals with the issue of biased courts by providing a forum that is more neutral both in a political and a procedural regard.[129] One prerequisite for international investment arbitration is, as with any other form of arbitration, that there is an agreement to arbitrate. Consent is required by both state and the investor. There are three main methods that states utilise in order to give consent to arbitration. Consent can be given in a direct agreement between the state and the investor. Consent can also be given by the state by adopting national legislation which gives a general consent to arbitration. An investor that wishes to submit a dispute to arbitration may give consent at any time while the legislation is still in effect by accepting the offer to arbitrate in writing, or by simply starting proceedings. The third method in which a state can give consent is by concluding a BIT or another IIA with an ISDS provision. By concluding the treaty the state consents to

[126] Ibid. p. 235.
[127] Ibid. p. 232-233.
[128] Blackaby, Partasides, Redfern & Hunter (2015) p. 443.
[129] Park (2006) p. 327.

arbitration with investors who are nationals of the other contracting state.[130] After the ICSID convention was concluded the method of giving consent by entering IIAs became very common, and many treaty drafters started to include ISDS provisions in BITs and other IIAs, granting investors the right to seek direct recourse for their claims.[131]

Out of the about 3 200 IIAs entered into worldwide approximately 93 % contain an ISDS provision granting investors a right to submit disputes arising from their investments to international arbitration.[132] The network of IIAs including ISDS provisions is very comprehensive and the network is still growing. Several regional and sectorial treaties such as NAFTA, ACIA and ECT also include an ISDS provision.[133] 330 new IIAs including an ISDS provision were concluded between 2010 and 2014 and 31 new IIAs were concluded in 2014 alone.[134] The expansion of the IIA network and the proliferation of ISDS provisions in IIAs have been accompanied by growing concerns regarding the legitimacy of arbitration in investment disputes, especially regarding the independence and impartiality of the arbitrators. Between 2007 and 2012 Bolivia, Ecuador and Venezuela, all countries being defendants in multiple investment arbitration proceedings, denounced the ICSID convention and discontinued certain BITs. However, this is no sign of the end of the investment treaty system. On the contrary, during the same period of time ICSID gained seven new members.[135] The system is however facing critique, which will be examined closer in a subsequent chapter.

2.4.3 Investor state dispute settlement in the United States of America

Historically the U.S. used Treaties of Friendship, Commerce, and Navigation (FCNs), which was an early kind of IIA that included some provisions relating to investments. FCNs did not solely deal with investment issues, but was broader and changed over time in order to safeguard U.S. commercial interests abroad.[136] In contrast with FCNs, the BITs that European states started concluding in the 1960s dealt solely with investment protection, and can in a way be considered the successor of FCNs. The U.S. was not as quick as Europe in adapting

[130] Dolzer & Schreuer (2012) p. 254-258.
[131] Blackaby, Partasides, Redfern & Hunter (2015) p. 444.
[132] Fabry & Garbasso (2015) p. 1.
[133] Blackaby, Partasides, Redfern & Hunter (2015) p. 445.
[134] UNCTAD (2015) p. xi.
[135] Blackaby, Partasides, Redfern & Hunter (2015) p. 446.
[136] Gudgeon (1986) *United States Bilateral Investment Treaties: Comments on their Origin, Purpose and General Treatment Standards*, 4 Int'l Tax & Bus. Law 105, p. 107-108.

BITs as a way of protecting investments. As the European BITs proved to be a success the U.S. also started concluding BITs, albeit a bit later. The first BIT concluded by the U.S. was in 1982 with Panama.[137] The U.S. has since then entered into 56 IIAs, whereof 49 are BITs, and the U.S. has been promoting the ISDS model worldwide. Of all states in the world, the U.S. is the state with the most active investors when it comes to filing investment claims under ISDS provisions.[138]

Traditionally the interests of states concluding BITs could be categorized in two categories. The capital-exporting states had an interest of strong protection for its citizens investing abroad. Capital-importing states were interested in attracting FDI while preserving their sovereignty and ability to promote public interest. Over the last decades this line between capital-exporting and capital-importing state have become blurred.[139] The U.S. has been a strong capital-exporting nation and thus used to be a strong proponent for strong investment protection measures and of using arbitration to resolve investment disputes in foreign host states. U.S.-based TNCs imposed international arbitration as a dispute resolution mechanism on developing countries, especially in Latin America, and justified it as a way of leveling the playing field and to counter the risk of home town justice. In the past two decades this attitude seems to have shifted, and criticism of the ISDS system has been raised by media, politicians and environmental advocacy groups.[140]

This shift of attitudes can be traced to 1994 and to the conclusion of NAFTA, which included an ISDS provision similar to the ones included by the U.S. in their BITs. Traditionally the U.S. had only concluded BITs with ISDS provisions with developing countries, but with NAFTA the U.S. suddenly became the respondent to claims brought by investors from Canada. As a result of this the U.S. got to experience the situation of capital-importing countries, and got to experience the potential downside of ISDS. A process that had earlier been embraced as a neutral and fair way of protecting U.S. citizens when investing abroad suddenly came to be regarded among some as a threat to American sovereignty and American values.[141] There seems to be a double standard towards ISDS where ISDS is good when it protects U.S.

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[137] Ibid, p. 109; See, United States Bilateral Investment Treaties, U.S Department of State, retrieved 2015-10-27 from http://www.state.gov/e/eb/ifd/bit/117402.htm.

[138] Fabry & Garbasso (2015) p. 1.

[139] Cross (2012) *Converging Trends in Investment Practice,* N.C.J Int'l L. & Com. Reg. 151, p. 154-155.

[140] Park (2006) p. 326.

[141] Ibid. p. 323-324.

citizens and corporations when they invest abroad, but when there is alleged wrongdoing on part of the U.S. ISDS is an undue restriction of U.S. sovereignty, and the issue should instead be dealt with by the U.S. court system. The potential issues with home town justice or the notion that U.S. courts could be impartial do not seem to be issues reflected upon.[142] Since NAFTA was concluded the U.S. has been the respondents in sixteen investment claims.[143]

The harsh critique aimed at NAFTA led to, among other things, the Trade Promotion Authority Act (TPA). The lead negotiator in the Senate for the TPA, Max Baucus, emphasized that the result of the TPA would be IIAs that struck a balance between protecting U.S. investors abroad and defending the regulatory authority of the U.S.[144] The TPA was enacted in 2002 and the negotiation objective for the TPA laid the foundation for the FTA concluded between the U.S. and Chile shortly thereafter. In 2004 the U.S. Model Bit was drafted which in its turn was modelled after the U.S.-Chile FTA and NAFTA.[145] In 2009 the Obama Administration decided to review the 2004 Model BIT. The review was finished in 2012, resulting in a new Model BIT.[146] The 2012 Model BIT was in essence the same as the 2004 Model BIT, its provisions differing only marginally on issues such as state-owned enterprises, environmental issues, labor issues and transparency.[147] The transparency provision of the 2004 Model BIT was updated to require the U.S. and other parties in future IIAs to *"consult periodically regarding how to improve their transparency practices, both in the context of developing and implementing laws, regulations, and other measures affecting investment and in the context of investor-State dispute settlement"*[148]. Critics of the investment law system had hoped for a roll-back of the system, including a deviation from the ISDS provision used in the 2004 Model BIT, but such a deviation did not take place in the 2012 Model BIT.[149]

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[142] Ibid. p. 326, 328.
[143] Fabry & Garbasso (2015) p. 11.
[144] Cross (2012) p. 183.
[145] Ibid. p. 184-185.
[146] *2012 U.S. Model Bilateral Investment Treaty*, U.S. Department of State, retrieved 2015-10-27 from http://www.state.gov/e/eb/ifd/bit/index.htm.
[147] Kantor (2012) *Little has changed in the New US Model Bilateral Investment Treaty,* ICSID Review, vol. 27, no. 2, p. 335-336.
[148] Weaver (2014) p. 240-241.
[149] Kantor (2012) p. 335-336.

2.4.4 ISDS and the European Union

The BIT movement started in Europe in 1959 when the Federal Republic of Germany concluded a BIT with Pakistan.[150] Since then the EU Member states have been very active in negotiating and entering BITs, concluding over 1 300 BITs with states outside of the EU in addition to around 190 intra-EU BITs.[151] Not all EU member states have been as active in concluding BITs. While Germany has concluded more than 130 BITs, other states, such as Ireland, have not concluded a single BIT. Only nine EU member states have concluded an IIA containing an ISDS provision with the U.S.: Bulgaria, Croatia, Estonia, Latvia, Slovakia, Romania, Poland, Lithuania and the Czech Republic. Out of all investment claims made under BITs EU member states have filed approximately 300, accounting for about 50 % of the total amount of investment claims made. The EU member states have been the respondents in 117 investment claims. In roughly 75 % of these investment disputes the investor who brought the claims was from another EU member state. In only nine claims where an EU member state was the respondent the claimant was an U.S. investor. There have been no cases in which an investor from an EU member state has brought a claim against the U.S.[152]

The EU has so far only ratified one treaty containing an ISDS provision, the ECT. Two FTAs containing ISDS provisions have been signed; one between the EU and Singapore and one between the EU and Canada, but these agreements have not been ratified yet.[153] International agreements concluded by the EU are binding upon both the institutions of the EU and on the EU member states.[154] If a member state fails to abide by an international agreement entered into by the EU the Commission may bring that member state before the European Court of Justice for the infringement of the provisions of that agreement.[155]

The EU is characterised by a complex legal order consisting of a supranational legal system which coexists with the member states' own legal systems. The EU has authority to enact directives or EU regulations in a certain area only if the member states have transferred their sovereign power, partly or fully, in that certain area. This transfer of power is done through

[150] *Treaty for the Promotion and Protection of Investments*, Pak.-F.R.G. Nov. 25, 1959, 457 U.N.T.S 23.
[151] Anderer (2010) *Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty,* 35 Brook. J. Int'L. 851, p. 853; Fabry & Garbasso (2015) p. 9.
[152] Fabry & Garbasso (2015) p. 9-11; UNCTAD (2015), p. xi.
[153] Fabry & Garbasso (2015) p. 9.
[154] See TFEU art. 216(2).
[155] Devuyst (2013) *European Union Law and Practice in the Negotiation and Conclusion of International Trade Agreement,* 12 J. Int'L Bus. & L. 259, p. 273.

treaties entered into by the member state; the Treaty of Rome (The EC Treaty) and the Maastricht Treaty.[156] Prior to the Lisbon Treaty, the EU and the EU member states had alternative competence in matters relating to FDI. The EC Treaty includes provisions on, among other things, the rights of establishment and on movement of capital. Furthermore the EU can, under art. 211 of the EC Treaty, conclude agreements with developing countries. Previously the EU's competence in the FDI area was limited and the EU member states could also exercise their competence in the area. This was done mainly through the negotiation and conclusion of IIAs. One issue with the system of alternative competence was that there was a risk of incompatibility between the provisions in BITs entered into by the EU member states and the EU legal order.[157]

On December 1, 2009, the Lisbon Treaty entered into effect. With the enactment of the Lisbon Treaty the EU was given exclusive competence over matters relating to FDI and alternative competence over IIAs.[158] Art. 207 of the Lisbon Treaty brings FDI under the exclusive competence of the EU. However, the scope of the EU's competence is poorly defined and it is not entirely clear what effect this will have on the EU member states' authority to negotiate and enter into IIAs in the future.[159] It is clear that the Lisbon Treaty did not automatically terminate IIAs entered into by the EU member states prior to the ratification of the Lisbon Treaty.[160] The Commission has recently required all EU member states to terminate any intra-EU BITs, claiming that such BITs are incompatible with EU law. The Commission has started infringement procedures against five member states: Austria, The Netherlands, Romania, Slovakia and Sweden, demanding that they terminate all intra-EU BITs among them.[161]

[156] Anderer (2010) p. 861-862.
[157] Ibid. p. 863-864.
[158] Ibid. p. 872-873.
[159] Ibid. p. 875.
[160] Ibid. p. 877-878.
[161] Press release from the Commission, dated June 18, 2015. Retrieved 2015-10-30 from http://europa.eu/rapid/press-release_IP-15-5198_en.htm.

3. Structure and substantive provisions of a typical international investment agreement

This section strives to give a brief insight into the structure and the content of a typical IIA. The IIA network consists of thousands of different BITs and other IIAs which have provisions specifically crafted to govern investments made between two or more states. As a result of this IIAs will differ somewhat from each other. States are not bound by any specific structure or to any specific substantive provisions when entering into an IIA. Despite this there is surprisingly high uniformity among the different IIAs. Attempting to give a full description of all provisions and their intricacies is outside of the scope of this thesis. A brief presentation of the most important provisions will however be given in order to facilitate the reader's understanding of the subject matter.

3.1 The scope of application

Under all international treaties it is important to have rules which define which persons and what actions that are protected by the treaty. The first provision of any IIA usually determines the scope of application of the IIA. The scope of application is important for mainly two reasons. It decides which investors and investments the contracting state has an obligation to under the treaty. Investors or investments that do not fall under the scope of application cannot expect any protection under the IIA. The scope of application also decides the jurisdiction of the IT. If an investor or an investment is not covered by the IIA the IT will lack jurisdiction to handle the dispute. Trying these jurisdictional issues are thus usually among the first order of business for the IT. The first line of defence for the state is usually to argue that the treaty is not applicable to the dispute.[162]

3.1.1 Is there an applicable treaty?

The first question that needs to be answered is whether there exists any applicable treaty at all. The network of IIAs is vast and there is no real comprehensive list where all IIAs are listed. An IIA's applicability is determined by its geographical coverage. If an IIA is applicable to a certain dispute depends on which states that are party to the agreement and the territorial limitations of these state. For example, a state cannot bring an investment claim

[162] Salacuse (2010) p. 158.

against the state of Sweden if the investment is not made within the territory of Sweden. A BIT concluded by Sweden and Uruguay would hence not be applicable on an investment made within the geographical region of Denmark.[163]

If there is an IIA with geographical coverage it must be then ascertained that the applicability is not affected by any temporal requirements set out in the IIA.[164] Most IIAs cover all investments, regardless of whether the investment was made before or after the date the treaty was signed or entered into force. The treaty will afford its protection to all investments as long it is in force.[165] ITs have often extended the protection of an IIA to investment made prior to the treaty's entry into force, even when this is not explicitly stated in the IIA. It is however possible to explicitly restrict the application of the IIA to investments made after the treaty entered into force by providing for this in the IIA. IIAs often have provisions which deals with the applicability of the agreement after it has been terminated or expired, often called a sunset clause. A sunset clause will extend the protection of the treaty for a period, usually between ten and fifteen years, after the termination or expiry of the treaty.[166]

3.1.2 Defining "investments" covered by the treaty

In order for an investment made by an investor to be protected by an IIA it must be established that the investment is a protected investment under the treaty. Most IIAs contain a provision where "investment" is defined, often in a very broad manner.[167] For instance, the ECT defines investment as follows: *"'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes (a) tangible and intangible, and movable and immovable, property and any property rights such as leases, mortgages, liens and pledges…"*[168]. The broad definition is used in order for the treaty to be flexible and able to adopt in response to the creativity of the investor and to the ever-changing world of international finance. This results in investors receiving a broad protection that is able to adapt and change over time.[169] Examples of things that have been considered

[163] UNCTAD (2004) p. 114.
[164] Blackaby, Partasides, Redfern & Hunter (2015) p. 447.
[165] Salacuse (2010) p. 172.
[166] Blackaby, Partasides, Redfern & Hunter (2015) p. 447.
[167] Ibid. p. 452.
[168] ECT Art. 1 (6).
[169] Salacuse (2010) p. 161.

protected "investments" are; holding of shares in the host country[170]; indirect shareholding in a local company via one or more intermediary companies[171]; and indirect investment in assets[172].

Some tribunals have applied the "Salini test" which originated in in Fedax v Venezuela, and was laid out in Salini v Morocco. The Salini v Morocco tribunal stated that *"the basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development"*[173]. The Salini Test has been accepted by some ITs and rejected by other ITs who considered it to be an undue way of narrowing the definition of investments. The definition of investment is not unlimited and for instance ordinary commercial transactions are usually not protected under IIAs. Bank guarantees contingent on sales contract and expenses incurred in bidding for a public contract have not either been considered investments under IIAs. Some states have narrowed the definition of investments in recently concluded IIAs by expressly excluding portfolio investments and commercial contracts or by referring to the criteria in the Salini test.[174]

3.1.3 Defining "investors" covered by the treaty

Even if an investment is covered by an IIA it does not necessarily mean that the IIA is applicable to the investment. IIAs are only applicable to investment made by persons who are considered to be an "investor" under the treaty. An investor must be connected with at least one of the other treaty partners by nationality or through other links. Two types of entities can be considered an investor; a natural person or a legal entity, such as a corporation.[175] For natural persons IIAs usually require a link between the individual and a contracting state based on either nationality or citizenship, or in some cases domicile or permanent residence. Whether or not a person is considered a national or a citizen depends on the domestic legislation of the country to which a link is claimed by the investor. If a

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[170] American Manufacturing and Trading Inc, v Republic of Zaire, *Award*, ICSID Case No. ARB/93/1, IIC 14 (1997), at 5.08-5.15.

[171] Sr Tza Yap Shum v. Republic of Peru, *Decision on Jurisdiction and Competence*, ICSID Case No. ARB/07/6, IIC 382 (2009).

[172] Mobil Corporation, Venezue Holding BV and ors v Bolivarian Republic of Venezuela, *Decision on Jurisdiction*, ICSID Case No. ARB/07/27, IIC 435 (2010).

[173] Salini Costruttori SpA and Italstrade SpA v. Morocco, *Decision on Jurisdiction*, ICSID Case No. ARB/00/4, ICC 207 (2004).

[174] Blackaby, Partasides, Redfern & Hunter (2015) p. 458.

[175] UNCTAD (2004) p. 117.

national is a national of both contracting states certain problems may arise. In such cases nationality is usually determined by international customary law, in which case the person would be considered a national of the state that is the person's dominant and effective nationality. Another solution is to deny the person protection from the IIA since it is only meant to provide protection to foreign investors.[176]

For a company or other legal entities to be considered an investor under an IIA it must have a connection with one of the contracting states, usually by being incorporated or constituted under the laws of one of the contracting states. A common practice under IIAs have been to establish holding companies in a state with the main purpose of getting access to their network of IIAs, for example to be able to submit a claim to arbitration. In order to prevent this practice, usually called "treaty shopping", it has become more usual to add additional requirements to be considered an investor under an IIA. A common addition is that the company is required to have some form of genuine economic activity in the home state.[177] If no such requirement is included in the scope of application the IT will usually consider a person, natural or legal, an investor under the treaty if the formal requirements in the domestic law of the investor's home state are satisfied. Some ITs have considered the restructuring of an investment to another state for the sole purpose of gaining the protection of an IIA to be an abusive manipulation of the system and lacking good faith and therefore denied protection under the IIA. Attempts to counter treaty shopping have been made by certain states by adding a denial of benefits clause, which gives the home state a right to deny treaty benefits to an investor which does not have genuine economic activity in its country.[178]

It is often necessary for an investor to establish a legal entity in the host state of the investment in order to control its investment and day-to-day activities. A legal entity established in the host state will have the nationality of the host state, and hence not be protected by the IIA. Such an entity will however be protected if it is controlled by entities

[176] Salacuse (2010) p. 187.
[177] Blackaby, Partasides, Redfern & Hunter (2015) p. 449.
[178] Ibid. p. 450-451.

incorporated in the other contracting state, provided that the contracting states have agreed in the IIA that such entities will be protected.[179]

3.1.4 General exceptions to the applicability of the IIA

Even if there is an IIA that is applicable to a certain investment it is not guaranteed that it will be applicable to the matter at hand. IIAs sometimes have provisions which create exceptions to the applicability of the treaty. These exceptions are sometimes called "carve-outs". One kind of carve-out that is common is a general carve-out that allows states to neglect their obligations under a treaty if there are important national interests at stake, for example national security, public order or restoration of peace and security.[180] An example of this can be found in the ECT which states that the provisions of the treaty is not to be construed as to *"prevent any contracting party from taking measures which it considers necessary for: (a) the protection of essential security interests… (c) for the maintenance of public order"*[181]. It is also common to find carve-outs in IIAs which create exceptions for a certain area of the state's legislation. It is very common to find an exception for tax matters, which are instead governed by double taxation treaties.[182]

3.2 Standards of protection

If jurisdiction can be established by the IT the proceedings will focus on whether any of the substantive standards of protection included in the IIA under which the dispute has been brought have been breached.

3.2.1 Expropriation

Historically one of the main problems for investors was unlawful expropriations of property.[183] It can be noted that not all taking of property belonging to a foreign investor is forbidden under international law. Lawful expropriation fall within the police power of a state, and is necessary for a state in order to be able to take measures to achieve important public policy objectives, including measures to protect the environment, public health and the economy of the state. Under customary international law there are certain requirements for lawful taking of property. The taking must be for a public purpose, the measure must be

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[179] Ibid. p. 451-452.
[180] Salacuse (2010) p. 342.
[181] ECT, art. 24 (3) (a),(c).
[182] Salacuse (2010) p. 348.
[183] Johnson & Gimblett (2011) p. 667-671.

non-discriminatory, it must be made in accordance with due process and the taking must be accompanied by payment of compensation.[184] Most IIAs set out requirements for lawful expropriation which are identical to customary international law, but with the change that compensation shall be prompt, adequate and effective; the so called Hull formula.[185]

Expropriation can be either direct or indirect. The difference between direct and indirect expropriation is that the legal title of the owner is affected in direct expropriations. Direct expropriations are relatively rare today, but indirect expropriation is claimed by investors to happen quite frequently.[186] Indirect expropriation is when a host state uses its legislative and regulatory powers in a way that decreases the benefits of an investment without formally affecting the investor's title to the property or its control over it. Even if a state measure does not formally affect the title to or the control over the investor's' property it may still cause substantial loss of control or economic value of the investment.[187]

Openly expropriating a foreign investor's property might give a state a bad reputation which will affect the investment climate negatively for the state. States have certain rights to use their regulatory powers in their territory, but the line between legitimate measures taken by a government and measures that constitute indirect expropriation is sometimes hard to draw.[188] Expropriation may take place either by a single action or by a series of measures which taken together have the same effect as a single expropriating measure. Expropriation happening in a series of cumulative measures is often called "creeping expropriation".[189] Examples of measures that can constitute indirect expropriation are; disproportionate tax increases, especially if the tax measure is not bona fide; interference with contractual rights; unjustified interference with the management of the investment; and revocation or denial of government permits or licenses.[190]

Whether a measure is to be characterised as indirect expropriation does not depend on the form or motive of the measure, but rather on its effect on the investment.[191] The CME v.

[184] UNCTAD (2004) p. 238-239.
[185] Blackaby, Partasides, Redfern & Hunter (2015) p. 470-471.
[186] Dolzer & Schreuer (2012) p. 101.
[187] Salacuse (2010) p. 297.
[188] Ibid.
[189] Dolzer and Schreuer (2012) p. 125.
[190] Salacuse (2010) p. 301-305.
[191] Blackaby, Partasides, Redfern & Hunter (2015) p. 474.

Czech Republic tribunal held that a measure amounting to an economic deprivation of an investment which affected its commercial value may constitute indirect expropriation.[192] The effect on the commercial value of the investment is usually required to be quite high, and it is often claimed that there needs to be a total or substantial deprivation of the investment's economic value, use or enjoyment. An IT is unlikely to hold that indirect expropriation has taken place when the investor retains control over the overall investment, even if it has been deprived of certain rights related to it.[193] The tribunal in LG&E v. Argentina stated that *"Ownership or enjoyment can be said to be 'neutralized' where a party no longer is in control of the investment, or where it cannot direct the day-to-day operations of the investment… Interference with the investment's ability to carry on its business is not satisfied when the Investment continues to operate, even if profits are diminished"*[194].

3.2.2 Fair and equitable treatment

The most frequently invoked standard in investment disputes is the FET standard. FET is also the standard that is most often used in successful claims. There is no exact definition of FET used by all ITs, but since the beginning of the year 2000 the meaning of the concept has been developed in the ITs' case law.[195] The FET standard is complex to apply for certain reasons. First of all, the term in itself is very vague, general and elastic. It is not clear by the wording of the standard how it is meant to protect the investor. Secondly, most treaties do not offer any guidance on how to understand or interpret the standard. The interpretation is also very much bound to the specific facts of the case, which diminishes the precedential worth of the judgments of ITs.[196]

FET is a broad standard and has the purpose of offering the investors a stable and predictable investment environment.[197] Despite the vagueness of FET, legal doctrine seems to be quite in agreement about some of the components constituting the FET standard. It includes, among other things; a duty to provide a stable and consistent legal framework; protection of the legitimate expectations of the investor; an obligation for the host state to act in accordance with due process; a duty to not act arbitrarily; a requirement to act

[192] CME Czech Republic BV v. Czech Republic, *Partial Award and Separate Opinion*, 13 September, 2001.
[193] Dolzer & Schreuer (2012) p. 117.
[194] LG&E v. Argentina, *Award,* ICSID Case No. ARB/02/1, 14 July, 2006.
[195] Dolzer & Schreuer (2012) p. 130.
[196] Salacuse (2010) p. 221.
[197] Blackaby, Partasides, Redfern & Hunter (2015) p. 466.

transparently towards an investor; a duty for the state not to harass or coerce the investor; and an obligation to act in good faith.[198]

There has been some discussion whether FET can be equated to the international minimum standard or if it is an autonomous concept which gives additional protection on top of the international minimum standard. One view, which is commonly supported by developing states, is that the FET standard only refers to the minimum international standards and hence do not oblige the state to afford the investor any additional protection. This view has been supported by some countries' treaty practices, among other the U.S. and Canada as well as by some ITs.[199] Others have concluded that when the FET standard is used in an IIA without additional qualifications or conditions, then is it is to be considered as an autonomous and additional standard that is not limited by the international minimum standard. The lack of an explicit link between FET and the international minimum standard in the IIAs entered into by states is one of the arguments supporting this view. If states believed that the FET standard was the same as the international minimum standard then they ought to have specified that in the treaties.[200]

3.2.3 Full protection and security

Another very common protection standard in IIAs is the FPS standard. Just as the FET standard, the FPS standard is quite vague, but it has been refined by the application of ITs. Some tribunals have found that FET and FPS are the same, while other tribunals have found the standards to be autonomous in relation to each other. FPS was originally meant for protecting investors against physical threat and was used when a foreign investment was damaged by, for instance, riots, insurgents, police authorities and military action. In recent cases the standard has been extended beyond issues of physical security to legal protection and protection against infringements of the investor's rights.[201] Not all tribunals have supported this extensive interpretation of FPS, and for example the Suez v. Argentina tribunal held that the concept of FPS did not cover legal protection.[202]

[198] Dolzer & Schreuer (2012) p. 145-159; Salacuse (2010) p. 228-243; Blackaby, Partasides, Redfern & Hunter (2015) p. 478-479.
[199] Salacuse (2010) p. 222-225.
[200] Ibid. p. 226-227.
[201] Dolzer & Schreuer (2012) p. 160-161.
[202] Suez v. Argentina, *Decision on Liability,* ICSID case No. ARB/03/19, 30 July, 2010, paras 158-173.

The standard of liability for the state is based on due diligence, which requires the state to exercise reasonable care to protect investments. This can be contrasted with a strict liability standard which would hold the state liable anytime the full protection and security of an investment was not met. The obligation of the state to provide FPS is independent of the level of protection and security afforded to its own citizens or to nationals of a third state.[203] According to the tribunal in Parkerings v. Lithuania, FPS standard requires the host state to not only prevent damage to the investor, but also to restore the investor to its previous situation after the damage has been inflicted and to punish the assailants.[204]

3.2.4 No arbitrary or discriminatory measures

Another classical standard of protection found in most IIAs is the prohibition of treatment that is arbitrary or discriminatory. The meaning of arbitrary is not entirely defined, but there are some categories of measures that by some ITs have been considered to fall under the standard. A measure that inflicts damage to an investor without having any apparent legitimate purpose would be considered to be arbitrary, as would a measure that is based on discretion, prejudice or personal preference instead of being based on a legal standard. When a pretext is given by a decision maker to justify a measure taken for an entirely different reason this might indicate that the measure was arbitrary. Furthermore, measures that are in wilful disregard of due process can be considered to be arbitrary. Conduct that is arbitrary will most likely also fall under the FET standard.[205]

A measure is discriminatory if the intent is to discriminate or if the measure has a discriminatory effect. A discriminatory intent is not necessary, and the relevant factor is whether unequal treatment has in fact taken place. Whether the host state acted in bad faith is of less importance. A measure is discriminatory if it results in different treatment of investors in a similar or comparable situation and if there is no reasonable ground for this differentiating treatment. Whether investors are in a similar or comparable situation is a question of fact. ITs have been restrictive in their interpretation of same or similar situation

[203] Blackaby, Partasides, Redfern & Hunter (2015) p. 482.
[204] Parkerings v. Lithuania, *Award,* ICSID Case No. ARB/05/08, 11 September, 2007, para 354.
[205]Dolzer & Schreuer (2012) p. 191-193.

and have been careful with declaring that investors are in a situation that is similar or comparable enough for this protection standard to be utilised.[206]

3.2.5 National treatment

The national treatment standard (NT) is another hallmark provision of IIAs. NT protects the investor by assuring that the host state will treat foreign investors in a way that is at least as favourable as the treatment afforded to the nationals of the host state. It is a standard that touches upon sensitive economic and political issues, and most countries have limited the applicability of NT in various ways. The NT standard is often limited by inserting a carve-out in the standard which removes certain areas from the applicability of the provision, for instance matters regarding public health and national security, or excluding certain areas such as taxation, or certain industries and sectors.[207] The purpose of NT is to make sure that the playing field between foreign and domestic investor is levelled. NT is usually only applicable in the post-establishment phase, but some IIAs, for instance IIAs concluded by the U.S. and Canada, also apply NT in the pre-establishment phase.[208]

There are three steps of analysis utilised when determining whether the NT standard has been breached or not. The first level examines whether the situation or circumstances between the foreign investor and the domestic investor is “like”. The likeness required under the NT standard is usually interpreted broadly by ITs. The second step of the analysis is whether the foreign investor have been treated differently than the domestic investor, and in that case whether such treatment is considered to be at least as favourable as the treatment afforded to the domestic investor. The third step of the analysis is whether the differentiating measures can be justified on a rational ground. Exactly which grounds that allows differentiation is not entirely clear, but measures favouring domestic investors may sometimes be acceptable if it can be justified by public policy objectives.[209]

3.2.6 Most favoured nation

Just as the NT standard the MFN standard is a comparative protection standard which does not guarantee any level of protection on its own, but rather requires the state to treat the investor no less favourably than it treats investors from other states. Just as with NT there is

[206] Blackaby, Partasides, Redfern & Hunter (2015) p. 482.
[207] UNCTAD (2004) p. 161, 177-178.
[208] Dolzer & Schreuer (2012) p. 199.
[209] Ibid. p. 199-204.

a requirement of showing that the investors are in like circumstances in order for MFN to be applicable.[210] Not all MFN provisions look alike, and some will only be applicable to certain issues in an IIA while other MFN provisions will cover the whole agreement. The language used to formulate MFN provisions in treaties sometimes vary considerable, and it is important to closely examine the provision in order to determine its scope of protection. MFN is often used by an investor to import provisions from an IIA entered into by the host state and a third state that are more favourable than the provisions afforded to the investor under the IIA governing its investment.[211]

MFN provisions leads to a uniform level of a protection afforded to foreign investors by assuring that any additional perk that is given to the investor of one state is also afforded to every investor from another state which are protected by an IIA with a MFN provision. Some tribunals have extended the application of MFN not only to substantial provisions, but also to procedural provisions, allowing a state to import dispute resolution provisions from another IIA entered into by the host state. To prevent this many new IIAs include explicit limitations to the MFN provision.[212]

3.2.7 Umbrella clause

An umbrella clause is a provision which is sometimes included in an IIA in order to ensure that host states complies with agreements entered into with investors, as well as ensuring that the state respects other promises made towards investors. An IT would ordinarily not have jurisdiction over a dispute originating from a state breaching a contract entered into with the foreign investor. An umbrella clause elevates the breach of a contractual obligation into a breach of the IIA, allowing the investor to seek the remedies allowed under the IIA, most typically ISDS.[213] An umbrella clause is really an expression of the legal principle of pacta sunt servanda, and is a means of ensuring that a state will honour its commitments.[214]

Umbrella clauses are quite controversial and the approaches opted by different tribunals are quite diverging, leading to uncertainty of the significance and meaning of the umbrella clause. Some ITs have interpreted the umbrella clause broadly and found that a breach of a

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[210] Blackaby, Partasides, Redfern & Hunter (2015) p. 482.
[211] Salacuse (2010) p. 251-252.
[212]Blackaby, Partasides, Redfern & Hunter (2015) p. 486.
[213] Ibid. p. 488.
[214] Dolzer & Schreuer (2012) p. 168.

contractual obligation due to the umbrella clause would be elevated to a breach of the IIA. Other ITs have found that, in absence of clear and convincing evidence supporting a broad interpretation, such an interpretation would be too far reaching and too burdensome in its potential impact on the host state.[215]

3.2.8 Free transfer of fund related to investment

Another protective standard that is commonly found in an IIA is a provision guaranteeing the investor free transfer of fund into and out of the host state. Being able to transfer capital and profits in and out of the host country is often a necessity for an investor in order to be able to invest.[216] This provision protects the investor from currency control regulations and other measures taken by the host state which prevents the investor from being able to repatriate its capital and profits. The scope of the provision is often broad and obligates the state to permit all transfers related to an investment freely and without delay within its borders. Despite being a theoretically very important provision it has been invoked in very few cases and it seems like the restriction of free transfer of funds in practice is not a major issue for investors.[217]

3.3 Dispute resolution provisions

The last part of an IIA often consists of rules relating to the solving of disputes arising under the treaty. Most IIAs provide for four distinct dispute resolution methods: state-state consultation and negotiation, state-state arbitration, investor-state consultation and negotiation and ISDS.[218]

Interstate consultation and negotiation is used when there is a disagreement between the contracting states regarding the interpretation and applicability of an IIA. Before submitting a claim to arbitration it is often required by the parties to seek an amicable solution to the dispute by negotiation, consultation or by diplomatic means. Not all IIAs have a provision providing for interstate consultation and negotiation. However, by virtue of customary international law, such a provision is not required since states have a duty to seek peaceful solutions and to engage in good faith negotiations to solve international disputes. By settling disputes between states amicably unnecessary arbitration costs as well as potential political

[215] Blackaby, Partasides, Redfern & Hunter (2015) p. 489.
[216] Dolzer & Schreuer (2012) p. 212.
[217] Blackaby, Partasides, Redfern & Hunter (2015) p. 487-488.
[218] Salacuse (2010) p. 359.

instability that an escalated conflict between two states could lead to is avoided.[219] If the dispute between the states cannot be solved by consultation and negotiation IIAs often provide for interstate arbitration. Interstate arbitration under IIAs is very rare and has only been used once when Peru in response to an investment claim made by a Chilean investor commenced an arbitration proceeding against Chile.[220]

Almost every IIA provides for mandatory consultation and negotiation between an investor and a state before allowing an investor to submit a claim to ISDS. There is often a period of six months in which the parties have to explore the possibilities of finding an amicable solution before it is possible to submit a claim to an IT. Due to the confidentiality surrounding these negotiations it is difficult to say how often cases are resolved prior to a claim being submitted to arbitration. Even if an arbitral proceeding have started this does not preclude the parties from revisiting negotiation in order to find an amicable solution. In fact, about 30 % of all cases submitted to ICSID are settled through negotiation. Other alternative dispute resolution mechanisms, such as mediation, is sometimes available under IIAs, but is not provided for as often as consultation and negotiation.[221] If a settlement cannot be reached by negotiation or consultation the next step for the investor is to submit a claim to arbitration. ISDS is, without doubt, the most interesting and practically important dispute resolution mechanism provided for in IIAs. ISDS has been discussed previously and will be discussed further in the following sections of this thesis.

[219] Ibid. p. 360-361.
[220] Ibid. p. 362-363.
[221] Ibid. p. 363-365.

4. The Transatlantic Trade and Investment Partnership – creating the world's largest trade zone.

4.1 The history and purpose of the Transatlantic Trade and Investment Partnership

In 1995 the New Transatlantic Agenda was created with the purpose of promoting closer ties between the EU and the U.S. The ultimate goal was to create a transatlantic marketplace. Both the European Parliament in 2004-2005 and the U.S. Senate in 2006 passed resolutions supporting a transatlantic marketplace by the year of 2015. This desire was once again confirmed in 2007 when the EU and the U.S. created the Framework for Enhancing Transatlantic Economic Integration which established the Transatlantic Economic Council (TEC). TEC's mission was to outline transatlantic priorities, develop working programs for strengthening transatlantic economic integration and to improve the regions' international competitiveness. Although there were some progress in certain policy areas, TEC never really made any headway on issues such as tariffs, quotas, regulations and investments.[222]

The TTIP is a proposed IIA that strives to create the biggest free trade zone in the world, which would encompass roughly 50 % of global economic output, 30 % of global trade and 20 % of global FDI.[223] Many observers assert that the relationship between the U.S. and the EU has not fully reached its potential, this due to regulatory, technical and other barriers. Growing concerns about declining economic growth and job creation as well as emerging markets increasing global competition have caused public and private stakeholders to require a renewed focus on eliminating trade barriers in the EU-U.S. market and on improving the cooperation between the regions.[224] The TTIP is a way to deal with these issues, and it could potentially boost the economies of both the U.S. and the EU with approximately $100 billion per year as well as creating jobs, encouraging innovation and other great benefits.[225]

[222] Eliasson (2014) *Problems, progress and prognosis in trade and investment negotiations: the transatlantic free trade and investment partnership,* Journal of Transatlantic Studies, volume 12, no. 2, p. 119-120.
[223] Weaver (2014) p. 227.
[224] Akthar & Jones (2013) p. 111.
[225] Weaver (2014) p. 227; Webpage of the European Commission retrieved 2015-11-02 from http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/impact/.

The Commission, which negotiates the TTIP on behalf of the EU, emphasizes three main purposes with the TTIP. The first purpose is to improve the access of EU companies to the U.S. market, thereby facilitating exports and imports between the regions as well as making overseas investments easier and more secure. This by, for example, cutting or removing custom taxes on goods exported from the EU to the U.S.[226] The second purpose is to facilitate exports by regulatory cooperation. Exports between the U.S. and the EU can be costly since the regions have different standards and rules. In terms of level of protection the U.S. and EU standards are usually conforming, but they differ regarding technical details and procedures for ensuring that the standards have been met by the exporting company. The TTIP would lead to mutual recognition of EU and U.S. rules where the standards of the two regions are conforming. When the regions' rules are non-conforming new compatible rules will be drafted to replace them. This would make it easier and cheaper for companies dealing overseas.[227] The third purpose is to put new rules in place that will help companies dealing overseas. These rules will give companies, among other things, better access to energy and raw materials they need, better protection for intellectual property and stronger investment protection.[228]

On March 20, 2013, the Obama administration notified Congress that it intended to negotiate the TTIP with the EU. The negotiations would be conducted under the procedure of the TPA, which required a 90 day consultation period for Congress to comment on the proposed negotiation. On March 12, 2013, the Commission agreed to a draft mandate for the TTIP negotiations, which was submitted to the Council of the European Union (the Council of Ministers) for approval by the member states. In May 23, 2013, the European Parliament passed a resolution supporting the negotiation of TTIP, albeit noting certain sensitive issues. On June 14, 2013, the Council of Ministers formally approved the Commission's submission, giving it a mandate to negotiate the TTIP with the U.S. On July 8, 2013, the first round of negotiations for the TTIP was held in Washington D.C.[229] Since then

[226] Webpage of the European Commission retrieved 2015-11-02 from http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/contents/#_market-access.
[227] Webpage of the European Commission retrieved 2015-11-02 from http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/contents/#_regulatory-cooperation.
[228] Webpage of the European Commission retrieved 2015-11-02 from http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/contents/#_rules.
[229] Akthar & Jones (2013) p. 109-110.

ten additional rounds of negotiation have been held, the latest round being held in Miami during 23-25 of October, 2015.[230]

4.2 Starting points of the TTIP negotiations

The U.S. Model BIT of 2012 formed the starting point for the U.S. in the TTIP negotiations. U.S. Ambassador Demetrios Marantis, who at the time was the acting U.S. Trade Representative, stated that the TTIP "*would include ambitious reciprocal market opening in goods, services, and investment, and would offer additional opportunities for modernizing trade rules and identifying new means of reducing the non-tariff barriers that now constitute the most significant obstacle to increased transatlantic trade*"[231].

The Commission negotiates the TTIP with representatives from the U.S. Approval to commence negotiations must be given by the Council of Ministers prior to the start of the negotiations. The Council of Ministers has a duty to establish negotiation directives to the Commission. The negotiation directives set out the general objectives that are to be achieved by the Commission and serve as the Commission's guidelines during the course of the negotiations. The negotiation directives are not legally binding upon the Commission.[232] The negotiation directives for the TTIP were issued on June 17, 2013, but were at the time classified. In an effort to make the TTIP negotiations more transparent, the TTIP negotiation directives were declassified and made available to the public on October 9, 2014.[233] This quest for transparency was approached further when the Commission on November 25, 2014, committed to publishing information about who met its political leaders and senior officials as well as providing greater access to documents pertaining to the TTIP negotiations. The reason for injecting more transparency into the TTIP negotiations was to "*ensure that the general public has accurate and full information of the EU's intentions in the negotiations, to address the concerns and to evacuate misperceptions*"[234].

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[230] Press release from the European Commission, dated October 23, 2015. Retrieved 2015-11-02 from http://trade.ec.europa.eu/doclib/press/index.cfm?id=1389.
[231] The President's 2013 Trade Policy Agenda: Hearing Before the S. Comm. on Finance, 113th Cong. 3 (2013).
[232] Devuyst (2013) p. 290.
[233] Press release from the Council of the European Union, dated October 9, 2014. Retrieved 2015-11-04 from http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/145014.pdf.
[234] Press release from the European Commission, dated November 25, 2014. Retrieved 2015-11-04 from http://europa.eu/rapid/press-release_IP-14-2131_en.htm.

The negotiation directives for the TTIP establishes the starting positions of the EU for the treatment of investors, investment protection, ISDS enforcement, trade policy and the overarching goals of the TTIP.[235] The first part of the directive addresses the nature and the scope of the agreement. It states that the TTIP will contain provisions on trade and trade-related areas and be based on common values, including the protection and promotion of human rights and international security. It further states that the TTIP shall be an ambitious and comprehensive agreement which is fully consistent with the rules and obligations of the WTO. The agreement shall provide for a reciprocal liberalisation of trade in goods and services as well as rules on trade-related issues, and the commitments shall go beyond existing commitments of the WTO. The TTIP shall be binding on all level of government and consist of three key components: market access, regulatory issues and non-tariff barriers and rules.[236] Provision six of the draft concerns the preamble and the general principles of the TTIP, and involves, among other things, a provision stating the right of the parties to take measures necessary to achieve legitimate public policy goals, such as public health, safety, labor and environmental issues. Provisions seven through nine states the objectives with the TTIP, which are *"to increase trade and investment between the EU and the US by realising the untapped potential of a truly transatlantic market place, generating new economic opportunities for the creation of jobs and growth through increased market access and greater regulatory compatibility and setting the path for global standards"*[237].

The negotiation directives also takes a very strong stand on investment protection and demands the highest level of liberalisation and the highest standard of protection possible for EU investors in the U.S., while still retaining the right of the state to adopt and enforce measures necessary to pursue legitimate public policy goals. The negotiations should strive to include all usual standards of treatment, including the FET standard, NT and MFN-provisions, protection against direct and indirect expropriation, the FPS standard, an umbrella clause and free transfer of funds relating to the investment.[238] The TTIP should also

[235] Weaver (2014) p. 244-245.
[236] *Directives for the Negotiation on a Comprehensive Trade and Investment Agreement, Called the Transatlantic Trade and Investment Partnership, Between the European Union and the United States of America*, provision 1-5. Available at http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf.
[237] Ibid. Provisions 6-9.
[238] Ibid. Provisions 22-23.

strive to provide an effective ISDS provision which is characterised by transparency, independence of arbitrators and predictability. Furthermore, the contracting states shall have a possibility of issuing a joint interpretation of a provision which is binding for the IT. The negotiation directives also urges the Commission to consider the possibility of creating an appellate mechanism applicable to the ISDS provision. [239]

In March, 2014, the Commission started an online public consultation on ISDS in the TTIP. The public was invited to answer a questionnaire and to share their opinions on ISDS.[240] Almost 150 000 replies were sent to the Commission. Most replies, roughly 145 000, were submitted through non-governmental organisations (NGOs) and consisted of pre-defined answers. A report with the findings of the consultation was published in January 2015.[241] On September 16, 2015, a new draft of the investment section of the TTIP was released (TTIP-draft). The draft was not a formal proposal to the U.S., but only an internal document of the EU. Nonetheless this document gives a good insight on the EU's current position on the investment protection provisions in the TTIP. The draft is in many ways conforming to the negotiation directives, albeit it is more specified in certain regards. A big change is that the latest draft proposes the establishment of the entirely new ICS in the TTIP, complete with a framework for how this could work.[242] This brand-new proposal will be discussed in a later section.

4.3 Development in the future – is the TTIP a frontrunner for a multilateral IIA?

The idea of a multilateral IIA is not new. Attempts at creating a comprehensive international agreement for investments were made as early as in the 1960s.[243] Despite several attempts at creating a multilateral IIA there is to date no such agreement, with the exception of the ECT, which is restricted to a particular sector. One attempt was made by the Multilateral

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[239] Ibid.

[240] Webpage of the Commission, *consultation notice,* retrieved 2015-11-11 from http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152279.pdf.

[241] Webpage of the Commission, *Report; Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement,* retrieved 2015-11-11 from http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

[242] Press release from the European Commission, dated September 16, 2015. Retrieved 2015-11-04 from http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364; the draft of the investment chapter of the TTIP can be found on: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[243] UNCTAD (2005) p. 8.

Investment Guarantee Agency which wanted to prepare a legal framework to promote FDI. This initiative resulted in the "Guidelines on the Treatment of Foreign Investment" (the Guidelines), which was based on a multitude of important legal instrument in the field, such as BITs. The Guidelines set out a general framework for the treatment of foreign investors and dealt with issues such as admission of FDI, expropriation and other standards of treatment. Due to the careful process in which the Guidelines was crafted it has been quite influential, but it never acquired the status of law and it is not binding.[244]

The most notable attempt at creating a multilateral IIA was the Multilateral Agreement on Investment (MAI) that the members of OECD sought to negotiate, beginning in 1995. The objective of the MAI was to consolidate in one document the rules that OECD had already achieved in the international investment law area and to make these rules clear and legally binding by adding a dispute resolution provision. It was to "*provide a broad multilateral framework for international investment with high standards for the liberalization of the investment regimes and investment protections and with effective dispute settlement procedures"*[245]. The treaty would be open to all OECD members, the European Community and to accession by any non-OECD country.[246]

The negotiators quite quickly agreed on the structure of the MAI, as well as on the issues of investment protection and dispute resolution. However, on the issue of investment liberalisation, there were significant disagreements, especially between the U.S. and the European states. Finding a common ground proved to be challenging, which was one of the reasons why the treaty was not concluded. Another difficulty was that other parties, such as developing countries led by India, opposed the MAI since they saw it as a threat against their national sovereignty and economic independence. In 1997 NGOs got ahold of a draft of the MAI and mounted an effective protest on the internet, raising the public awareness which made politicians in the U.S. and Europe take opposing stands. They argued that the process of the MAI was flawed because it was held in secrecy and promoted business interests at the

[244] Salacuse (2010) p. 104-105.
[245] UNCTAD (2005) *International Investment Agreements: key issues,* Volume III, p. 130.
[246] Ibid.

expense of labour unions, environmental organisations and other parties.[247] It can be noted that these arguments are among the same arguments that are used against the TTIP.

The attempt to create the MAI attracted much attention, but was ultimately discontinued in 1998. The efforts were however not in vain. In the aftermath of the MAI certain lessons of a general nature could be learned from the failed negotiations. One important lesson learned was that the procedure of the negotiations must be transparent in order to secure the necessary support and legitimacy needed. It is crucial that the civil society from both developed and developing nations are aware of the proceedings and understand the content of the agreement. Another lesson was that there must be some extent of flexibility in the agreement that allows the contracting parties to pursue objectives important for their state. An agreement that is too rigid will constitute a too large restriction on the autonomy of the contracting state and will face problems in the negotiation phase.[248] In November 2014 the Commission declared that it was boosting the transparency in the TTIP negotiations to show what the negotiations are about and to remove the veil of mystery surrounding the negotiations. Thus it seems like some of the lessons from the MAI have indeed been learned.[249]

The U.S. and the EU have publicly expressed a desire to work together to utilise similar ISDS provisions as the one inserted in the TTIP in future IIAs with other states and to commit to open and non-discriminatory investment policies, strong protection for investors, strong rules on transparency and binding international dispute settlement.[250] The idea of concluding a multilateral IIA that is beneficial to both the U.S. and the EU arose with the New Transatlantic Agenda in 1995, where the parties committed to "*work together for the successful conclusion of a Multilateral Agreement on Investment at the OECD that espouses strong principles on international investment liberalisation and protection*"[251]. The

[247] Salacuse (2010) p. 106.
[248] UNCTAD (2005) Volume III, p. 130, 137-138.
[249] Press release from the European Commission, dated September 25, 2014. Retrieved 2015-11-10 from http://europa.eu/rapid/press-release_IP-14-2131_en.htm.
[250] Weaver (2014) p. 246.
[251] The New Transatlantic Agenda, 1995 US-EU Summit in Madrid (Dec. 5, 1995), retrieved 2015-11-11 from http://eeas.europa.eu/us/docs/new_transatlantic_agenda_en.pdf.

Commission stated recently that the establishment of an investment court is "*intended to be the stepping stones towards a permanent multilateral system for investment disputes*"[252].

There seem to be hopes and aspirations that the TTIP can be the frontrunner for a future multilateral IIA, but whether this is possible on a global scale is yet to be settled. Provided that the U.S. and the EU are able to settle their differences and conclude an IIA among them with strong and balanced investment protection, reduced transaction costs and incorporating roughly 50 % of the global economic output then this might encourage other states to agree to similar provisions, creating a de facto multilateral IIA. Considering that most states have concluded an IIA with either the U.S. or the EU, if the provisions of the TTIP become the modus operandi when concluding new IIAs then a multilateral IIA might indeed be possible in the future.[253]

[252] Webpage of the Commission, *Concept paper – Investment in TTIP and beyond – the path for reform*, p. 4. Retrieved 2015-11-11 from http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.
[253] Weaver (2014) p. 247-248.

5. Is ISDS an appropriate dispute resolution mechanism for the TTIP?

This section will examine the arguments for and against ISDS in general and the inclusion of an ISDS provision in the TTIP in particular. In a perfect world no need for adjudication would exist. All treaties would be perfectly drafted and leave no doubt about how to be interpreted. Unfortunately, that's not the case and conflict over the interpretation of treaties will always exist in international relations. The difficulties of writing agreements that are unambiguous can be attributed to two facts. Treaty negotiators are usually from different countries and are shaped by different cultures, legal traditions and interests which influence their communication and perception during the negotiations. It is also impossible for the negotiators to foresee all of the circumstances to which the treaty will be applied to. Even if that was possible there would be no guarantee that the person applying the treaty would interpret it in the way that the drafter had presumed. Due to this it is important that a mechanism for solving conflicts through objective and effective application of the treaty's provisions exists and that there is a possibility of enforcing the treaty's provisions.[254] An effective and objective way of resolving investment disputes is according to UNCTAD *"the ultimate guarantee of protection for foreign investors"*[255].

Despite the need for fair and efficient dispute resolution mechanism in investment disputes ISDS has been highly criticised. This can be understood by examining the nature of the disputes in international investment law. The matter at hand in investment dispute are usually related to public policy decisions, where the host state takes measures in the interest of pursuing goals important to the state, such as imposing a tax, regulating businesses or preserving the environment. These measures might under certain circumstances be a violation of the rights of an investor. An IT that finds the measures illegal under a treaty might not only offend the state and force them to pay considerable damages but it will also force the state to repeal or change the measures taken in order to avoid claims from other investors.[256] Since investment disputes usually involve public policy the disputes are also political in its nature and political groups, NGOs and the public usually have views on the

[254] Salacuse (2010) p. 353.
[255] UNCTAD (1998) *Bilateral Investment Treaties in the Mid-1990s,* p. 87.
[256] Salacuse (2010) p. 355.

matter, making investment disputes highly politicised and controversial.[257] The amount of money at stake is usually extremely high, sometimes amounting to billions of U.S. Dollars. In Yukos v. Russia the claimant was awarded $50 billion as well as being reimbursed for a majority of their legal fees.[258] Especially for developing countries the risk of having to pay awards and legal fees of this size might constitute a big burden for the state budget.[259]

With these things in mind it is easier to understand why ISDS is a highly controversial subject. The criticism against ISDS has mostly come from host states and NGOs, which is understandable since the big risks and the potential downsides of ISDS usually does not affect the capital-exporting state. The criticism can be categorized into two categories; criticism against the system as such and criticism against specific aspects of the system.[260]

5.1 Criticism of the ISDS system

This category of criticism takes aim on the ISDS system as such and whether ISDS is necessary, appropriate or desirable at all.[261] This section will deal with the most interesting objections to ISDS in the TTIP as a whole and counter-arguments to these objections.

5.1.1 Threat to sovereignty and the rule of law

One common argument against ISDS in the TTIP is that it threatens domestic sovereignty and weakens the rule of law by giving corporations a right to go to arbitration. Giving an IT the right to review and possibly undermine the state is considered an unacceptable threat and restriction to the sovereignty of the state. By including ISDS in the TTIP it is argued that states abdicate from their sovereign responsibilities.[262] An ISDS provision in the TTIP would mean that a state would have to honour their commitments. It is undoubtedly so that ISDS does constitute a limitation on the sovereignty of the state. However, one of the hallmark rules of sovereignty is that a state is free to agree to limit its own sovereignty if it wishes.[263]

A state must be free to enter into a treaty which gives them binding obligations if they believe that treaty will lead to positive consequences outweighing the downsides of the

[257] Ibid.
[258]Yukos Universal Limited v. The Russian Federation, *Final Award*, 18 July 2014, para 1688.
[259] Salacuse (2010) p. 356.
[260] Hober (2013) p. 534.
[261] Ibid.
[262] Alliance for justice, *Letter opposing ISDS*, see note 14.
[263] Hober (2013) p. 536.

agreement. If a right is given to an investor by a state, then there should be a corresponding duty for a state to make sure that the investor's rights are upheld and consequently providing an available remedy if that is not the case. It is a fundamental rule of international law that a state must be able to justify its acts and take responsibility for inappropriate conduct. An ISDS provision would in fact strengthen the rule of law, and make sure that states honour their commitments. An ISDS provision in the TTIP would subject states to the risk of losing some cases, but it would also bring other positive consequences that might outweigh this risk. That states keep entering into IIAs with ISDS provisions might indicate that states do in fact believe that the restriction on their sovereignty is a fair bargain in exchange for what is offered; i.e. stability and increased FDI flows.[264]

5.1.1.1 The right to regulate

The right to regulate is a fundamental concept under international law that gives the sovereign the right to choose its own domestic laws and a right to enact new legislation to protect any public interest within its borders.[265] The apparent problem with the limitation on sovereignty of the state is a concern that the state will not be allowed to regulate freely and hence will not be able to achieve important public policy objectives. Claims submitted by investors to ITs are often based on decisions by the state, new laws or policy changes which infringes upon one or more of the protection standards in an IIA. However, an IT can only award financial compensation and cannot demand that a state change, withdraw or suspend any decision or law that constitute a breach of the IIA, and thus the right to regulate cannot be directly impeded by the IT.[266]

The right to regulate is a well-known concept in international investment law and there are clear rules articulated by ITs that give states a right to regulate freely, except under certain circumstances. The right to regulate has been discussed primarily in relation to the area of indirect expropriation, the FET standard and the NT standard.[267] A governmental measure that is bona fide and furthers a legitimate purpose in a non-discriminatory and proportionate way is always considered to be within the state's right to regulate, and no compensation will have to be paid to an investor that suffers a loss. Property rights have inherent limitations

[264] *An open letter about investor-state dispute settlement,* see note 15.
[265] Tietje & Baetens (2014) *The impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership,* p. 49.
[266] Fabry & Garbasso (2015) p. 14.
[267] Tietje & Baetens (2014) p. 49.

and legitimate regulations by the state will trump the property rights of the investor.[268] This principle can also be found in the European Convention of Human Rights which states that the right to property *"shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"*[269]. A measure taken by a state must be proportionate to the public interest that the state strives to protect. This was emphasized in the IT's decision in Tecmed V. Mexico which stated that "*whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account the significance of such impact has a key role upon deciding the proportionality"*[270].

A state will thus only be penalized for adopting new legislation or changing current one if their acts are arbitrary, discriminatory or in any other way breaches the IIA entered into. Bona fide acts committed by a government will not be punished by an IT. For instance in Methanex v. the United States of America, which was a NAFTA case and involved California's ban on gasoline additive methyl tertiary-butyl ether, the IT stated that *"the California agencies acted with a view to protecting the environmental interests of the citizens of California, and not with the intent to harm foreign methanol producers"*[271]. If the purpose of a measure on the other hand is not bona fide, such as in S.D. Myers v. Canada, then the measure will not pass muster. In this case Canada imposed a ban on the export of PCB waste, for remediation in the U.S., claiming it was to protect the environment. However, the IT found that the true motive behind the measure was to protect Canada's PCB waste disposal industry. The IT found that Canada had breached the NT standard and the FET standard.[272]

5.1.1.2 Regulatory chill

A concept that is closely related to the right to regulate is the concept of regulatory chill. A very common criticism against ISDS is that governments will abstain from altering or enacting legislation due to fear of expensive arbitration procedures. The proponents of the

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[268] Newcombe (2005) *The Boundaries of Regulatory Expropriation in International Law,* p. 27.

[269] ECHR Art. 1 of the First Additional Protocol.

[270] Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, Award, May 29, 2003, ICSID case No. ARB(AF)/00/2, at para 119.

[271] Methanex Corporation v. United States of America, *Final Award of the Tribunal on Jurisdiction and Merits,* August 3, 2005, Part IV, ch E, p. 8 at para 20.

[272] S.D. Myers, Inc. v. Canada, *Partial Award,* November 13, 2000, at paras 255-256, 268.

regulatory chill theory claim that ISDS prevent states from exercising their sovereign rights by restraining policy space in areas such as the environment, labour law, health and human rights area.[273] Regulatory chill can be divided into three groups. Anticipatory chill is when legislators account for the risk of disputes prior to drafting legislative changes. Specific response chill is when a regulatory measure that is already underway is stopped or changed when the legislator is made aware of the risk of getting into a dispute. The last kind of regulatory chill is precedential chill, which is when a state after losing an ISDS claim roll-back legislation that was enacted to achieve public policy goals. This is also called regulatory freezing.[274]

Measuring regulatory chill is quite hard. Political choices are made depending on many independent variables and it is hard to pin-point ISDS threat as the reason for chilling effects. Proponents of the theory point at governmental acts and case studies to show that governments believe ISDS is threating their ability to legislate. Countries that have withdrawn from the ICSID convention, or threatened to do so, can be seen as proof of discontentment with ISDS. A number of cases also support the theory of regulatory chill. For instance Canada retracted a ban on a gasoline additive and paid compensation to a corporation named Ethyl Corp, which can be seen as a sign of regulatory chill since Canada was forced to roll-back their environmental friendly measures due to Ethyl's arbitration proceedings against Canada. However, there could possibly be other reasons for the roll-back, such as Canadian provinces challenging the measure in Canadian courts and there was evidence indicating that the measure was really aimed at protecting Canadian commercial interests rather than benefiting the environment.[275]

An argument against regulatory chill is that law in itself chills government activities and that the point with international law is to curb sovereign measures. The purpose of international investment law is to chill certain governmental measures to make sure that the host state treats the investor fairly and accordingly to the IIA. While regulatory chill is undesirable in regards to bona fide government measures, it is necessary and desirable to stop the host state from taking protectionist and unfair measures. Another argument is that most ISDS claims arise from executive branch decisions and administrative measures and that only 9 %

[273] Tietje & Baetens (2014) p. 40.
[274] Ibid. p. 41.
[275] Ibid. p 43.

of all ICSID cases resulted from legislative acts. Even if regulatory chill theory was proven that would also apply to domestic court decisions, and the government could, providing it has a functioning legal system, face legal claims from both domestic and foreign investors, albeit in the domestic courts.[276]

5.1.1.3 Measures to strengthen the right to regulate and to avoid regulatory chill in the TTIP

In modern IIAs the right to regulate is often specifically addressed in the IIA to preserve the state's right to regulate in a more specific manner than what is granted by the precedents of ITs.[277] In the TTIP-draft the right to regulate and regulatory chill have been addressed in several ways. In the public consultation that took place prior to the release of the draft critics demanded a clear and unequivocal affirmation of the state's right to regulate.[278] This issue have been dealt with in article 2.1 of the TTIP-draft with a provision stating that the provisions of the section *"shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity"*[279]. In art 2.2 of the TTIP-draft it is also made clear that the provisions of the section shall not be construed as a commitment from the state to abstain from changing its legal or regulatory framework in a way that negatively affects an investment or the investor's expectation of profits.[280] Another way of preventing an ISDS provision to be used to prevent state measures is to carve-out specific areas from the scope of the agreement. One area that is often carved-out is tax measures. It is not clear whether there will be a general tax carve-out in the TTIP. In the TTIP-draft there is however a partial tax carve-out which removes double taxation treaties from the scope of the MFN standard. There is also a carve-out removing procedural matters from the scope of the MFN standard, preventing an investor from importing dispute resolution provisions from a treaty entered into by the host state and a third state.[281]

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[276] Ibid. p. 45-47.
[277] Ibid. p. 60.
[278] Van Harten (2014)*Why Arbitrators not Judges? Comments on the European Commission's approach to investor-state arbitration in TTIP and CETA,* p. 21.
[279] TTIP-draft, section 2 art. 2.1.
[280] Ibid. Ch 2, sect, 2, art 2.2.
[281] Ibid. Ch 2, sect 1, art 2-4, paras 3-4.

The right to regulate has also been safeguarded in the TTIP-draft by making the definitions of specific protection standards clearer. A common complaint among opponents of ISDS is that the indirect expropriation standard is too vague and gives the arbitrators too much leeway in deciding whether a measure constitutes indirect expropriation or not. Critics also claim that arbitrators tend to have an expansive view on what constitutes indirect expropriation.[282] In Annex I of the TTIP-draft there is an extensive definition of direct and indirect expropriation, and how to determine whether a measure taken by the state is to be considered indirect expropriation or not. It is also clarified that the sole fact that a measure or a series of measures has a negative economic impact on an investment is not enough to establish that indirect expropriation has taken place. The third paragraph of Annex I also states that a measure that is non-discriminatory and is designed and applied to protect legitimate public welfare objectives does not constitute indirect expropriation unless the measure is manifestly excessive.[283]

Another standard that is commonly criticised is the FET standard which is accused of being the most abused standard in investment arbitration due to it being ambiguous. The FET standard is the most commonly invoked provision before ITs and was called upon in 88 % of all NAFTA investment disputes.[284] In newer IIAs drafters tend to define the FET standard more precisely and give examples in the treaty, whereas earlier IIAs usually left it for the arbitrators to decide what constituted a breach against the FET standard.[285] The language in the TTIP-draft is based on the language already agreed upon by the EU and Canada in CETA and the FET standard can be found in the TTIP-draft article 3.1. In Article 3.2 there is a list of measures that would constitute a breach of the FET standard, such as denial of justice in criminal, civil or administrative proceedings, targeted discrimination, manifest arbitrariness and fundamental breach of due process. In the interpretation of the FET standard the IT may also take into account any specific representations made to an investor to induce an investment that created a legitimate expectation for the investor.[286] This list is not

[282] Sinclair (2014) *Investor-state dispute settlement in the TTIP and CETA – submission to the European Commission's public consultation,* Canadian Centre for Policy alternatives, p. 10; Van Harten (2014) p. 18-19.
[283] TTIP-draft. Annex 1.
[284] Sinclair (2014) p. 8.
[285] Tietje & Baetens (2014) p. 62.
[286] TTIP-draft, Ch 2, sect 2, art 3, paras 1-2, 4.

exhaustive, but it is an expression of greater party control over the definition of FET.[287] Critics assert that the proposed FET provision, despite the exemplifications given in the provision, still suffers from ambiguity and that a standard such as manifest arbitrariness still is susceptible to unpredictable interpretations. Furthermore the introduction of a legitimate expectation standard is problematic and poses a threat to the government's right to regulate.[288]

5.1.2 Investment arbitration is biased in favour of the investor

Another common argument put forth by opponents to ISDS is that host states are usually on the losing side of investment disputes and that ITs are biased in favour of the investor. In Latin America certain states were unhappy with constantly being the respondents in investment arbitration and considered ITs to be biased. This resulted in several states denunciating the ICSID-convention and terminating BITs.[289] If ITs do hold more often in favour of investors this could according to some critics be explained by a systemic bias that springs from the fact that arbitrators seek to promote the growth of the ISDS system in order to get more appointments and hence economic gain. Since states cannot commence investment arbitration under IIAs the system is contingent on investors bringing the cases. By favouring the side of the investor the arbitrator increases its chances to be appointed in future disputes. This bias stems from the lack of tenured adjudicators and objective case assignment in addition to the large amount of money to be made by arbitrators. The mere suspicion that arbitrators might be biased is enough to question the whole ISDS system.[290] The current ISDS landscape is governed by a few dozen repeat players, sometimes referred to as a "cartel" or the arbitration "mafia".[291] These individuals are afforded too much power and have driven the interpretation of investment treaties in a way which is favourable to investors, and thereby themselves. According to critics the arbitration mafia has a track record of *"exploiting legal ambiguity to expand their power over states, investors, public money, and so on"*[292].

[287] Tietje & Baetens (2014) p. 63-64.
[288] Sinclair (2014) p. 9.
[289] Hober (2013) p. 535.
[290] Van Harten (2014) p. 40-41.
[291] Rogers (2005) *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. p. 967.
[292] Van Harten (2014) p. 3.

This argument could be said to be counterintuitive though. Assuming that arbitrators are rational agents with a goal of enhancing their income, being biased and impartial would be a bad way of achieving this since the awards are subject to review either by domestic courts or by an ad hoc committee if the award was rendered in an ICSID proceeding. An arbitrator that has performed its task in a negligent or wrongful way might be liable to pay damages to the parties should the award be overturned. Furthermore, in a profession where neutrality and sound judgment are among the hallmark traits, rumors of impartiality might be devastating for the arbitrator.[293] It can also be mentioned that in most procedural frameworks for arbitration each party appoints one arbitrator. The arbitrators selected by the parties then choose the chairman of the arbitration board.[294]

Statistics from UNCTAD shows that the majority of the 274 final awards rendered have favoured states. 43 % of all resolved ISDS claims resulted in a decision favourable to the state, 31 % resulted in a decision favourable to the investor and 26 % were settled amicably.[295] These statistics do not seem to imply any bias in favour of the investor; on the contrary, states are winning more frequently than investors. The Commission proposed the establishment of the ICS that would deal with some of the issues raised in this section. This proposal will be dealt with in the next chapter.

5.1.3 An ISDS provision is unnecessary between developed states

Another quite common and compelling argument against an ISDS provision in the TTIP is that there is no apparent need for it. The legal systems in both the U.S. and the EU are objective, fair, dependable and are perfectly capable of dealing with disputes arising from investments made under the TTIP.[296] Including an ISDS provision in the TTIP equals to an assumption that the domestic courts in the U.S. and the EU are not able to offer justice to foreign investors, which would be incorrect. Furthermore, there is no proof that investment arbitration would lead to judgments that are more fair and independent than domestic courts, at least not in developed states.[297] There are several different dispute resolution mechanisms that investors can use instead of ISDS. The TTIP-draft has provisions for alternative dispute

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[293] Waibel, Kausal et al. (2010) *The Backlash against Investment arbitration,* p. 212-213.
[294] ICSID convention art. 37 (2) (b), UNCITRAL Arbitration Rules art. 9.1, SCC Arbitration Rules, art. 13 (3).
[295] Fabry & Garbasso (2015) *p*. 14.
[296] Sinclair (2014) p. 4.
[297] Van Harten (2014) p. 3-4, 28.

resolution such as negotiation and mediation.[298] Furthermore, an investor can ask for diplomatic protection from its home state if it believes it has been treated unjustly. Political risk insurances have also become more common, and it is possible for an investor to protect itself against political risks by getting a private insurance which will guarantee compensation if the host state would deny the investor a fair judicial proceeding. To summarise, even if the investor does not trust the courts of the home state and does not have the option of ISDS there are other ways of dealing with their problems.[299]

The reason why an investor might prefer arbitration instead of domestic courts is primarily because there is a concern for home town justice. A foreign investor might have concerns about whether the domestic court is really neutral, or if it is unduly influenced by the fact that the state is a party to the dispute. There is a risk for prejudice towards foreign investors even if the court is otherwise independent and neutral, as was seen in the NAFTA case of Loewn Group, Inc v. United States of America.[300] Domestic courts might also lack the expertise to apply complex principles of international law on very complicated foreign investments. Even if the domestic court would have expertise enough it might be prohibited to adjudicate on its state's international commitments.[301] Domestic legal systems usually do not include the same protection standards as IIAs, such as FET, FPS, NT and MFN. For an investor it is important to make sure that its investment is protected and enforced in accordance with international legal standards.[302]

In the public consultation document released by the Commission it is stated that "*Domestic remedies would be preferable, but TTIP provisions cannot be invoked directly in front of a national court. Despite the general solidity of developed court systems such as the US and the EU, it is possible that investors will not be given effective access to justice, e.g. if they are denied access to appeal or due process, leaving them without any effective legal remedy.*

[298] TTIP-draft, Ch 2, section 3, sub-section 2, art. 2-3.
[299] Fabry & Garbasso (2015) p. 14.
[300] Park (2006) p. 328; Loewen Group, Inc v. The United States of America, *Response of the United States of America to the June 27 and July 2, 2002 Submissions of the Governments of Canada and Mexico Pursuant to NAFTA article 1128,* ICSID case no ARB (AF)/98/3, July 19, 2002.
[301] Salacuse (2010) p. 358.
[302] Tietje & Baetens (2014) p. 73-74.

ISDS is therefore necessary to allow legitimate claims to be pursued"[303]*.* If the issue according to the Commission is that investors might get denied effective access to justice sometimes, then a solution would be to let investors have access to investment arbitration only in such cases when effective access to justice have been denied the investor.[304] A requirement to exhaust all available domestic legal would however further increase the costs and time to settle a dispute. One of the advantages of investment arbitration is that it is a relatively expeditious way of settling disputes. A requirement to exhaust domestic legal remedies would remove this advantage. Some countries in Europe have judicial systems which are very slow. For instance Italy requires 1 120 days[305] in average to enforce a contract if the first instance's verdict is not appealed. Requiring the exhaustion of domestic legal remedies would make an already slow process, sometimes excruciating slow process, even more cumbersome for an aggrieved investor attempting to defend its rights.[306]

Negotiation, mediation and other alternative dispute resolution measures are great and it is good that such mechanisms will be included in the TTIP. However, these mechanisms can only complement ISDS, not replace it. Adjudication by a neutral party is required by investors, and alternative dispute resolution mechanisms do not offer this. Diplomatic protection is not an adequate replacement for investment arbitration either. Whether or not an investor's claim will be espoused by the state is out of the investor's control, and if the home state chooses to espouse the claim then the state owns the claim, and decides solely what settlement it will accept and whether or not the investor will receive part of the settlement.[307] One of the main reasons why ISDS became a popular way of solving disputes in the first place was because it de-politicised investment disputes. In this aspect ISDS has been very successful, and reverting to a former system based on diplomatic protection and state-state arbitration could potentially cause political instabilities between states.[308]

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[303] The Commission (2014) *Public consultation on modalities for investment protection and ISDS in TTIP,* p. 9, available at: http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf. Henceforth referred to as "The Public Consultation".
[304] Van Harten (2014) p. 28.
[305] Webpage of World Bank Group, retrieved 2015-11-13 from http://www.doingbusiness.org/data/exploreeconomies/italy/enforcing-contracts/.
[306] Salacuse (2010) p. 358.
[307] Ibid.
[308] Tietje & Baetens (2014) p. 69-70.

5.1.4 Discrimination of domestic investors

Another argument against ISDS in the TTIP is that it creates an un-level playing field that gives foreign investors advantages over domestic investors. This by giving foreign investors a right to go to arbitration if they are not happy with the available domestic legal recourses, while not granting domestic investors the same right. Furthermore, the MFN and NT standards in the TTIP guarantees investors treatment "no less favourable", which allows for better treatment of foreign investors than domestic investors. Critics claim that the Commission's approach to non-discrimination in the TTIP is flawed and undermines the goal of a level market playing field.[309]

Although it is correct that allowing foreign investors to go to arbitration whereas domestic investors cannot is a kind of discrimination, this is allowed under international law. The purpose of IIAs for the host state is primarily to attract FDI. In order to do this the state promises investors of the other contracting state that their investment will be protected, which induces the investment.[310] An IIA does not grant any rights to the investor vis-à-vis its own state, but only grants investors rights in relation to the host state. It is true that U.S. investors might suffer a disadvantage compared to EU investors in the U.S., since the U.S. investor may not resort to arbitration, but the opposite is true in the EU, where U.S. investors can resort to arbitration. One of the main arguments for ISDS is that the domestic courts might be unbiased or prejudiced towards the foreign investors. This is obviously not the case with domestic investors which do not need to fear discrimination based on their nationality, and consequently the need for arbitration is not as great for domestic investors. A domestic investor also has political rights and can influence domestic policy in a way that a foreign investor usually cannot. If a domestic investor is unhappy with measures taken by its government it has bigger prospects of affecting those measures than a foreign investor might have – provided that the state is a democratic state.

5.1.5 Harmonization of ISDS and the creation of uniform principles of international investment law

After the Lisbon Treaty entered into force in December 2009 the competence to conclude IIAs was transferred into an alternative competence, giving both the EU member states and

[309] Van Harten (2014) p. 9.
[310] Salacuse (2010) p. 35-36.

the EU authority to enter into IIAs. The Commission proposed that they would be given the authority to review and force termination or renegotiation of intra-EU BITs that, in the view of the Commission, constituted a threat towards the internal market. The Commission holds the view that intra-EU BITs are unnecessary since there are EU remedies available to resolve investment disputes between member states. However, most EU member states seem to consider Intra-EU BITs still to be necessary.[311] There are roughly 190 Intra-EU BITs still in force which creates an internal market that is not entirely harmonised, since investors from certain EU member states have rights that investors from other EU member states do not have. In addition to this the EU member states entered into a considerable amount of BITs with countries outside of the EU, and these BITs did not all adopt the same standards, which means that businesses from the EU are not on a level playing field outside of the EU either.[312]

Since the EU was granted exclusive competence in foreign trade matters it has become a strong player on the international stage in the trade and investment field. The Commission is currently negotiating IIAs with China and Myanmar and is reviewing trade agreements with Japan, India, Thailand, Morocco and Vietnam. The IIAs negotiated with Canada and Singapore are currently awaiting ratification. In all of these IIAs an ISDS provision has been proposed.[313] If the EU successfully manages to induce the EU member states to terminate all intra-EU BITs and proceeds with entering into new IIAs this would lead to a harmonised legal approach for investment from and into the EU. This would benefit foreign investors since the standardisation of legal rules would provide one single and simplified route into the whole EU market. If an ISDS provision would be included in the TTIP this would further harmonise the investment law area and would allow all investors from EU member states that currently have no IIA signed with the U.S. to compete on the same terms as investors from the nine EU member states that have an IIA with the U.S. The states that already did sign an IIA with the U.S. would also stand to benefit from this since the new generation of IIAs is better defined and balanced.[314]

[311] Hober (2013) p. 534.
[312] Fabry & Garbasso (2015) p. 12.
[313] Ibid. p. 11.
[314] Ibid. p. 12.

The current landscape of international investment law consists of thousands of different IIAs with different provisions. This fragmented legal framework creates legal uncertainty for investors. This legal uncertainty also leads to inconsistent arbitral awards and complicates the development of uniform principles in the area of international investment law. There is to date no multilateral IIA and the prospects of creating such an IIA seems bleak. However, since the TTIP will encompass 40 % of global FDI, the inclusion of ISDS in the TTIP could lead to a generalisation of standards and pave the way for a future multilateral IIA. It could also set a precedent for the EU in the negotiations with other important strategic trade partners such as China. If the TTIP would include ISDS that could put pressure on China to do the same, which would further contribute to the standardisation of IIAs and also contribute to a FTA between the EU and China.[315]

5.2 Criticism of specific aspects of ISDS

Not all criticism is aimed at the ISDS system as a whole. Some criticism is only aimed at certain aspects of the system which are deemed to be lackluster, for instance the lack of transparency in the ISDS proceedings.[316]

5.2.1 Lack of procedural protections

In the letter that the Alliance for Justice sent to Congress ISDS was described as follows: *"ISDS proceedings lack many of the basic protections and procedures of the justice system normally available in a court of law. There is no appeals process. There is no oversight or accountability of the private lawyers who serve as arbitrators, many of whom rotate between being arbitrators and bringing cases for corporations against governments"*[317]. Some of the claims made in this letter are true. For instance, there is usually no appeals process in arbitration. Other claims made, such as the statement that investment arbitration lack basic procedural protections, are however incorrect. Arbitration was traditionally used to resolve state conflict, but after World War II its importance in international commercial dispute increased dramatically. A considerable amount of international business disputes are resolved by the means of arbitration rather than by the domestic court systems. Arbitration is a highly structured and formal process which operates through specific rules and procedures, although these might vary depending on what set of arbitration rules that the

[315] Ibid.
[316] Hober (2013) p. 534.
[317] Alliance for justice, *Letter opposing ISDS*, see note 14.

parties have agreed to. Some of the rituals and procedural technicalities that are common in the domestic legal systems might not exist in arbitration, but it must always conform with a minimal standard of justice that is common to all developed legal systems in the world.[318]

Arbitration is recognized by most domestic legal orders[319] as well as by the New York Convention on Recognition and Enforcement of Arbitral Awards (the New York Convention), which entered into force on June 7, 1959, and is signed by 154 countries, including the U.S. and all of Europe.[320] Arbitration is by no means a novelty in international dispute resolution. Most ISDS claims are governed either by the ICSID convention or by the UNCITRAL procedural rules. Both of these sets of rules contain multiple control mechanisms to ensure the procedural fairness of any awards, including a possibility to dismiss arbitrators which are perceived to be biased.[321] There is also a duty for an arbitrator to continuously during the arbitral process disclose any circumstances that is likely to raise justifiable doubts as to its impartiality.[322]

Under the ICSID convention it is possible for either party to request annulment of the award within 120 days of the date that the award was rendered. An award can be annulled by an annulment committee if the tribunal was not properly constituted; if the tribunal manifestly exceeded its powers; if a member of the tribunal was corrupt; if there was a serious department from fundamental procedural rules; or if the tribunal did not state the reasons for the award.[323] Arbitral awards rendered under other rules than the ICSID convention are subject to review by the first instance of the domestic court in the legal seat of the arbitration. The reward can be set aside by the domestic court, but only on certain grounds decided by domestic law. Common grounds used by the courts to disregard arbitral awards are, for instance, that the arbitral agreement between the parties was invalid or that the arbitrators exceeded the authority granted to them by the parties.[324] If a party wishes to enforce an arbitral award outside of the place of arbitration, by means of the New York

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[318] Salacuse (2010) p. 369-370.
[319] See for instance, Lag (1999:116) om skiljeförfarande in Swedish law, the Federal Arbitration Act in the United States and in sections 1025-1066 of the German Zivilprozessordnung.
[320] Webpage of UNCITRAL, retrieved 2015-11-14 from http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status_map.html.
[321] *An open letter about investor-state dispute settlement,* see note 15; ICSID convention ch. V, art. 56-58, UNCITRAL procedural rules sec. 2, art. 12.
[322] UNCITRAL procedural rules, sec. 2, art. 11.
[323] ICSID convention, ch. IV, sec. 5, art. 52.
[324] See for instance, Lag (1999:116) om skiljeförfarande 34 §; Federal Arbitration Act sec. 10.

Convention, it must seek the assistance of the domestic court of that country. According to the New York Convention, the losing party can oppose enforcement on multiple grounds, including that enforcing the award would go against ordre public, that it did not receive proper notice of the arbitration proceeding, that it was unable to present its case, or that the arbitrators exceeded their authority or decided matters outside of the scope of the submission to arbitration.[325]

Claiming that arbitration lacks the most basic procedural protections is thus incorrect. However, while there is certainly some possibility of review, this review does not fully encompass all matters tried by the IT. Misjudgments or misinterpretation of domestic law by the arbitrators are usually not enough to overturn an arbitral award. Sometimes even manifest error of law might not be enough for an annulment.[326] Despite the possibilities of review, in some cases there is a need for a procedure of appeals which currently do not exist under most arbitration regimes. The Commission's proposal for ICS includes stronger procedural protections as well as an appeals procedure, which would address and resolve the issues raised by these arguments. I will discuss this proposal in the next section.

5.2.2 Predictability and inconsistency of outcomes

ISDS has proved to be a very effective way of settling dispute in international investment law. In the last couple of decades the amount of ISDS claims has increased sharply. With this sharp increase of claims there have also been other developments. Litigants have started to engage in strategic considerations about where and how to bring their cases, so called forum shopping, trying to pursue their claims in multiple forums with different courts and tribunals.[327] Multiple and parallel proceedings comes with a number of drawbacks. It multiplies the costs of litigation, which is a waste of resources, and can financially strain states. It may also lead to investors utilising harassing and oppressive litigation tactics, forcing the state to defend itself. The greatest risk however, is the risk of inconsistent outcomes. One of the most fundamental values of a system based on the rule of law is predictability. If ITs render conflicting judgments on similar or same issues, then there will be poor predictability in the ISDS system. The issue of inconsistent outcomes is not only an

[325] The New York Convention, art. V.
[326] Impregilo S.P.A. v Argentine Republic, Annulment Proceeding, , ICSID Case No. ARB/07/17 , January 24, 2014, at para 132.
[327] Waibel, Kausal et al. (2010) p. 112-113.

issue when there are parallel proceedings, but also when there are separate cases which have a similar background or fact pattern.[328]

That the awards of ITs are inconsistent and unpredictable is not very surprising, considering that the awards are based on a framework of public international law that is decentralised and non-hierarchic and consists of thousands of different IIAs. There is no formally binding principle of stare decisis in public international law or international arbitration. In regular international commercial arbitration the award is usually kept confidential, which makes inconsistencies and fact discrepancies hard to detect. Awards rendered in investment disputes are however to a large extent published which makes it possible to detect inconsistencies and deviations from established rules and principles.[329]

Inconsistent outcomes may result from ITs having divergent views on legal issues or on how to assess the facts of the case. Divergent views on legal issues was an issue in the SGS cases where the IT in SGS v. Pakistan held that an umbrella clause does not necessarily elevate a breach of contract to a breach of international law, while the tribunal in SGS v. Philippines held that an umbrella clause elevates all breaches of contract to a breach of the BIT. Subsequent tribunals have followed both approaches, and thus there is uncertainty of the true meaning of an umbrella clause. Diverging assessments of identical facts took place in several ICSID cases where Argentina was the defendant. Some ITs held that there was a state of necessity in Argentina during the beginning of 2000, while other tribunals found that this was not the case – different views that affect the legal assessment.[330]

Several proposals on how to solve these problems have been suggested. One easy way of dealing with investors starting proceedings in both domestic courts and through ISDS is by including a fork in the road clause in the IIA. A fork in the road clause forces the investor to choose to either submit the claim to ISDS or to go to domestic court. An investor that chooses to go to domestic court is barred from submitting a claim to ISDS.[331] One suggestion on how to deal with inconsistency and incoherency was to establish an appeals procedure. ICSID drafted a proposal for such an appeals facility at ICSID, but the proposal came to nothing since it would have required an amendment to the ICSID convention. Another

[328] Ibid. p. 114.
[329] Hober (2013) p. 538.
[330] Waibel, Kausal et al. (2010) p. 114-115.
[331] Tietje & Baetens (2014) p. 95.

proposal was to create a system of preliminary rulings, which was inspired by the system in EU law. This would however require the suspension of the arbitral proceedings to await the preliminary ruling and would require an agreement establishing the separate body that would issue the preliminary rulings. Another proposed solution to the problems of inconsistent awards is a permanent investment court. This would require a multilateral treaty to function, which, as discussed previously, is not very easy feat to achieve. All of these proposals would require amendments to current IIAs and the conclusion of new multilateral treaties in order to function, which might be unrealistic to achieve.[332]

It has been proposed that the easiest and most effective way of dealing with inconsistency in arbitral awards is by developing a robust and consistent case law. Despite not being formally bound by precedents ITs do in practice often adhere to earlier judgments and avoid open conflict with earlier decisions. The continued development of case law should help with the predictability of the awards of ITs. It might also be noted that while there are some cases which clearly are inconsistent, in general the consistency of decisions made by ITs is quite high.[333]

In the Public Consultation a possibility for the contracting states to jointly adopt an interpretation of the treaty's substantive provisions that would be binding to the ITs was proposed.[334] Some critics believe that a system of shared interpretation in reality is not helpful. An equivalent provision can be found in NAFTA and has only been invoked twice in over twenty years. It is a bureaucratic process which requires all signatory states to agree, and is in reality not an effective mechanism.[335]

5.2.3 Transparency

"Their meetings are secret. Their numbers are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments have led to national laws being revoked, justice systems questioned and environmental regulations challenged"[336].

[332] Hober (2013) p. 538-539.
[333] Waibel, Kausal et al. (2010) p. 123-125.
[334] The Public Consultation, p. 9.
[335] Van Harten (2014) p. 25-26.
[336] Article in the New York Times, quoted in Hober (2013) p. 537.

One of the most common complaints about ISDS is that it is not transparent enough. Confidentiality is one of the fundaments of international commercial arbitration, and is often chosen because of the confidentiality it offers.[337] Claims dealt with in ISDS differ from ordinary international commercial arbitration in that it involves challenges to governmental measures. Sometimes these measures were taken to achieve important public policy objectives, such as measures affecting the labour market, the environment or consumer rights. ITs will sometimes require the host state to pay damages to the aggrieved investor, sometimes in the amount of billions of U.S. Dollars, and thus public funds might be affected by ISDS. It is argued that when public policy issues are resolved by ITs it is crucial to have a high level of public access to the arbitration process. A transparent process is essential in order to secure public acceptance of the tribunal's decisions and to make sure that the process is carried out in accordance with the rule of law.[338] It could be noted that in many countries, even in advanced democracies, the court system is not always entirely transparent. The difference between ITs and domestic courts might not be as big as some critics believe. Nonetheless, increased transparency in the arbitral proceedings would increase the legitimacy of ISDS.[339]

The need for increased transparency has been recognized, and steps in order to solve the problem have been taken. Since 2001 Canada and the U.S. have posted all awards rendered in the cases where they have been defendants. Pleadings, memorials, procedural decisions and other documents have continuously been posted online. Mexico has done the same for all arbitral proceedings under chapter 11 of NAFTA. Participation of non-disputing parties by the means of amicus curiae-like briefs has been welcomed by NAFTA countries, giving NGOs and other interested non-parties a possibility to participate in the arbitral proceedings.[340] Changes have also been made in the ICSID arbitration rules and in the Additional Facility rules to allow for the publication of awards, or excerpts of the awards, and to give the tribunals the power to, in absence of any objections from the parties, open up the arbitral proceedings to the public. The Canadian model Foreign Investment and Promotion

[337] Hober (2013) p. 537.
[338] Vanduzer (2007)*Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation,* McGill Law Journal, Vol. 52, p. 684-685.
[339] Fabry & Garbasso (2015) p. 16.
[340] *An open letter about investor-state dispute settlement*, see note 15.

Agreement and the new U.S. Model BIT both includes strong provisions on transparency, requiring all hearings to be open to the public and documents to be made available.[341]

UNCITRAL recently released new rules on transparency that went into effect on April 1, 2014. These procedural rules provide transparency and accessibility to the public in ISDS cases brought under the UNCITRAL rules.[342] On March 17, 2015, the Mauritius Convention on transparency opened for signature. This convention has so far has been signed by 16 states, among others the U.S., the United Kingdom and Sweden. By signing the convention the states express their consent to apply the UNCITRAL rules on transparency on IIAs concluded prior to April 1, 2014.[343]

Much emphasis, both from the U.S. and the EU, in the TTIP negotiations have been on increased transparency. The TTIP-draft has a provision which states that the UNCITRAL transparency rules shall apply to disputes under the TTIP, with some additional obligations which further improves the transparency of the proceedings.[344] Following the UNCITRAL transparency rules will mean that all documents will be made publicly available, that all hearings will be open to the public and that any interested party, such as NGOs or trade unions, may make a submission. These procedural rules are mandatory and will be applicable on all investment disputes under the TTIP.[345] Transparency is indeed an important issue, and making sure that the proceedings under the TTIP are open to the public is vital for the legitimacy of the system. However, I believe that this will be accomplished by the provisions proposed by the Commission in the TTIP-draft. Lack of transparency should not be an issue in the TTIP, provided that these provisions are included in the final agreement.

5.2.4 Treaty shopping

In recent years the practice of treaty shopping has developed. There is no official definition of treaty shopping, but it can be described as a process of routing an investment through a certain state to gain access to an IIA where such access did not exist previously, or where the

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[341] Vanduzer (2007) p. 706-707.

[342] UNCITRAL rules on Transparency in Treaty-based Investor-State Arbitration. Available at: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

[343] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, Available at https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf.

[344] TTIP-draft, ch. 2, sec. 3, art. 18.

[345] The Commission (2015) *Concept Paper – Investment in TTIP and beyond – the path for reform,* p. 2. Available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

IIA covering the investment is less favourable for the investor. It is a kind of corporate structuring with the purpose of gaining advantages, which is not prohibited, but is considered an abuse of the purpose of the treaty.[346] Treaty shopping is made possible by the definitions of investment and investor, which are usually quite broad. To be covered by the IIA network of a state it is usually enough that the company is incorporated in the state, that the company has its seat in that state, a registered office or principle place of business in that state or that a national from that state have control over or has a substantial interest in the company that made the investment.[347] This makes it possible for TNCs to relocate their business or change the country of incorporation for the company to the country which gives the best protection and which has an IIA with an ISDS provision with the country that the company has invested in. A company that, when making the investment in a state was not protected by any IIA, might later become covered by another state's IIA by restructuring their business. This creates uncertainty for host states which might suddenly get sued by a company that previously had no rights under any IIAs.[348]

Examples of this are the arbitration proceedings started by the cigarette manufacturer Philip Morris against Uruguay and Australia. Uruguay and Australia both introduced new laws on packaging for cigarettes which in different ways restricted the use of trademarks on cigarette packets. The measures aimed at improving consumer health. Philip Morris International filed a request for arbitration against Uruguay under the ICSID convention based on a BIT between Switzerland and Uruguay. The Asian subsidiary of Philip Morris, Philip Morris Asia Limited, filed an arbitration claim against Australia pursuant to a BIT between Hong Kong and Australia.[349] Philip Morris is a U.S. company with its seat being in the state of Virginia. The U.S. does not have any IIA containing an ISDS provision with neither Uruguay nor Australia, but by restructuring their business and using a subsidiary Phillip Morris was able to submit a claim to ISDS anyway.[350] The EU and Canada explicitly prohibited treaty shopping in CETA and the Commission has expressed its intention to do this in the TTIP as well. This by requiring that a company has real business operation in one of the

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[346] Chaisse (2015) *The Treaty Shopping Practice: Corporate structuring and Restructuring to Gain Access to Investment Treaties and Arbitration,* Hastings Bus. L.J., Vol. 11:2, p. 228.
[347] Salacuse (2010) p. 188.
[348] Chaisse (2015) p. 245.
[349] Ritwik (2013) *Tobacco Packaging Arbitration and the State's Ability to Legislate,* Harvard International Law Journal, Volume 54, number 2, p. 523.
[350] Chaisse (2015) p. 246.

contracting states in order to be covered by the provisions in the investment protection chapter of the TTIP.[351] In the TTIP-draft there is also a denial of benefits provision which allows a state to deny an investor the benefits of the investment chapter of the TTIP under certain circumstances.[352]

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[351] The Commission (2015) Concept Paper – Investment in TTIP and beyond – the path for reform, p. 2. Available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

[352] TTIP-draft, ch. 2, sec. 1, art. 9.

6. Establishing an Investment Court System

On September 16, 2015, the Commission declared their intentions of working towards the inclusions of the ICS in the TTIP.[353] On November 12, 2015, a final draft that will be used in the negotiations with the U.S. was released. The Commission intends for the ICS to replace the current ISDS mechanism in all future IIAs entered into by the EU. The Commission furthermore expressed their intentions to start working on setting up a permanent international investment court which, over time, will replace all investment dispute resolution mechanisms in IIAs entered into by the EU.[354] This section will examine the proposal put forth by the Commission and discuss the pros and cons with establishing the ICS.

U.S. Trade Representative Michael Froman has expressed doubts about the proposed ICS. He stated that the agreement will have high standards and safeguards and that an ICS is not necessary. The U.S. has only been the defendant in a few ISDS cases, and has emerged victorious in every claim filed against them. According to Michael Froman *"It's not obvious to me why you would want to give companies a second bite of the apple"*[355]*.* Other strong political actors in the U.S. have also expressed skeptical attitude toward the proposal. The U.S. Chamber of Commerce, which is an organisation working to further the interests of businesses in the U.S., believes that the proposal is a result of a public debate in Europe that is not grounded in facts, and that the Commission's proposal is seriously flawed in certain aspects.[356]

6.1 The quest for an appellate mechanism

For quite some time there have been calls for introducing an appellate mechanism in ISDS. A strong support for establishing an appellate mechanism could be found in the U.S. in the beginning of 2000, but since 2004 the issue seems to have lost some of its edge on a political

[353] Press release from the Commission, dated September 16, 2015. Retrieved 2015-11-17 from http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364.
[354] Press release from the Commission, dated November 12, 2015. Retrieved 2015-11-17 from http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396.
[355] News article published on Reuters, *U.S. Wary of EU proposal for Investment court in trade pact,* dated October 29, 2015. Retrieved 2015-11-18 from http://www.reuters.com/article/2015/10/29/us-trade-ttip-idUSKCN0SN2LH20151029#egP0tAT32XDQJfSj.97.
[356] Webpage of U.S. Chamber of Commerce, retrieved 2015-11-18 from https://www.uschamber.com/issue-brief/investment-protection-if-it-ain-t-broke-why-fix-it.

level. [357] In the US Trade Act of 2002, the U.S. has expressed its objectives in negotiation trade agreements and one objective is to include in IIAs "*meaningful procedures for resolving investment disputes between an investor and a government, through inter alia the provision of an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements…"*[358]. This approach was furthered strengthened by the 2004 US Model BIT which included a provision which prompted the parties to within three years after the date of entry of the treaty consider whether to establish an appellate body.[359] However, in the 2012 US Model BIT it seems like this provision has been removed.[360]

The main reason for the calls for an appeal mechanism was the incoherence and inconsistency of the awards rendered by ITs. Inconsistency is a big problem since it leads to unfairness, injustice, and unpredictability and there is a risk that it might undermine the confidence in the whole ISDS system.[361] Although there are some possibilities for review of arbitral awards, there are no general possibilities for appeal. Even if the IT has ignored important elements of the case or made a manifest error of judgment when interpreting domestic or international law this might not be enough to force a change under the currently available review mechanisms. Considering that ITs decide over matters that are potentially very important and sensitive for states or for the investor, the availability of a proper appeal mechanism is important.[362]

6.1.1 Choosing the appellate process

Different possible appeal mechanisms have been proposed. One possibility would be to add an appellate mechanism when concluding new BITs. A drawback with this would be that having different appeal mechanisms in every BIT would not lead to consistency, which is the whole point. Furthermore it would be inefficient and expensive.[363] Another possibility would be to add an appellate mechanism into the ICSID convention. This was proposed by the ICSID

[357] Muchlinski, Ortino & Schreuer (2008) *The Oxford Handbook of International Investment Law,* p. 1155.
[358] Ibid. p. 1156.
[359] Ibid.
[360] 2012 U.S. Model Bilateral Investment Treaty, available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.
[361]Butler (2012) *The State of International Investment Arbitration: The possibility of Establishing an Appeal Mechanism, p.* 192.
[362] Tietje & Baetens (2014) p. 112.
[363] Muchlinski, Ortino & Schreuer (2008) p. 1160.

secretariat in 2004. The ICSID secretariat acknowledged that there was a big interest among signatory states to establish an appeal mechanism which would foster coherence and consistency. They however warned that an appeal facility could be detrimental to the ICSID system since it could cause fragmentation if not all signatories agreed to the inclusion of the appeal mechanism. Due to the lack of consensus no such appellate mechanism has been established yet.[364] Another possibility would be to utilise the appellate procedure found in WTO. For this to be possible many questions would have to be address, like for instance if investors would have standing in the dispute settlement system, whether to allow certain WTO rules on compensation and suspension of concessions on investment disputes and if the WTO dispute settlement system had to be coordinated with current IIAs.[365]

6.1.2 Establishing an international investment court

A fourth possibility would be to create an appeal mechanism by establishing an investment court. The Commission did not come up with this idea, on the contrary, several proposals on how an investment court could function can be found. One detailed proposal was made by Van Harten. He believes that states should be encouraged to support a multilateral treaty that would establish an international investment court which would have jurisdiction over all first instance claims filed by an investor of a state which have signed the multilateral treaty. Another possibility would be for the investment court to only work as an appellate mechanism and try awards rendered by tribunals. This would however be less desirable according to Van Harten. The judges in the court would be staffed in a way resembling other international courts. The judges would be appointed for a set term and the court would consist of twelve to fifteen judges, which would allow several three-judge tribunals to sit at the same time. The cases would be appointed to the judges either by the president of the court or on a random basis. A decision made by the first instance can be appealed to a special assembly of the court, which would consist of a majority of the court's judges.[366]

Another proposal put forth by Qureshi is that the ICJ should serve as a supreme investment court. The ICJ is suitable to do this for several reasons. ICJ safeguards and facilitates principal substantive and procedural pillars upon which international economic relations rests on a very fundamental level. It ensures basic freedoms that are crucial for international

[364] Butler (2012)p. 207-208, 211.
[365] Muchlinski, Ortino & Schreuer (2008) p. 1163.
[366] Van Harten (2008) *Investment Treaty and Public Law,* p. 180-184.

commerce and investment. The ICJ is also important in clarifying questions on state economic sovereignty; especially in issues relating to rights of territory. The ICJ also has a constitutional role in international economic law, and many international economic treaties refer to it in the case of disputes. Furthermore, states have resorted to the ICJ for resolution of economic disputes even when the dispute did not fall within the treaty's provision. The ICJ has also contributed to the creation of fundamental legal principles in international economic law, and could facilitate this process in the area of international investment law too. Considering these points Qureshi concludes that ICJ would serve well as a supreme investment court, provided that a consensus on creating such an institution could be reached.[367]

6.2 The Commission's proposal of an Investment Court System

In the latest TTIP-draft the Commission proposed to establish the ICS. How the ICS would function is described in the TTIP-draft, and will be examined in this section.

6.2.1 Tribunal of First Instance

The ICS will consist of two tribunals. The Tribunal of First instance (Tribunal) and the Appeal Tribunal. The Tribunal will consist of fifteen judges, whereas five of them will be nationals of an EU member state, five will be nationals of the U.S. and five will be nationals of a third country.[368] The judges must possess the qualifications needed in their countries in order to be appointed a judge, or otherwise be a jurist of recognized competence. They must be experienced in public international law, and preferably in international investment law, international trade law and investment dispute resolution. The judges are appointed for six years at a time, and vacancies are filled as they arise.[369] Cases will be heard by three judges, one judge being a national of the U.S., one a national of from an EU member state and one a national of a third country, which will also serve as the chair. The cases will be appointed to the judges on a rotational basis which will happen in a random and unpredictable way, ensuring that all judges will have the same chance of being appointed a case.[370] There is a provision on judge ethics in the proposal, with the purpose of ensuring that the judges are impartial, independent and free from conflicts of interests. Furthermore there is a code of

[367] Muchlinski, Ortino & Schreuer (2008) p. 1166-1167.
[368] TTIP-draft, ch. 2, sec. 3, art. 9, para. 2.
[369] TTIP-draft, ch. 2, sec. 3, art. 9, paras. 4-5.
[370] TTIP-draft, ch. 2, sec. 3, art. 9, paras. 6-7.

conduct proposed as an annex to the TTIP. An investor that believes a judge to be in a conflict of interest can challenge the appointment. If the judge does not choose to resign from the case, the president of the Tribunal, or the Appeal Tribunal, will issue a decision on the matter. A judge can be removed permanently as a member of the Tribunal or Appeal Tribunal if its behaviour is inconsistent with the ethical requirements in this provision.[371]

If the disputing parties agree the dispute can be solved by a single judge. This is an important option, especially when the claimant is a small or medium size corporation or the damages claimed are low.[372] The Tribunal will draw up its working procedures on its own. The judges will be paid a retainer fee in order to make sure they are available. This retainer fee will be paid equally by the disputing parties. The retainer fee can be permanently transformed to a regular salary. In that case the judge will serve full time and may not engage in any other occupation, unless exemption is granted by the Tribunal's president.[373]

6.2.2 The Appeal Tribunal

The Appeal Tribunal will consist of six judges, two that are nationals of the U.S., two that are nationals of an EU member state and two that are nationals of a third country. The judges are appointed on a six year term, which is renewable once.[374] Members of the Appeal Tribunal shall be qualified enough to be appointed to the highest judicial office in its home state, or otherwise be a jurist of recognized competence. It must also have an expertise in the same areas that is required for the judges of the Tribunal.[375] Regarding the composition of the divisions hearing cases, appointment of the cases, the court's working procedures and fees, the provisions are all identical to the rules governing the Tribunal.[376]

6.2.3 The court proceedings

If a dispute cannot be settled within six months by other means provided for in the TTIP, such as mediation, consultation or negotiation, a claim can be submitted to the Tribunal. The claimant can choose to submit the dispute under the ICSID rules, the ICSID Additional Facility rules, the UNCITRAL rules, or any other rules agreed by the disputing parties.[377] The

[371] TTIP-draft, ch. 2, sec. 3, art. 11, paras. 1-3, 5.
[372] TTIP-draft, ch. 2, sec. 3, art. 9, para. 9.
[373] TTIP-draft, ch. 2, sec. 3, art. 9, paras. 10, 12, 13, 15.
[374] TTIP-draft, ch. 2, sec. 3, art. 10, paras. 2, 5.
[375] TTIP-draft, ch. 2, sec. 3, art. 10, para. 7.
[376] TTIP-draft, ch. 2, sec. 3, art. 10, paras. 8-15.
[377] TTIP-draft, ch. 2, sec. 3, art. 6.

applicable law is the provisions of the TTIP as well as any international law applicable between the parties. The rules will be interpreted in accordance with the rules of interpretation in the Vienna Convention on the law of treaties. Domestic law is not part of the applicable law, but if the Tribunal is required to ascertain the meaning of a rule in domestic law, then it shall follow the prevailing interpretation of the courts in that state.[378]

Other interesting provisions are, for instance, the anti-circumvention provision. This provision makes it possible for the court to deny jurisdiction to a claimant if the claimant acquired ownership or control of an investment subject to a dispute with the main purpose of submitting a claim to the court under the TTIP.[379] The court can order some interim measures to protect the rights of a disputing party, such as an order to preserve evidence. It may however not order a seizure of assets or prevent a measure that is alleged to be a breach of the treaty.[380] The Tribunal can also require security for costs if there are reasonable grounds to believe that a claimant might not be able to afford a decision of costs made against it. If such security is not posted within 30 days or within a deadline set up by the Tribunal, then the Tribunal may order suspension or termination of the proceedings.[381]

6.2.4 Award and costs

If the Tribunal finds that a state has taken measures that are not allowed under the TTIP it may only award the claimant monetary damages and interest or restitution of property. If restitution is ordered the state may choose to pay monetary damages instead. The monetary damages shall be equal to the fair market value of the property as it was immediately before the expropriation or when the expropriation became known, whichever took place first. The monetary damages paid by the state shall not by greater than the loss suffered by the claimant, and the Tribunal is not allowed to award punitive damages.[382]

The costs of the proceedings and other reasonable costs, such as legal representation, shall be paid by the losing party. The Tribunal can decide that the costs should be apportioned in a different way if it is appropriate due to specific circumstances. If only some parts of a claim were successful the costs shall be adjusted proportionally to reflect this. The award shall be

[378] TTIP-draft, ch. 2, sec. 3, art. 13.
[379] TTIP-draft, ch. 2, sec. 3, art. 15.
[380] TTIP-draft, ch. 2, sec. 3, art. 19.
[381] TTIP-draft, ch. 2, sec. 3, art. 21.
[382] TTIP-draft, ch. 2, sec. 3, art. 28, paras. 1-3.

issued by the Tribunal within 18 months of the date of the submission of the claim. If this is not possible the Tribunal must adopt a decision to that effect, explaining why the award is delayed.[383]

6.2.5 Appeal procedure

Both disputing parties can appeal an award rendered by the Tribunal to the Appeal Tribunal. The appeal must be made within 90 days of the award being rendered. There are three grounds for appeal. The first ground for appeal is that the Tribunal has misinterpreted or misapplied the applicable law. The second ground for appeal is that the Tribunal has manifestly erred in the assessment of fact, including the assessment of domestic law. The last ground is the same as the grounds provided for in art. 52 of the ICSID convention, for instance that the Tribunal was not properly constituted or that it manifestly exceeded its powers.[384]

The Appeal Tribunal can dismiss an appeal if it is manifestly unfounded. In this case the judgment rendered by the Tribunal will be final, which is also the case if the Appeal Tribunal rejects the appeal after trying it on the merits. If the appeal is accepted the Appeal Tribunal shall modify or reverse the Tribunal's judgment, either in whole or in part. The Appeal Tribunal must specify how it has modified or reversed the findings and conclusions of the Tribunal. The appeal proceedings shall normally not take more than 180 days. If more time is needed the Appeal Tribunal shall inform the parties. The maximum time for an appeal proceeding is 270 days.[385] A party that appeals a judgment rendered by the Tribunal must provide security for the costs of the appeal proceedings and for any amount awarded against it by the Tribunal.[386]

6.3 Arguments for and against the Investment Court System.

Arguments can be found both in favour and against the ICS. This section will briefly examine these arguments.

[383] TTIP-draft, ch. 2, sec. 3, art. 28, paras 4, 6.
[384] TTIP-draft, ch. 2, sec. 3, art. 29 para 1; ICSID convention, art. 52.
[385] TTIP-draft, ch. 2, sec. 3, art. 29 paras 2-3.
[386] TTIP-draft, ch. 2, sec. 3, art. 29 para. 4.

6.3.1 Arguments in favour of the Investment Court System

The ICS would serve as a remedy to some of the problems with ISDS that was identified earlier. Arguably the most important feature of the ICS is the appeal mechanism, which has been a long sought after mechanism. The possibility of correcting a judgment that is incorrect is a big advantage with the ICS and might safeguard the objectivity and sensitivity in the judicial decision-making process.[387] The main objective of a dispute settlement mechanism is arguably to render judgments that are materially and legally sound. Considering the important issues and the huge amount of money that is usually at stake, making sure that judgments are correct is crucial. An appeal mechanism could play a large role in accomplishing this.[388]

Another reason for the call for an appeal mechanism is the apparent lack of consistency and coherency in ISDS, leading to a system that is unpredictable. The lack of predictability is problematic since predictability is a hallmark of a functioning legal system. This problem has become even more pressing with the increased number of ISDS cases over the last decade.[389] This unpredictability raises concerns about the sustainability of the ISDS system and might lead to a lack of credibility in ISDS. The ICS complete with an appeal mechanism and the institution of a formalized rule of precedent would facilitate the development of clear rules, since its judgments will be binding and hence its interpretations correct, leading to a system that is more predictable for both the state and the investor.[390]

The ICS may also lead to international investment law becoming better harmonised. Especially if the Commission is successful in developing the ICS into an international investment court that has jurisdiction over all IIAs entered into by the EU. Creating the ICS which has jurisdiction over all investments made between the U.S. and EU might encourage other states to join in, and be the first step towards a multilateral IIA.[391] The ICS and an appeal mechanism might also prevent distortion. Under the current ISDS system investors can cherry pick arbitrators, the forum of the dispute and, by the means of treaty shopping, which IIA to bring the claim under. By creating one central authority such as the ICS these practices will be diminished, which has the potential of making proceedings more objective

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[387] Muchlinski, Ortino & Schreuer (2008) p. 1156.
[388] Butler (2012) p. 207-208, 211.
[389] Muchlinski, Ortino & Schreuer (2008) p. 1156.
[390] Butler (2012) p. 195-197.
[391] Weaver (2014) p. 247-248.

and fair. It would also render the whole international investment law area less complicated since there would be no point for investors in examining thousands of BITs and restructuring businesses in order to take advantage of the most favourable BITs, since there will be one central authority. Granted, this effect will only take place if the jurisdiction of the ICS is extended to encompass a large amount of IIAs, which would probably require the development of a multilateral IIA.[392]

The proposed rules for the ICS also remedies some of the issues raised regarding the objectivity of arbitrators. For instance Von Harten has raised harsh critique regarding how arbitrators are chosen, appointed cases and paid. His distrust of arbitrators runs deep, and he claims that investors have *a "track record of exploiting legal ambiguity to expand their power of states, investors, public money and so on.*[393]", and has proposed that arbitrators are replaced with financially disinterested judges.[394] The proposed rules for the ICS deals with all of the problems discussed by Von Harten by having states choose the arbitrators, introducing ethic requirements for the judges, appointing cases randomly and by creating a structure of payment for the judges which makes them economically independent from the investor, hence removing any possible bias in favour of the investor.

Another advantage with the proposed rules for the ICS is that small and medium sized corporations will have better access to justice due to the possibility of opting for a single judge to decide a case in the Tribunal.[395] The rules for the ICS also discourages frivolous and unfounded claims by introducing a loser pays principle and by offering a possibility to demand that the claimant posts security prior to trying the claim. If the Tribunal on reasonable grounds believes there is a risk that the claimant will not be able to honour a decision of cost made against it such security might be required. Security must also be posted if a party wishes to appeal a judgment rendered by the Tribunal.[396]

6.3.2 Arguments against the Investment Court System

There are several arguments against establishing the ICS, most of the arguments taking aim at the proposed appeal mechanism. The first argument claims that there is no necessity of

[392] Butler (2012) p. 195-197.
[393] Von Harten (2014) p. 3.
[394] Ibid. p. 20.
[395] TTIP-draft, ch. 2, sec. 3, art. 9, para 9.
[396] TTIP-draft, ch. 2, sec. 3, art. 21, art 28, para 4., art. 29, para 4.

an appeal mechanism for ISDS. Inconsistency and incoherency in judgments has not been a large issue, and the need for an appeal mechanism is overstated. Furthermore, the problems with inconsistency and incoherency is not unique to ISDS, the same issues exists in other international tribunals and in domestic courts.[397] The increased case load will not necessarily mean that inconsistency and incoherency will become a larger issue in the future, on the contrary the continued development of case law should help with the predictability of the awards of ITs in the future, solving the problem on its own.[398]

The ICS would be detrimental to the flexibility that is currently associated with ISDS. Currently the parties have the freedom to choose arbitrators and venue. The parties have a high amount of control over the proceedings, which is one of the great advantages with arbitration. However, considering that investment dispute usually are about issues that are not only commercial, but also includes issues of public policy such as environmental issues or human rights, such high flexibility might not be called for. It is possible to argue that the loss of flexibility is tolerable if it leads to proceedings which considers public policy issues to a larger extent and to judgments that are objective and legitimate.[399]

The ICS and an appeal mechanism would also be damaging to the principle of finality, which is another great advantage with arbitration. Allowing an appeal mechanism would weaken the finality of judgments in favour of correctness and justice. The opportunity of appeal would also further delay the arbitration process, which is already a very time-consuming process. An appeal mechanism will also make it even more expensive to solve investment disputes. Arbitral proceedings are already very expensive, and forcing the parties to go through yet another legal instance might make it even more expensive, which might deter small and medium sized investors from seeking justice.[400] There is a risk that an appeal mechanism would lead to a standard practice where cases are always appealed. The increased time to deal with claims that constant appeals would mean might severely increase the case load. It is doubtful whether the Tribunal consisting of only fifteen judges and five divisions would be able to handle all incoming cases. One advantage with the

[397] Butler (2012) p. 201.
[398] Waibel, Kausal et al. (2010) p. 123-125; Hober (2013) p. 539.
[399] Ibid. p. 449.
[400] Butler (2012) p. 203-204.

current ISDS system is that the parties may choose the arbitrators themselves. This leads to the possibility of choosing from a big roster of arbitrators.[401]

Another disadvantage with the ICS is that the selection of judges might be biased in the favour of the states. The current proposal does not give the investor any say in the selection of judges. The states will alone appoint the judges, which might lead to judges that are pro-government or anti-business. With the current system both parties to the dispute gets to appoint one arbitrator each. These arbitrators choose a third arbitrator that will serve as the chair of the arbitration tribunal. By letting each party choose an arbitrator any potential bias harbored by an arbitrator chosen by either side will presumably be balanced out by the arbitrator chosen by the opposing party. Furthermore, the ICS proposal allows nationals of the parties' to be judges, which is prohibited under the ICSID rules. The potential for bias is apparent. The judges will also be paid a retainer, which might be unnecessarily expensive if there are few or no cases brought before the court.[402] A potential practical difficulty might be to find qualified adjudicators who are ready to commit to a lengthy term of service, thereby relinquishing other sources of income and career opportunities. However, it seems unlikely that finding competent people should prove to be impossible.[403]

[401] Ibid. p. 205.
[402] Webpage of the U.S. Chamber of Commerce, retrieved 2015-11-18 from https://www.uschamber.com/issue-brief/investment-protection-if-it-ain-t-broke-why-fix-it.
[403] Waibel, Kausal et al. (2010) p. 448.

7. Discussion and conclusions

The main purpose of this thesis was to examine the main arguments for and against the inclusion of an ISDS provision in the TTIP, and how such a provision could be altered in order to avoid some of the potential downsides with ISDS. Furthermore I set out to examine the proposal by the Commission to establish the ICS. The end-goal of the thesis was to result in a standpoint either for or against the inclusion of ISDS in the TTIP and the ICS.

The debate regarding ISDS has been raging the last decades, but with the negotiations for important IIAs such as the TTIP, CETA and TPP the debate has intensified. Strong voices have been raised both in opposition and in support of ISDS in the TTIP. After examining the most common arguments both in favour and against ISDS my opinion is that ISDS should be included in the TTIP. This does not mean that the ISDS system is perfect. Just as with any other legal system, whether it is domestic or international courts or arbitration, there are things that could be improved. However, with all things considered, I believe that ISDS is the most balanced, effective and fair means of dispute resolution currently available for investment disputes and hence it should be included in the TTIP.

The arguments against ISDS are many and they take aim at different aspects. However, in my opinion, much of the debate regarding the negative effects of ISDS is based on misconceptions, skewed facts and political considerations which have nothing to do with investment protection or the legitimacy of ISDS. I believe that it is important that the civil society and the public is involved and interested in issues affecting their lives, and I think it is great that there have been much debate regarding the TTIP and ISDS. However, I believe that the public debate surrounding the TTIP has been based on misrepresentation of facts and isolated shortcomings of the system that do not give an accurate representation of the ISDS system in full. Proclamations of "the end of democracy" and similar doomsday propaganda made in relation to ISDS in the TTIP have only resulted in confusion and anger among the public and have taken focus from meaningful debate regarding legitimate issues raised by ISDS.

Some of the fiercest criticism against ISDS is regarding state sovereignty and ISDS encroaching on the state's right to legislate and to take measures in order to achieve

important public policy goals. Critics often point at cases such as Philip Morris v. Australia as evidence of the negative effects of ISDS and as proof of how ISDS allow commercial interest to trump all other interests, effectively catering to large businesses. It should be noted that the Phillip Morris case is not even settled yet and it is not unlikely that the IT will hold in favour of Australia. Even if the IT would hold in favour of Phillip Morris that does not mean that the measures taken by Australia would be forbidden under all IIAs. In fact, IIAs have developed over time and modern IIAs often afford the state considerable leeway to implement measures in order to achieve public policy goals. The TTIP-draft has an explicit safeguard to the state's right to regulate. Provided this provision is in the final TTIP agreement the threat to sovereignty does not seem to be very pressing.

ISDS is a system that was invented, developed and entered into by states. It is not the investors that have formed these IIAs and the investors cannot force a state to enter into an IIA with the investor's home state. There must be a reason for the extreme proliferation of BITs and IIAs over the last decades. States seem to believe that entering into IIAs is beneficial to them, or they would abstain from entering into them. If a state believes that it is losing more than it is gaining from their IIA network then it is free to terminate its IIAs and denounce the ICSID convention, as a few Latin American states have done. Most states have not done so, presumably because they believe that whatever they are losing in terms of sovereignty and regulatory freedom they gain back in increased FDI flows, complete with all its advantages. Granted, there is no empirical evidence showing exactly how much ISDS contributes to increased FDI flows, and attaining such empirical evidence is perhaps not possible, but at least states seem to believe that they are getting a good deal when entering into IIAs.

The idea with IIAs is to improve the investment climate in order to attract FDI. By promising a certain level of protection investors will be more willing to invest their money in the state. However, how much is a promise worth if there is no way of making sure that the promisor can be kept to his word? The truth is that without a way for the investor to enforce the promises made to it by the state the IIA would essentially be worthless, or as some might call it, a paper tiger. Pacta sunt servanda is a fundamental concept in contract law. Ensuring that states are bound by this fundamental principle is not unreasonable and ISDS serves as an effective and fair mechanism which makes sure that states are kept to their promises, just as

everyone else is. The alternatives, domestic court proceeding, diplomatic protection, alternative dispute resolution or political risk insurance, are not really alternatives at all since effective, unbiased and binding dispute resolution cannot be guaranteed through these means. Opponents to ISDS might claim that ISDS cannot provide these things either since ISDS is biased in favour of the investors. Whether arbitrators are biased toward investors or not is impossible to know, but considering that states are winning ISDS cases more often than investors that seems unlikely.

From my point of view there are no alternatives to ISDS in the TTIP, except perhaps an international investment court. The discussion will instead focus on how the ISDS provision included in the TTIP can be improved in order to avoid other issues brought up by critics. One important issue that is often brought up by critics is the issue of transparency. Confidentiality and secrecy is a hallmark of international commercial arbitration and one of the reasons why companies choose it as their preferred way of dispute resolution mechanism. However, when states are involved, when the measures being contested are important to the public and when the awards are paid by public funds I believe that secrecy and confidentiality is outright inappropriate and wrong. However, arguing for more transparency in ISDS is a little bit like arguing in favour of puppies, rainbows and cotton candy – almost everyone already agrees that those are great things. Lack of transparency has been an issue earlier, but with the new UNCITRAL rules and the call from virtually everyone for more transparency in ISDS proceedings this will not be an issue in the TTIP. The proposed transparency rules for the TTIP are far-reaching and should be more than enough to guarantee public insight into the ISDS proceedings.

Another common argument against ISDS is that it lacks certain fundamental procedural protections. I must however disagree with this notion. Arbitration is a highly structured and formal process which operates through specific rules and procedures. Arbitration might deviate from domestic legal orders in that it does not have some of the rituals and procedural technicalities that are sometimes found in domestic legal systems, but it must always conform with a minimal standard of justice that is common to all developed legal systems in the world. If international arbitration was a system that lacked in procedural protections it would be hard to explain why it is the most important mechanism of dispute settlement for international commercial disputes. At least the business world seems to

believe that arbitration is the best and most fair way of solving international disputes. The truth is that the major procedural frameworks for investment disputes, the ICSID convention and the UNCITRAL rules, both have quite strict procedural protection and if the arbitrators do not follow these rules their judgment can be overturned. It is somewhat problematic that investors can start parallel proceedings in both domestic courts and before an IT, but such practices can be avoided in the TTIP by simply adding a fork in the road provision. The only thing that is truly lacking in ISDS is a possibility of appeal. An appeal mechanism could solve the issue with inconsistent and incoherent judgments. While an appeal mechanism might indeed be a good thing I am not entirely certain that it is necessary. This issue will be discussed shortly when dealing with the ICS.

Novel things are often scary. There is a great fear among a lot of people that ISDS in the TTIP will change our societies in a negative and irreversible way. The things it though, ISDS is nothing new. ISDS has been depicted as a new and dangerous threat to our democracy, but the truth is that almost all member states of the EU and the U.S. are already bound by a large amount of IIAs with ISDS provisions, and despite this our democracies have not been crushed by foreign corporations armed with malice and bad intentions. With the enormous IIA network existing and the possibility of treaty shopping most states could already be brought before an IT. Including ISDS the TTIP will change nothing in this regard. Including ISDS in the TTIP would instead guarantee that all investors from the EU or the U.S. would have the same protection and would simplify and harmonise the process for everyone involved. If the U.S. and the EU could agree on an IIA including ISDS which is balanced and fair towards both investors and states then it could possibly become a model for future IIAs, and might be the beginning of an international investment regime. Creating a multilateral IIA has proved to be very challenging, but if international investment law was harmonised in this way then I believe it would be very beneficial for states, investors and the international economy.

To summarise, I believe that an ISDS provision should be included in the TTIP. Despite suffering from some issues I believe it is the dispute resolution mechanism best suited to deal with investment disputes under the TTIP. The only possible alternative in my opinion would be a kind of international investment court, like the ICS that the Commission has proposed. I will now briefly discuss this proposal.

I find the ICS proposed by the Commission to be interesting, and I believe that an international investment court having jurisdiction over all investment disputes could potentially be a good thing and that it would remedy some of the problems related to ISDS. However, there are some issues with the proposal and I am doubtful whether it will be able to replace ISDS. First of all it can be noted that it is uncertain whether the U.S. will accept this proposal at all. The proposal is very new and things might change, but at least for the moment representatives from the U.S. seem to be skeptical towards the proposal. Except this practical issue there are some issues with the substantial provisions of the ICS that are worth discussing.

The first issue that is worth discussing is the judge selection procedure. Under the current ISDS regime both the state and the investor have influence over which arbitrators that will solve their disputes. By letting both parties choose one arbitrator each, the arbitrators can balance each other out should one or both of them be biased towards either party. In the ICS proposal all the power of choosing judges would fall to the states. There is a risk that the judges chosen might be biased in favour of the state, to the detriment of the investor. Furthermore, judges from the same country as one of the parties will inevitably preside over cases. It is hard to devise a way to choose a permanent roster of judges in a totally neutral way, and obviously it is impossible for investors as a collective to choose half of the judges for an international court. On the other hand, some believe that the arbitrators in ISDS are biased in favour of the investor, and the ICS includes rules on ethics, structure of payments and appointment of cases which would prevent bias in favour of the investor. I cannot devise an alternative way of selecting judges that would be better, and if an international investment court is to be established I assume that this risk of judges being biased will have to be accepted.

The biggest gain from the ICS is the appeals mechanism that it would include. One of the biggest flaws with ISDS is the lack of an appropriate appeals mechanism, which the ICS would provide. It could be argued that the main point of having a dispute settlement mechanism is for disputes to be solved in a way that is materially and legally sound. Since there are usually important public policy issues and large amount of money at stake in investment disputes it is crucial that the judgments rendered are correct. An appeals mechanism would without doubt help with increasing the amount of correct judgments. An

appeals mechanism would also remedy the lack of consistency and coherency that ISDS is accused of leading to.

One might wonder – why is it that there are no appeals mechanisms under current IIAs? If faulty judgments and inconsistency is such a big issue, why have this not been remedied before? It would be entirely possible for two states to provide for an appeals mechanism in their BIT, or to include an appeals mechanism in another IIA, such as the ECT or NAFTA. One reason might be that it is hard to devise such a mechanism; another reason might be that, with all things considered, there just is not a huge need or demand for it after all. An appeal mechanism does come with advantages, but it is also encumbered with some downsides. Adding an appeals mechanism to investment disputes would lead to proceedings being even more time-consuming and costly than they already are. Furthermore it would remove one of the great advantages with arbitration – finality. There is a risk that parties appealing every case would become the norm, leading to even higher costs, increased case load and drawn-out proceedings.

I am not convinced that the need for ICS and an appeal mechanism is pressing enough for it to outweigh the potential downsides with the system. In my opinion the importance and prevalence of faulty judgments in the current ISDS regime have been overstated by opponents to ISDS. Furthermore, there are some opportunities for review under the ICSID convention and the New York Convention, which makes it possible for the parties to seek annulment or to prevent the award from being enforced under certain circumstances. Granted, it is possible that some cases might turn out wrong due to a faulty judgment by the arbitrators, but even if an appeals mechanism existed there would be no guarantee that judgments would always be correct. As for inconsistency and incoherency in judgments I do not believe that this is that big of an issue either. There have been some cases where the outcome has been inconsistent, and it cannot be denied that there are some things that ITs are in disagreement about. However, I believe that inconsistency and incoherency with time and with the continued development of case law will become less of an issue and the awards of ITs will become more predictable.

As stated earlier, I believe that an international investment court could be a good thing, especially if it could help with harmonizing the international investment law area. However, I

am not sure whether it is necessary to include it in the TTIP. The proposal is still very new, and it is possible that it during the negotiations with the U.S. will be developed in a way which makes it a worthwhile addition to the TTIP. However, as the proposal stands right now, I am doubtful whether it is really necessary and there is a risk that the ICS would only lead to even higher costs and lengthier proceedings.

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