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CLEER

Tiptoeing the TTIP: What Kind of Agreement for What Kind of Partnership?

Luca Pantaleo, Wybe Douma and Tamara Takács
(eds.)

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**TIPTOEING THE TTIP: WHAT KIND OF AGREEMENT FOR
WHAT KIND OF PARTNERSHIP?**

**LUCA PANTALEO, WYBE DOUMA AND TAMARA TAKÁCS
(EDS.)**

CLEER PAPERS 2016/1

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ISSN 1878-9587 (print)
ISSN 1878-9595 (online)

© Author
Printed in The Netherlands
T.M.C. Asser Institute
P.O. Box 30461
2500 GL The Hague
The Netherlands
www.cleer.eu

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PREFACE

In February 2013 the President of the European Commission José Manuel Barroso and President of the United States of America Barack Obama announced simultaneously their intention to negotiate a trade agreement between the two largest economic powers in the world. This would become known as the Transatlantic Trade and Investment Partnership (TTIP). Together the EU and the US represent 60 percent of the global economy. They cover 33 percent of world trade in goods and 42 percent of world trade in services. With import tariffs at an average of only circa three percent, the main trade barriers exist in differences in national regulations and procedures. History demonstrated that removing trade barriers would boost the economy, prosperity and employment on both sides of the Atlantic Ocean.

So far, at the time of writing, twelve rounds of negotiations have taken place. But negotiations have proved a bumpy ride. Apparently, it is easier to reduce import tariffs, than to achieve mutual recognition of test procedures for cars or for the inspections of livestock.

At the same time public awareness increased, and so did the opposition against TTIP. Few people oppose trade and investment as such. In the European Union the epicenter of public arousal is democratic legitimacy, or rather the perceived lack thereof. The concerns focus on two elements that might supposedly undermine democratic legitimacy. Firstly, the so-called regulatory cooperation body, which would act as a platform to discuss future regulations. And secondly, the possibility for foreign investors to have access to arbitration in case their investments are harmed. Both require some further explanation.

The first concern for democratic legitimacy that is often raised, relates to post-TTIP regulations, rather than to the current negotiations. Once concluded, TTIP would freeze a certain state of affairs in transatlantic trade and investment. But new or revised regulations will be formulated, and technological developments continue. To avoid the risk that the whole of TTIP needs to be renegotiated for every new development, a more pragmatic solution is being explored, the so-called regulatory cooperation body. This body would act as a platform for information exchange and stakeholder consultation. Consequently, it might advise the competent authorities on future regulations.

Critics fear that by allowing multinationals to voice their opinion in the regulatory co-operation body the appropriate democratic channels could be circumvented. The European Commission has repeatedly reaffirmed that TTIP will fully respect European, national and local democratic procedures, and in no way sideline these, whatsoever.¹ The Netherlands' Minister for Foreign Trade

¹ See <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153002.1%20RegCo.pdf>.

and Development Cooperation, Lilianne Ploumen acknowledged the purely consultative role of the regulatory cooperation body too.²

The second concern about democratic legitimacy relates to litigation in case of investment disputes. As a starting point it is good to note that hardly anyone would contest an investor's right to seek justice in case its property is harmed due to unlawful actions by public authorities. Under international investment law, foreign investors generally have recourse to both the national judicial system, and to arbitration, should such an event occur.

The subsequent question is often why should only foreign investors (as opposed to domestic investors or other stakeholders) have recourse to arbitration as an additional judicial route? The more so, since arbitration could provoke imminent multi-billion dollar claims. The answer is largely historical. In the late 1950s bilateral investment treaties were concluded to protect foreign investors against unlawful discrimination when the rule of law in the receiving country was less well embedded.³ Without arbitration, investors could only seek diplomatic protection. Today, arbitration would also allow countries recovering from a post-war conflict to attract foreign direct investment, while still in a period of institutional capacity building.

The follow-up question is of course, why do two mature economies with a good reputation on the rule of law, the United States and the European Union, need arbitration? Possibly, individual investors may have doubts on the legal protection in individual states on both sides of the Atlantic Ocean, which would unnecessarily restrain productive investments. More importantly, the European Union and the United States expressed the clear ambition to set a world standard in trade and investment policy in the absence of multilateral agreements.

In 2014 the Netherlands, with almost 100 active bilateral investment treaties, commissioned research into the scope and impact of arbitration. While concluding that investment protection generated benefits to both investors and the receiving countries, Minister Ploumen acknowledged that the traditional Investor to State Dispute Settlement (ISDS) scheme should be modernized and would benefit from multiple improvements.⁴ These improvements included amongst all increased transparency, reaffirming the right to regulate, limiting the interpretation of the fair and equitable treatment provision and ensure legitimacy of arbitral awards by introducing an appeal mechanism. Together with her colleagues from Denmark, France, Germany, Luxembourg and Sweden she submitted these proposals to the European Commission in the paper 'Improvements to CETA and beyond'.⁵ The proposals found their way in a new

² Answers to questions from Member of Parliament Jasper van Dijk, nr. 2015Z06083. All documents of the Dutch Parliament are accessible online at <https://zoek.officielebekendmakingen.nl/zoeken/parlementaire_documenten>. However, they are only available in Dutch.

³ See the study commissioned by the INTA Committee of the European Parliament, available at <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU\(2014\)534979_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU(2014)534979_EN.pdf)>

⁴ Parliamentary documents 21 501–02, n. 1397.

⁵ CETA stands for Comprehensive Economic and Trade Agreement concluded between the EU and Canada. Parliamentary documents 21 501–02, n. 1465.

and transparent system for resolving disputes between investors and states – the Investment Court System – as adopted by the European Commission on 16 September 2015.⁶ In particular, the Commission proposals emphasized the right to regulate for governments in order to safeguard democratic legitimacy. Moreover, transparency and accountability will be enhanced by incorporating the possibility for stakeholders to submit *amicus curiae* briefs, or intervene as a third party. Since then, this standard has been adopted in the EU trade and investment agreements with Vietnam and Canada, and could be applied in other bilateral or plurilateral treaties, if so desired.

Two days after the Commission presented the investment protection proposals, on 18 September 2015, the Asser Institute had organized a much needed and highly welcome roundtable on TTIP, and in particular on these two concerns for democratic legitimacy. The Asser Institute invited influential scholars, policy makers and non-governmental organizations to conduct a fact-based debate on TTIP. This volume contains the various research papers that were presented and discussed. They make excellent input for a nuanced debate and good input for the elaboration of the various proposals on the table to make sure that TTIP is democracy proof, while still delivering the anticipated jobs and welfare. I would like to thank the Asser Institute and its Academic Director, Janne Nijman, for enriching the scope and depth of the TTIP debate.

Ronald Roosdorp
Director for International Trade Policy
and Economic Governance
Ministry of Foreign Affairs

⁶ See <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364>>.

INTRODUCTION

The present CLEER Paper collects some of the papers that were presented during the roundtable organised by the T.M.C. Asser Institute in September 2015, in cooperation with the Dutch Ministry of Foreign Affairs. The papers focus on some of the most debated issues currently under negotiation; topics that have drawn much public opinion, and raised controversy at societal and political levels. These issues include democratic legitimacy and accountability relevant to the regulatory cooperation chapter of the negotiations and the EU's position therein; sustainable development (including protection of the environment and consumers), constituting another chapter in the negotiations and an important aspiration for the EU in its external relations, include commercial links; and finally, issues relevant to the investment chapter, namely dispute settlement and investment litigation.

This CLEER Paper critically assesses the status of negotiations in these issues and highlights the controversies. It also offers constructive recommendations. A common element in all papers is the centrality placed on the status of citizens, calling for negotiations that are open and transparent and receptive of societal concerns that go beyond economic considerations and trade liberalisation.

In his contribution, **Davor Jančić** explores questions related to the democratic legitimacy of a future TTIP arrangement and of the collaborative regulatory mechanisms foreseen by its regulatory cooperation chapter, and in particular the 'living agreement' character embodied therein. To support his claim, namely the need for parliamentary involvement in transatlantic regulatory cooperation, he enlists three risks: the regulatory race-to-the-bottom phenomenon that may ensue trade liberalisation; the regulatory chill effect that may emanate from governments' fear of litigation against their regulatory actions; and, the deviation of regulatory agenda setting-powers from national to transnational levels. He suggests the opening up of regulatory cooperation to political contestation and specifically to make parliaments active parties of the institutional mechanisms shaping (the various aspects of) trade and investment policies within TTIP. His recommendations weight heavily on the (upgrade for the) role of the Transatlantic Legislative Dialogue, including delegations from national parliaments, in the oversight of regulatory cooperation mechanisms.

Joana Mendes explores the ways in which TTIP impacts EU rulemaking procedures and assesses the regulatory cooperation modalities and participation therein from the angles of governance and as an exercise of freedom. She notes that participation in regulatory cooperation, as formulated in Commission's proposals, are given little significance, and the procedures in which the assessment of regulatory recognition and compatibility are conducted do not seem to be open to public.

Wybe Douma explores another societal interest potentially impacted by TTIP, namely sustainable development. In his contribution to this volume, he

examines alleged negative effects on the protection of the environment and consumers, emanating notably from the regulatory cooperation chapter and from the highly contested arbitration system (ISDS, to be replaced by the 'investment court system' proposed by the EU). He asserts that, in line with the Commission's own guidelines, the Trade Sustainability Impact Assessment exercise should have been published and discussed with stakeholders well in advance of the end of the TTIP negotiations, so as to gauge its effect for sustainable development concerns on the ongoing negotiations. He takes examples of contested issues bearing impact on environment and consumers' preferences and examines proposals put forward for regulatory convergence and points to improvements, albeit emphasises that precautionary principle, being so central to EU regulatory practices in cases where potential risks are identified but science is unable to provide full answers, is still not explicitly mentioned in the official EU texts proposals.

Moving on to the investment chapter, **Ingo Venzke** offers insight in the functions, authority and legitimacy of investor-state arbitration drawing on a public law theory of adjudication that he had developed with Professor Armin von Bogdandy, and asserts the multifunctional actorness of international courts and tribunals requiring democratic legitimacy so that law be spoken in the name of the peoples and citizens. He highlights the relevant elements in the EU's recent proposal on the investment court system and its democratic legitimacy through three factors: connectedness to the judges, the judicial process and the decision itself. In his conclusions, Venzke welcomes the proposed investment court system and notes that public institutions serve better to carry the legitimacy of international judicial authority that peoples and citizens embody.

Luca Pantaleo's evaluation of the TTIP Proposal on the introduction of a bilateral investment court system carries the readers through elements that he sees as positive change, in comparison to the traditional ISDS, and issues that he considers challenging and less advantageous as reforms. Such positive changes, in his assessment, relate to the composition of the investment court, enhanced transparency of proceedings and opening up to third party interventions, all pointing towards an increased institutionalisation of investment disputes, and taking those out from the 'monopoly' of private parties. He notes, nonetheless, that (extraterritorial) enforcement challenges may emerge and borrowing of the enforcement regimes under the ICSID and New York Convention may have investment deterrent implications. He also points out that a bilateral appellate mechanism may not be a viable solution to the vexed question concerning the traditional inconsistency and unpredictability of investment tribunals.

The final and concluding remarks written by **Pieter Jan Kuijper** offer a critical overview of the preceding chapters and of the main arguments therein developed. He also dwells on some points of crucial importance that are not otherwise addressed in the volume – such as the US perspective, or the potential threat posed to EU international agreements by national *referenda*. Last but not least, he draws the reader's attention to the very genesis of the original TTIP project and recalls the reasons behind its importance for the (present and

future) relations of the transatlantic community – and it does so in a thought-provoking, razor-sharp and, so to speak, typically Kuijperian way.

Finally, we would like to thank Daniele Marchi for his irreplaceable assistance in editing this volume.

The Editors,
The Hague, May 2016

DEMOCRATIC LEGITIMACY OF ENHANCED REGULATORY COOPERATION IN TTIP

Davor Jančić

1. INTRODUCTION

After a dozen rounds of negotiations on a Transatlantic Trade and Investment Partnership (TTIP), the questions of the democratic legitimacy of the future agreement and of the collaborative regulatory mechanisms foreseen in it become increasingly salient. This is for a number of reasons. I elucidate the two most pertinent ones.

The first is the sheer volume of trade between the EU and the US. TTIP is touted as the world's largest free trade agreement to date.¹ According to US congressional estimates, the EU and the US jointly account for close to a half of global GDP, some 30% of global exports, and have investments in excess of \$3.7 trillion in each other's economies.² Data collected by the US Census Bureau – the federal statistics agency operating within the Department of Commerce – reveals that the EU enjoys a hefty surplus in trade in goods with the US. This steadily rose from roughly \$17 billion in 1997 to \$153 billion in 2015.³ Yet, for its part, the US ran a surplus in trade in services with the EU of some \$50 billion in 2014.⁴ Even minor adjustments to the existing tariff rates in transatlantic trade can thus have a significant impact on the real economy and aggregate business activity. Given that reducing these essentially protectionist measures carries important consequences for the shape and volume of the domestic, transatlantic and global economy, it is requisite to ensure that decisions to proceed with such plans are supplied with democratic approval by legislative authorities. In this case, the legislative authorities concerned are the European Parliament, the US Congress, as well as national parliaments of the EU Member States in the probable case of TTIP being concluded as a mixed agreement.⁵

¹ W.H. Cooper, 'EU-U.S. Economic Ties: Framework, Scope, and Magnitude', *Congressional Research Service, Report for Congress* no. 30608, (21 February 2014).

² S.I. Akhtar and V.C. Jones, 'Transatlantic Trade and Investment Partnership (TTIP) Negotiations', *Congressional Research Service, Report for Congress* no. R43158 (4 February 2014).

³ Available at <<https://www.census.gov/foreign-trade/balance/c0003.html>>.

⁴ US Census Bureau & US Bureau of Economic Analysis, 'US International Trade in Goods and Services', (December 2015), at 28.

⁵ That TTIP 'will probably be a mixed agreement' has been confirmed by the incumbent EU Trade Commissioner C. Malmström. See C. Ziedler, 'Malmström: We Can Finish TTIP during the Obama Administration', (28 July 2015, updated: 16 November 2015), available at <<https://www.euractiv.com/section/trade-society/interview/malmstrom-we-can-finish-ttip-during-the-obama-administration/>>.

The second reason is more salient. It is grounded in the critique of the ‘living’ nature of TTIP, announced by the former European Commissioner for Trade, Karel De Gucht.⁶ In order to increase mutual market access and achieve the highest possible level of liberalization of trade and investment, TTIP envisages a wide-ranging elimination of non-tariff barriers to trade at the border as well as behind the border.⁷ This is to be carried out through regulatory approximation in numerous industries on issues such as licensing, permit requirements, conformity assessments, and sector-specific technical standards.⁸ This is expected to shore up EU and US competitiveness and provoke speedier economic growth and job creation.

However, TTIP is not conceived as a static legal instrument laying down norms once and for all. What is innovative – and potentially problematic for that matter – is that this goal is to be achieved through an institutionalized, open-ended process of regulatory cooperation. This process refers not only to rules and regulations but also to legislation adopted at central and non-central levels. TTIP’s regulatory reach therefore extends to legislative acts adopted at the US federal level, at the level of US States, at the EU level, and at the level of the EU Member States. The current EU’s TTIP negotiating texts indeed define ‘regulatory measures’ in the first place as draft EU regulations and directives and draft US bills and only then as EU delegated and implementing acts and US agency statements.⁹ TTIP introduces mutual discussions and *ex ante* commenting on planned regulatory and legislative acts, while taking approaches of the other Party into consideration when conducting impact assessments.¹⁰ Legislation, rules and regulations are set to be jointly reviewed for the purpose of identifying priorities for future regulatory cooperation and proposing new initiatives to realize them.¹¹ This enhanced form of cooperation ‘towards furthering regulatory compatibility’¹² and joint agenda setting by EU and US regulators is foreseen to go ahead without reverting the matter back to legislatures, which will only have carried out the original act of democratic approval of TTIP. This is why legislatures are likely to be involved in transatlantic regulatory cooperation even after TTIP enters into force, albeit in a way that is as yet unknown

⁶ K. De Gucht, ‘Transatlantic Trade and Investment Partnership (TTIP) – Solving the Regulatory Puzzle’, SPEECH/13/801, (10 October 2013), available at <http://europa.eu/rapid/press-release_SPEECH-13-801_en.htm>.

⁷ See further in S. Lester and I. Barbee, ‘The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership’, 16 (4) *Journal of International Economic Law* 2013, 847–867.

⁸ The sectors covered include vehicles, chemicals, cosmetics, engineering equipment, medical devices, pesticides, pharmaceuticals, textiles, and information and communication technologies.

⁹ Arts. x.2 of the EU’s textual proposal for the TTIP Regulatory Cooperation Chapter and 2 of the EU’s textual proposal for the TTIP Good Regulatory Practices Chapter (both 21 March 2016).

¹⁰ Arts. x.4(2)(b) and x.8(3) of the EU’s textual proposal for the TTIP Regulatory Cooperation Chapter and 8(4)(b) of the EU’s textual proposal for the TTIP Good Regulatory Practices Chapter, (both 21 March 2016).

¹¹ Art. x.4 of the EU’s textual proposal for the TTIP Regulatory Cooperation Chapter (21 March 2016).

¹² Art. x.5(1) of the EU’s textual proposal for the TTIP Regulatory Cooperation Chapter (21 March 2016).

because it is currently being negotiated. Still, the negotiating texts reveal the direction in which TTIP's institutional and regulatory architecture is headed.

This paper analyses the democratic dimension of TTIP based on the EU's textual proposals for the chapters on Regulatory Cooperation and Good Regulatory Practices, published on 21 March 2016 following the 12th round of negotiations (22–26 February 2016).¹³ It provides a critical assessment of the projected implications of TTIP for parliamentary involvement in transatlantic regulatory cooperation. The paper proceeds to evaluate the logic behind a call for a greater participation of legislative bodies in TTIP as a rulebook for engineering transatlantic trade and investment for the following decades. I then turn to appraising horizontal regulatory cooperation.¹⁴ Although the said two negotiating chapters are constantly being revised, the objective of the present commentary is to expose the premises on which they are founded and expose the pitfalls they may contain. The analysis then focuses on the institutional mechanics of transatlantic regulatory cooperation that will enable TTIP to 'live' a life of its own. While the new iterations of the TTIP proposals replace the previously foreseen Regulatory Cooperation Body with a less formal 'coordination mechanism',¹⁵ the gist and underlying rationale of the institutional setup for EU-US regulatory collaboration have been preserved. Since TTIP will have significant repercussions for parliamentary institutions in the EU and the US, the paper closes by assessing the possible design of transnational cooperation between the European Parliament and the US Congress as a way of bridging the gap between the citizen and the nascent transatlantic policy-making space.¹⁶ This is complemented by suggesting reasoned policy recommendations on how parliaments could be utilized to address the potential legitimacy shortfalls of a future TTIP.

2. RATIONALE FOR INCREASED PARLIAMENTARY INVOLVEMENT IN TRANSATLANTIC REGULATORY COOPERATION

The key perceived problem with TTIP is well summed up by the claim that it might 'restrain the primacy of politics in favour of private enterprise'.¹⁷ Three scenarios illustrate this compellingly.

¹³ Available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#regulatory-cooperation>>.

¹⁴ See an account in A. Alemanno, 'The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences', 18 (3) *Journal of International Economic Law* 2015, 625–640.

¹⁵ Author's personal exchange of thoughts with the incumbent EU Trade Commissioner C. Malmström during the Interdisciplinary Conference on the Transatlantic Trade and Investment Partnership, Centre for European Research, University of Gothenburg, Sweden (14–15 March 2016).

¹⁶ D. Jančić, 'The Role of the European Parliament and the US Congress in Shaping Transatlantic Relations: TTIP, NSA Surveillance and CIA Renditions', 54 (4) *Journal of Common Market Studies*, 2016, available in early view at <<http://dx.doi.org/10.1111/jcms.12345>>.

¹⁷ F. Ville de and G. Siles-Brügge, *TTIP: The Truth about the Transatlantic Trade and Investment Partnership*, (Cambridge: Polity 2016), at 11.

First, the push for deregulation with the purpose of liberalizing the transatlantic market may give rise to a regulatory race-to-the-bottom in the form of 'enhanced regulatory competition'.¹⁸ This leads to a situation where conditions for conducting business are loosened and requirements lowered in order to attract investment.

Second, concerns have been raised over the 'regulatory chill' effect flowing from the possibility of corporations on one side of the Atlantic to sue, and potentially win lawsuits, against the state on the other side of the Atlantic.¹⁹ In order to avoid being challenged on grounds of restricting or distorting transatlantic trade and investment, states might refrain from pursuing otherwise legitimate public policy objectives in areas such as health, safety, the environment and the provision of services of general interest (e.g., water, electricity, health, education, social services, etc). The main culprit for the fear that national and European parliaments would lose the authority to legislate in the public interest has been the infamous investor-state dispute settlement (ISDS) mechanism.²⁰ The European Parliament outlawed ISDS in a resolution on TTIP negotiations in July 2015.²¹ This, and the wider public scepticism towards ISDS, led the European Commission to replace it with a proposal for an investment court.

Third, and potentially most worrying, is the centralisation of regulatory agenda-setting powers in the transnational realm, away from democratic checks that exist at the national level. At stake here is not whether the institutional mechanism to be created by TTIP will be empowered to pass legislation and adopt other legal rules, but whether the practices that such a mechanism would develop would promote a broader trend of expert-led, non-legislative decision making as a standard way of conducting international trade and making investment policies.

To address these preoccupations, the EU's latest TTIP textual proposals make an even stronger case than before in favour of protecting the right to regulate and the authority of the negotiating Parties to pursue public policies and the provision of the aforesaid public services.²² They now give the right to

¹⁸ *ibid*, at 130.

¹⁹ G. Siles-Brügge and N. Butler, 'Regulatory Chill? Why TTIP Could Inhibit Governments from Regulating in the Public Interest', *LSE EUROPP Blog* (9 June 2015), available at <<http://bit.ly/1JBOXpg>>.

²⁰ See different views in M. Bronckers, 'Is Investor-State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements', 18 (3) *Journal of International Economic Law* 2013, 655–677; R. Quick, 'Why TTIP Should Have an Investment Chapter Including ISDS', 49 (2) *Journal of World Trade* 2015, 199–210; M. Weaver, 'The Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation and Future Trade Implications', 29 (1) *Emory International Law Review*, 225–275. See also the contributions to this volume by I. Venzke, 'On the Functions, Authority and Legitimacy of Investor-State Arbitration: The Case of the Transatlantic Trade and Investment Partnership', and L. Pantaleo, 'Lights and Shadows of the TTIP Investment Court System', *CLEER Paper Series* no. 1/2016.

²¹ European Parliament Resolution (8 July 2015) 'containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)', P8_TA-PROV(2015)0252.

²² Preamble to TTIP, Arts. x.1(1)(b), x.1(2), x.1(3) and Annex on the Institutional Setup of the EU's textual proposal for the TTIP Regulatory Cooperation Chapter, as well as Arts. 1 and 7 of

any natural or legal person to submit views on the effectiveness of the existing regulatory framework in protecting these public policies.²³ The new TTIP texts also abandon the institutionalization of regulatory cooperation in the shape of a formalised body and opt instead for a set of arrangements for regulatory coordination that are currently discussed between the EU and US trade representatives.

However, the potential consequences stemming from the three scenarios outlined above are unsatisfactory from a democratic point of view because they favour market rationality over regulatory autonomy and democratic process.²⁴ Enhanced regulatory cooperation is being put in place without providing for adequate institutional safeguards that guarantee the involvement of directly elected officials in the choices that inform normative approaches to regulation. The argument here is that TTIP might depoliticise important swathes of EU and domestic policy making.

Risks associated with TTIP relate to the alienation of sites for transatlantic regulatory cooperation from the democratic processes embodied by parliamentary institutions. A remedy to this is sought predominantly through public consultations of stakeholders, the involvement of the civil society and industry representatives, and a general possibility for natural and legal persons to submit 'concrete and sufficiently substantiated proposals for regulatory measures.'²⁵ However, their roles and mandates are different from those of parliamentary representatives, whose involvement is scarcely elaborated. Legislators are elected and typically uphold the public interest, which is wider than the interest of stakeholders. This is not to say that parliamentarians may not be influenced by lobby groups or that some of them do not have their own discrete agendas, but merely that parliamentary institutions are formal mechanisms of public law that embody the constitutional guarantees of public participation and influencing law and policy.

Yet, for TTIP to live up to its goal of creating economic added value in a democratically sustainable fashion, it is necessary to open transatlantic regulatory cooperation to political contestation to a greater extent than presently envisaged. Conflicts of ideas and regulatory approaches ought to be a matter for public debate and not only within the closed circles of trade and regulatory

the EU's textual proposal for the TTIP Good Regulatory Practices Chapter (all 21 March 2016).

²³ Art. 7 of the EU's textual proposal for the TTIP Good Regulatory Practices Chapter of 21 March 2016.

²⁴ See the many objections raised in Corporate Europe Observatory, 'TTIP: "Regulatory Cooperation" a Threat to Democracy: Statement from 45 Organisations on the New EU Proposal on Regulatory Cooperation', (21 March 2016), available at <<http://corporateeurope.org/international-trade/2016/03/ttip-regulatory-cooperation-threat-democracy>>; Joint analysis by Transport & Environment (T&E), the European Environmental Bureau (EEB), the European Public Health Alliance (EPHA), the European Heart Network (EHN), the European Consumer Organisation (BEUC) and the Transatlantic Consumer Dialogue (TACD), 'Shared Concerns on the Revised TTIP Regulatory Cooperation Proposal Detailed', (21 March 2016), available at <<http://www.transportenvironment.org/sites/te/files/publications/Revised%20Regulatory%20Cooperation.pdf>>.

²⁵ Arts. x.5(2) and x.6 of the EU's textual proposal for the TTIP Regulatory Cooperation Chapter and 6 of the EU's textual proposal for the TTIP Good Regulatory Practices Chapter (both 21 March 2016).

officials. Raising awareness of the extraterritorial impact of some EU and US legislation and regulation emphasizes the need to incorporate parliaments in TTIP's institutional setup.²⁶ Excluding them would undermine democratic participation and the accountability of executive actors for the policy directions chosen and for transatlantic economic integration in general. The European Commission's transparency initiative is a welcome step towards creating a fertile soil for a wider politicization of TTIP and the EU's Common Commercial Policy.²⁷ While greater transparency may have shortcomings of its own – by enabling politicians to place more emphasis on some trade policies than on others and thus skew the public discussion²⁸ – the discursive power of parliaments, one that feeds the legislative process, is an important asset in the making of external trade strategies.

The following heading addresses the institutional side of TTIP from the perspectives of good regulatory practices and legislative participation.

3. INSTITUTIONAL DYNAMICS OF HORIZONTAL REGULATORY COOPERATION IN TTIP

3.1. **Regulatory Impact Assessments and TTIP's Good Regulatory Practices**

With TTIP, EU policy making will to some extent have to be coordinated with the US. Regulatory cooperation in TTIP is premised on two leitmotifs: increasing the transparency of regulatory intentions and bolstering *ex ante* policy analysis between the EU and US regulatory authorities.

These commitments to implementing good regulatory practices are to be attained by means of information exchange and dialogue between the competent regulatory authorities. The establishment of specially designated 'focal points' has now been dropped, although this will have little practical impact because officials will need to be appointed in both the EU and the US to ensure steady and ongoing communication. Each Party is to publish a list of planned major regulatory and legislative acts at least once a year, outlining their scope and objectives. Where these undergo impact assessment, information needs to be provided as early as possible on planning, timing, planned stakeholder consultations, and, importantly, significant impacts on trade and investment.²⁹

²⁶ D. Jančić, 'Transatlantic Regulatory Interdependence, Law and Governance: The Evolving Roles of the EU and US Legislatures', 17 *Cambridge Yearbook of European Legal Studies* 2015, 334–359. See also: J. Scott, 'From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction', 57 (4) *American Journal of Comparative Law* 2009, 897–942.

²⁷ See to this end the speech by the incumbent EU Trade Commissioner C. Malmström, 'Debating TTIP' (11 December 2014) available at <http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152942.pdf>.

²⁸ D.Y. Kono, 'Optimal Obfuscation: Democracy and Trade Policy Transparency', 100 (3) *American Political Science Review* 2006, 369–384.

²⁹ Art. 5 of the EU's textual proposal for the TTIP Regulatory Cooperation Chapter (21 March 2016).

TTIP encourages the conduct of impact assessments in general, and, whenever these are carried out, the Parties are obliged to consider the position of the other Party and assess a number of further aspects: (a) the need for the proposed regulatory or legislative act as well as the nature and significance of the problem tackled by the act; (b) feasible alternatives, including the possibility of not regulating at all; (c) the potential short-term and long-term social, economic and environmental impacts of such alternatives along with the anticipated costs and qualitative and quantitative benefits. Results of impact assessments are to be published at latest with the final regulatory acts,³⁰ which is inadequate because tardy publication may prevent public debate on the consequences of the regulatory or legislative action contemplated. It is therefore helpful that TTIP negotiators envisage, on the one hand, the exchange of available evidence, data, methodology and economic assumptions used in policy-formulation processes; and, on the other, the exchange of experiences and *ex post* evaluations.³¹ This principle of mutual awareness is crucial for reducing disputes and extraterritorial action. These practices bear resemblance to the EU's Better Regulation Agenda, which aims to cut red tape, simplify the legislative framework that encumbers business, and review whether legislation is still 'fit' for purpose.³²

A welcome novelty of the new TTIP proposals is that it mandates impact assessment processes to pay 'special attention' to the position and corollaries of planned regulation on small and medium-sized enterprises (SMEs).³³ This is important because regulatory compliance costs typically represent a greater burden for SMEs than for large multinational corporations.

3.2. Legislative Participation in TTIP's Regulatory Coordination Mechanism

In a guide on the EU's position in TTIP negotiations, the European Commission promises that TTIP 'will not circumvent parliaments' and 'will not change the way each side makes regulation.'³⁴ The risk of this happening, which is well

³⁰ Art. 8(5) of the EU's textual proposal for the TTIP Good Regulatory Practices Chapter (21 March 2016).

³¹ Arts. 8(6) and 9 of the EU's textual proposal for the TTIP Good Regulatory Practices Chapter (21 March 2016).

³² The Better Regulation package is available at <http://ec.europa.eu/smart-regulation/index_en.htm>. See an analysis of its democratic dimension in: D. Jančić, 'The Juncker Commission's Better Regulation Agenda and Its Impact on National Parliaments', in C. Fasone et al. (eds), Special Issue 'Parliaments, Public Opinion and Parliamentary Elections in Europe' *EUI Working Paper MWP* 2015/18, 45–54, available at <<http://ssrn.com/abstract=2683358>>.

³³ Art. 8(3) of the EU's textual proposal for the TTIP Good Regulatory Practices Chapter (21 March 2016). See also Arts. x.1(1)(a) and x.6(3) of the of the EU's textual proposal for the TTIP Regulatory Cooperation Chapter (21 March 2016).

³⁴ European Commission, 'TTIP and Regulation: An Overview', Factsheet, (10 February 2015), available at <http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153121.pdf>, at 7.

detected in the literature,³⁵ nevertheless lies in a twofold consideration related to institutional and substantive aspects of TTIP.

First, there is an *institutional* conundrum. In an attempt to assuage fears of executive and technocratic ‘hegemonisation’ of regulatory processes, the EU’s TTIP negotiators withdrew the proposal for the creation of a Regulatory Cooperation Body. The latter is now replaced with an ‘effective coordination structure,’ albeit with much the same competences – namely, to monitor the implementation of TTIP and make plans for future regulatory cooperation.³⁶ While it is underlined that this structure – whatever form it definitively takes – would not have the power to adopt legal acts, its supervisory and agenda-setting competences create important consequences for parliamentary input, because a forum composed of executive officials is entrusted with the task of charting transatlantic trade and investment regulation. This is done primarily by preparing an Annual Regulatory Cooperation Programme, which outlines common regulatory priorities, suggests new joint initiatives, and proposes steps and timeframes for their realization. To this end, the EU and the US are to exchange information and discuss regulatory options and objectives at the earliest possible stage. With respect to the EU, opportunities for regulatory dialogue shall be provided before the Commission adopts a formal position, which means even before the European Parliament have had a chance to examine it. However, no obligation is foreseen to share draft texts before they are published in accordance with the applicable administrative or regulatory procedures.³⁷

Concerningly, review of the progress made by the regulatory coordination structure would be performed at the ministerial level on a regular basis, while reporting to the EU-US Summit and to legislators would only take place once in two years. The coordination structure furthermore provides for a ‘full involvement of the relevant regulatory authorities,’ whereas ‘proper involvement’ of the legislative authorities is to be ensured not directly but by each Party. These arrangements skew political accountability in favour of the executive and effectively preclude meaningful parliamentary control over TTIP’s regulatory processes. This is hence a key area where TTIP needs to be further developed.

Moreover, new regulatory cooperation initiatives are considered based on input from either Party or stakeholders. While the regulatory variation can provide alternative policy options and an opportunity for mutual learning,³⁸ for these processes to be legitimate they should not only be a product of technocratic or civil society dialogue but also of political exchange, which forms the core of parliamentary business. No concrete procedure is yet made in TTIP negotiating

³⁵ A. Meuwese, ‘Constitutional Aspects of Regulatory Coherence in TTIP: An EU Perspective’, 78 (4) *Law and Contemporary Problems* 2015, at 155.

³⁶ Art. x.4 and Annex on the Institutional Setup of the EU’s textual proposal for the TTIP Regulatory Cooperation Chapter (21 March 2016).

³⁷ See footnote 8 accompanying Art. x.4(2)(a) of the EU’s textual proposal for the TTIP Regulatory Cooperation Chapter (21 March 2016).

³⁸ J.B. Wiener and A. Alemanno, ‘The Future of International Regulatory Cooperation: TTIP as a Learning Process toward a Global Policy Laboratory’, 78 (1) *Law and Contemporary Problems* 2015, at 135.

texts to the possibility of consultation with or oversight by legislative authorities. Proposals for their interaction with the regulatory coordination structure are still being considered. Another closely related concern is that of limited transparency of internal decision-making processes, which is typical for international regulatory cooperation.³⁹

Second, there is a *substantive* element of the puzzle. The scope of TTIP is extremely wide and it covers policy areas that fall under the legislative competence of both the US Congress, the European Parliament and national parliaments of the EU Member States. Yet it is not provided for these institutions to take part in joint examinations of ways to promote regulatory compatibility, which include mutual recognition of equivalence, harmonisation, and simplification of regulatory acts.⁴⁰ Concomitantly, TTIP expressly foresees pursuing 'a high level of protection' of the environment, consumers, public health, working conditions, social protection and social security, human, animal and plant life, animal welfare, health and safety, data protection, cyber security, cultural diversity, and financial stability.⁴¹ However, there is no single way to achieve these goals, which go well beyond trade and investment and address the regulation of social policy and the operation of public services. Other contentious areas include the regulation of GMO foods, the protection of intellectual property rights (e.g., geographical indications), and the inclusion of financial services.⁴²

Both the institutional and substantive dimensions of TTIP negotiations necessitate the making of political choices, which are contingent on the preferences and interests of the negotiating partners and on the values that underpin the existing policies. Since these may and do differ in the EU and the US,⁴³ the question of democratic decision making emerges as an important ingredient of TTIP's legitimacy. It is therefore important to ensure that the methods of reaching compromises on regulatory convergence are subject to democratic debate and political contestation by parliamentarians through means of involvement beyond the existing internal arrangements of the European and American legislatures.⁴⁴

³⁹ R.T. Bull, N.A. Mahboubi, R.B. Stewart and J.B. Wiener, 'New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements', 78 (4) *Law and Contemporary Problems* 2015, at 13–14.

⁴⁰ Art. x.5(1) of the EU's textual proposal for the TTIP Regulatory Cooperation Chapter (21 March 2016).

⁴¹ Art. x.1(1)(b) of the EU's textual proposal for the TTIP Regulatory Cooperation Chapter (21 March 2016).

⁴² D. Jančić, 'Financial Services in TTIP: Impact on Law and Business', Presentation at the Interdisciplinary Conference on the Transatlantic Trade and Investment Partnership, Centre for European Research, University of Gothenburg (14–15 March 2016).

⁴³ R. Parker and A. Alemanno, 'Towards Effective Regulatory Cooperation under TTIP: A Comparative Overview of the EU and US Legislative and Regulatory Systems', *CEPS Special Report* no. 88 (15 May 2014).

⁴⁴ D. Jančić, 'The Transatlantic Connection: Democratizing Euro-American Relations through Parliamentary Liaison', in S. Stavridis and D. Irrera (eds), *The European Parliament and Its International Relations* (London: Routledge 2015), 178–196; D. Jančić, 'The European Parliament and EU-US Relations: Revamping Institutional Cooperation', in E. Fahey and D. Curtin (eds),

Admittedly, the EU's TTIP negotiating text states that TTIP would not oblige the Parties to achieve any particular regulatory outcome.⁴⁵ However, the level of regulatory cooperation sought would require legislative or at least regulatory action on the part of the EU and the US.⁴⁶ The formal legal assurances in TTIP are not necessarily a sufficient guarantee that pursuit of certain regulatory goals would not become a necessity as a matter of fact – through the agency of market forces sparked by TTIP – and not as a matter of law. Put simply, it is the uncertainty as to the actual impact of TTIP on policy-making cultures and traditions that causes widespread concern. Examples of this are the failed European Citizens' Initiative 'Stop TTIP'⁴⁷ and anti-TTIP demonstrations across Europe, most notably in Berlin and Brussels.⁴⁸

The European Parliament and the US Congress have a stake in, as well as a responsibility for, TTIP negotiations because of the impact of the agreement on the discussions on the values driving regulation and on bilateral and global norm production.⁴⁹ This is why, as Cremona rightly argues, the legislative power of assent to the final text of TTIP is 'no real substitute for involvement in the shaping of legislation.'⁵⁰ The argument in favour of preserving a role for legislatures is particularly strong on the side of the EU, where, unlike in the US, regulatory standard setting is frequently the product of legislative action and not of regulatory action by virtue of enabling legislation.⁵¹ Yet the TTIP negotiating texts do not seem to incorporate sufficient guarantees of democratic oversight over decision making with transatlantic repercussions. TTIP therefore requires the inclusion of additional institutional mechanisms for democratic participation. But how can these be modelled?

A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders (Cambridge: Cambridge University Press 2014), 35–68.

⁴⁵ Art. x.1(4) of the EU's textual proposal for the TTIP Regulatory Cooperation Chapter (21 March 2016).

⁴⁶ P. Chase and J. Pelkmans, 'This Time It's Different: Turbo-Charging Regulatory Cooperation', in D. Hamilton and J. Pelkmans (eds), *Rule-Makers or Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership* (London: Rowman & Littlefield International 2015), 17–60, at 43.

⁴⁷ Available at <<http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/2041>>.

⁴⁸ EurActiv, 'Thousands across Europe Protest against TTIP', (20 April 2015), available at <<http://www.euractiv.com/section/trade-society/news/thousands-across-europe-protest-against-ttip/>>. See specifically the scepticism towards TTIP in the German public opinion in: P. Sparding, 'Germany's Pivotal Role on the Way to TTIP', *The German Marshall Fund of the United States, Europe Policy Paper* no. 5/2014, at 3.

⁴⁹ See the global context in which TTIP is being negotiated in: J.F. Morin, T. Novotná and M. Telò (eds), *The Politics of Transatlantic Trade Negotiations TTIP in a Globalized World* (Farnham: Ashgate Publishing 2015).

⁵⁰ M. Cremona, 'Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)', 52 (2) *Common Market Law Review* 2015, at 362.

⁵¹ L. Bergkamp and L. Kogan, 'The Precautionary Principle and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership', 4 *European Journal of Risk Regulation* 2013, at 498.

4. DESIGNING EU-US LEGISLATIVE COOPERATION

There are two layers of democratic involvement in TTIP that need to be discerned. On the one hand, there is 'external' democratic legitimation, which is ensured by votes of approval of TTIP by the European Parliament, the US Congress, and, in the likely case of mixity, national parliaments within the EU. On the other hand, there is 'internal' democratic legitimation, which is aimed at performing ongoing scrutiny of regulatory cooperation within the institutional mechanisms established by TTIP upon its entry into force. As examined below, the latter appears more contentious in the negotiations.

Given the ambitious regulatory approximation agenda, it would be erroneous to keep the European Parliament and the US Congress at bay from transnational policy making. TTIP negotiating texts only lay down that the Parties will remain 'fully sovereign' in setting protection levels they deem appropriate. The previous version of the negotiating texts provided that written comments or statements that have been made by one Party on regulatory acts of the other Party should be communicated to legislative authorities, but this has now been deleted in favour of a more vague commitment for each Party to ensure their legislative bodies' involvement in regulatory cooperation. Instead of isolating parliaments from regulatory coordination, TTIP should make them a component of the transatlantic trade and investment policy apparatus. This can be accomplished in a number of ways, as presented below.

A) A first way would be to build on the existing horizontal regulatory cooperation efforts⁵² and *establish a formal early warning mechanism* in order to enable the European Parliament and the US Congress to pronounce on the Annual Regulatory Cooperation Programme drawn up within the regulatory coordination structure. EU and US legislators should be consulted before this Programme may be published. The said legislatures would have 12 weeks to send their opinion. The officials gathered within the coordination structure would be obliged to respond in the form of a written reply, explaining the added value of regulatory initiatives and, whenever possible, providing documents substantiating the proportionality of the proposed action and the underlying regulatory approach applied. Not providing for a duty to reply could deter the involvement of parliaments, because their comments could simply be ignored. The same procedure would then apply to any new regulatory cooperation initiative agreed outside the framework of the Annual Regulatory Cooperation Programme. This solution would enable parliamentarians to have direct access to intergovernmental policy discussions without jeopardizing the confidentiality requisite in international trade negotiations. This would also rectify the shortcoming of the EU's current negotiating text, whereby consultations are envisaged with stakeholders but not with directly elected representatives. These procedural changes are important to make because TTIP rightly acknowledges that the adoption

⁵² T. Takács, 'Transatlantic Regulatory Cooperation in Trade: Objectives, Challenges and Instruments for Economic Governance', in E. Fahey and D. Curtin (eds.), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (Cambridge: Cambridge University Press 2014), 158–185.

of EU and US legislation frequently carries significant transatlantic implications for trade and investment. It is therefore advised to insert new provisions that would foster a dialogue between legislators, on the one hand, and regulators and trade representatives, on the other.

B) A second way would be to *enable members of the Transatlantic Legislators' Dialogue (TLD) – which is a six-monthly meeting of EU and US lawmakers that has operated since 1972 and which was formally established as a forum in 1999 – to oversee the work of the regulatory coordination structure* that is in the making. This would provide a new channel for the participation of MEPs and US Congress members in the evaluation of policy directions to be taken in transatlantic regulatory cooperation. This is feasible: (a) because the TLD has gradually expanded its policy activities, notably through the establishment of working groups in the areas of transport, agriculture and food safety, financial markets and stability, and cyber security; and (b) because this ensures that existing institutional infrastructures and resources are better utilised, thus obviating the need to create new interparliamentary forums.

C) A third way would be to *enable delegations of national parliaments existing within the EU to participate in the work of the TLD*. This can be done by dispatching parliamentarians from the committees competent for foreign affairs, EU affairs, or other relevant sectors to participate in TLD meetings, as well as by appointing rapporteurs for transatlantic relations to maintain liaison with the EP and US Congress, either directly or through the TLD. Such a channel of parliamentary involvement is supported by the aforesaid high likelihood of TTIP being concluded as a mixed agreement. In light of this, several national parliaments, for example the French and Irish ones, have requested access to TLD meetings.⁵³ This recommendation draws inspiration from the EU's positive experience of experimentation with parliamentary cooperation beyond the nation state. Scrutinising draft EU legislative acts has made most national parliaments more attentive and more alert to EU decision-making processes.⁵⁴ The EU is also a venue for growing parliamentary dialogue in the form of interparliamentary conferences between national parliaments and the European Parliament in the fields of general EU affairs, economic and financial governance, and Common Foreign and Security Policy and Common Security and Defence Policy. These practices provide useful cues for designing transatlantic legislative involvement in TTIP.⁵⁵

⁵³ D. Jančić, 'Towards a Transatlantic Trade and Investment Partnership (TTIP): National Parliaments and EU-US Relations', *Paper presented at ACCESS Europe & Academy of Finland Workshop on Legislative-Executive Relations in Foreign and Security Policy*, Vrije Universiteit Amsterdam (21–22 May 2015).

⁵⁴ See most recently: C. Heffler et al. (eds.), *The Palgrave Handbook of National Parliaments and the European Union* (Basingstoke: Palgrave Macmillan 2015).

⁵⁵ See the US view on this in: R.J. Ahearn and V. Morelli, 'Transatlantic Regulatory Cooperation: Possible Role for Congress', *Congressional Research Service, Report for Congress* no. RL34735 (4 January 2010); K. Archick and V. Morelli, Vincent, 'The U.S. Congress and the European Parliament: Evolving Transatlantic Legislative Cooperation', *Congressional Research Service, Report for Congress* no. R41552 (2 January 2013).

5. CONCLUDING REMARKS

The main argument made in this paper is that while TTIP seeks to achieve the welcome objective of liberalizing trade and investment between the EU and the US, it carries a risk of generating new democratic deficits once it has come into force and has been implemented. The transfer of certain regulatory and policy-making powers into the transnational domain is conducive to widening the gap between the citizen and decision makers in a way that consultations with stakeholders alone – including industry representatives, the civil society and the public at large – cannot remedy. The principal-agent mechanisms of power delegation, engendered through electoral processes, are important levers of democratic legitimacy and accountability. Not utilising them beyond the one-off acts of approval in TTIP ratification procedures threatens to chip away the benefits that the political process can bring.

This paper has also provided a number of policy recommendations as to how these challenges can begin to be overcome. They are rooted in the belief that a greater implication of parliamentarians in transatlantic policy shaping can yield significant democratic advantages. These include better communication between the ever more interconnected legislative and regulatory activities of the EU and the US, greater understanding of the reasons why the EU and the US espouse different philosophies of regulation, smarter utilisation of the existing infrastructural and institutional resources and, ultimately, a higher sense of legitimacy among TTIP's addressees.

Increasing the profile of the TLD could be a stepping stone towards a more enhanced parliamentary involvement in transatlantic regulatory cooperation. The current low profile of this interparliamentary EU-US forum is due to it having virtually no role beyond discussion. Upgrading it to a consultative body in transatlantic regulatory affairs might mobilise the interest of parliamentarians and facilitate stronger linkages between European and American legislators in matters of transatlantic importance, whose number is bound to rise. It is up to the EU and US negotiating teams to realise the potential and positive effects that these changes could have.

REGULATORY COOPERATION UNDER TTIP: RULEMAKING AND THE AMBIGUITY OF PARTICIPATION*

Joana Mendes

1. “BRIDGES” AND THEIR IMPACTS

After the 11th round of talks on the Transatlantic Trade and Investment Partnership (TTIP), the European Commission categorically announced in a press release the main principles of regulatory cooperation. In addition to the pledge to maintain or improve the level of protection for consumers, regulatory cooperation, whichever form it may take, ‘will not change or affect the EU regulatory and democratic process’.¹ The same point has been reiterated in previous Commission documents and in public statements regarding regulatory cooperation.

However, the claim that the EU *regulatory* process – or those of other domestic systems – will not be affected is unrealistic. Attempts to keep apart international, or transnational, and domestic procedures ignore that decisions taken at both levels may be intertwined in such a way that they may deplete procedural standards that apply domestically.² Specifically with regard to TTIP, it is hardly possible to keep apart the way EU rulemaking procedures are currently taking shape – namely, some of the new features of the better regulation agenda that the European Commission announced in May 2015 – from the on-going negotiations of this agreement. In a sense, TTIP is already changing EU rulemaking procedures from within, no matter which normative assessment one may make of such transformation.³

A report of the European Parliament (EP) of June 2015 indicates the potential impact that regulatory cooperation may have on the EU’s constitutional and institutional framework, precisely via its possible repercussions for EU decision-

* This contribution reflects the state of TTIP negotiations as they stood by January 2016.

¹ Available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1389>>. Another round of negotiations will take place at the end of February 2016, with regulatory cooperation again in the agenda (outline available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1454>>). The analysis in this paper is based on the Commission’s Textual proposal on regulatory cooperation tabled for discussion with the US in the negotiating round of April 2015 and made public on 4 May 2015, available at the time of the writing.

² J. Mendes, ‘Rule of Law and Participation: A normative analysis of internationalized rule-making as composite procedures’, 12 (2) *International Journal of Constitutional Law* 2014, 370–401.

³ I am referring to the explicit inclusion of delegated and implementing acts in the better regulation agenda, making them systematically subject to impact assessments and consultations. A more developed analysis of the current state of development of EU rulemaking procedures may be found in J. Mendes, ‘Executive Rulemaking: Procedures in Between Constitutional Principles and Institutional Entrenchment’, in C. Harlow, G. Cananea and P. Leino-Sandberg, *Handbook on EU Administrative Law*, (Cheltenham/Camberley: Edward Elgar 2016 (forthcoming)).

making. In particular, the EP showed concern regarding the preservation of its legislative role and of its power of scrutiny over the EU's regulatory processes.⁴ One of the Committees pointed out that regulatory cooperation would grant the US formal rights in the adoption of implementing acts (under Article 291 TFEU), while the European Parliament has no right of intervention in those procedures.⁵ The EP's report called on the Commission to clarify the powers of the Regulatory Cooperation Body, pointing out that 'any direct application of its recommendations [...] would imply a breach of the law-making procedures laid down in the Treaties and would therefore undermine the democratic process as well as the European public interest'.⁶

In fact, whether the EU *democratic* process will not be hindered by regulatory cooperation under the TTIP depends on a series of issues that remain open at the time of the writing:⁷ the relationship between the bodies supporting regulatory cooperation under the TTIP with the European Parliament (the same applies, of course, for the US Congress concerning possible impacts on the US democratic process); the composition of such bodies (it is questionable whether they should include only or mainly representatives of regulators and competent authorities);⁸ the possibilities of parliamentary oversight over the likely reinforcement of executive decision-making as a result of regulatory cooperation; the institutionalization of opportunities of contestation within decision-making procedures stemming from regulatory cooperation. These are arguably crucial questions that deserve further reflection. The following considerations focus on the last point. Participation in decision-making procedures could, if adequately designed, be a forum of such contestation, where different

⁴ See 'Motion for a European Parliament Resolution containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)', 2014/2228(INI) point (c)(viii); European Parliament, 'Opinion of the Committee on Legal Affairs for the Committee on International Trade on recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)', 2014/2228(INI) (4 May 2015), (point 1(j)).

⁵ European Parliament, 'Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on International Trade on recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)', 2014/2228(INI) (16 April 2015), point L.

⁶ European Parliament, 'Opinion of the Committee on Constitutional Affairs for the Committee on International Trade on Recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)', 2014/2228(INI) (4 May 2015) point 1(d)(ii); Opinion of the Committee on Legal Affairs, *supra* note 4, point 1(l); Opinion of the Committee on the Environment, Public Health and Food Safety, *supra* note 5, point 5. See also 'Motion for a European Parliament Resolution containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)', *supra* note 4, point 1(c)(viii), 15. See also the discussion about the Regulatory Cooperation Body carried out in this volume by D. Jančić, 'Democratic Legitimacy of Enhanced Regulatory Cooperation in TTIP', *CLEER Paper Series* no. 1/2016.

⁷ It is possible that some of these issues will be addressed in the 12th round of negotiations to take place in February 2016.

⁸ See Art. 16 of the Commission's textual proposal. Cf. 'Opinion of the Committee on the Environment, Public Health and Food Safety', *supra* note 6, point L, which calls for involvement of 'all legislators and all stakeholders concerned'. The same observation applies in the event that regulatory cooperation might rely on existing bodies rather than on institutions created specifically to foster regulatory cooperation under the TTIP.

interested persons voicing different interests would be given equal opportunities to influence decision-making. However, the way participation is currently envisaged in the textual proposal of the Commission on regulatory cooperation raises strong doubts on whether participation could perform this role, as will be argued below.

2. ACCESS TO REGULATORY COOPERATION: OPEN PROCEDURES?

On a first approach, the textual proposal of the Commission on regulatory cooperation provides for a procedural framework that appears to be transparent and open to public input. Each Party would have the duty to make a list of planned acts *publicly* available and provide related information (as specified in Article 5 of the proposal). They would need to ‘offer a *reasonable opportunity* for any *interested* natural or legal person on a *non-discriminatory basis* to provide input through a *public consultation* process and [to] take into account the contributions received’ [emphasis added] (Article 6). In addition, the Parties would ‘reaffirm their intention’ to carry out impact assessments in the terms specified in Article 7. While it is not certain whether these duties will enter the text of the agreement, it is arguably unlikely that regulatory cooperation will totally deviate from duties of transparency (at least between the Parties) and involvement of stakeholders.

It is noteworthy that, in the current Commission’s textual proposal, these legal duties and commitment (in the case of impact assessments) would not be restricted to acts pertaining to regulatory cooperation. They would apply to *any act* adopted at the central level (i.e., EU legislative and non-legislative acts covered by Articles 290 and 291 TFEU; US federal statutes, executive orders and other acts defined in Article 2 of the proposal) in areas ‘not excluded from the scope of the TTIP provisions’ that deal with the supply or use of services or with the marketing of goods. They would apply irrespective of actual instances of regulatory cooperation *stricto sensu*.⁹ Thus, consultations, in the terms specified in Article 6, would be a legal duty binding the Parties for a very wide range of legal acts. This would be a novelty in the EU legal system.¹⁰ Consultations would be an access point given to interested parties, at the domestic level, to legislative and non-legislative procedures outside of regulatory cooperation *stricto sensu*. The Regulatory Cooperation Body would monitor

⁹ Art. 3(1) of the Commission’s textual proposal on regulatory cooperation, available at <http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf>. Regulatory cooperation *stricto sensu* includes a bilateral cooperation mechanism (Art. 8), information and regulatory exchanges between the parties (Arts. 9, 11 and 12), ways of promoting regulatory compatibility (i.e., mutual recognition, harmonization, and simplification (sic!)) in the areas where mutual benefits would have been identified (Art. 10), promoting international regulatory cooperation (Art. 13).

¹⁰ Cf. Communication from the Commission, ‘Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission’, COM(2002) 704 final (11 December 2002), which remains part of the current Better Regulation Agenda announced in May 2015 by the Juncker Commission, available at <http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm#_consultation>.

compliance with this duty, as with the other procedural obligations envisaged in the chapter on regulatory cooperation (Article 14 (1)). This competence could give it a potentially influential role in the way each Party conducts its decision-making procedures. It only stresses the importance of clarifying the relationships of this body with the EU and US legislators (which at the time of the writing feature in the textual proposal of the Commission as ‘placeholders’).¹¹

The Commission’s text proposes two additional access points: ‘stakeholders’ would be able to submit initiatives for regulatory co-operation, including proposals for regulatory compatibility, to the Regulatory Cooperation Body (Article 14(2)(d)); the same Body would hold yearly meetings with ‘stakeholders’ to discuss the Annual Regulatory Co-operation Programme (Article 15). In the last case, the proposal includes a series of specifications: a balanced representation of various interests should be ensured; participation would not be conditional on ‘stakeholders’ being directly affected by the items on the agenda; it would be the task of each Party to provide for means to ensure the submission of general views and concrete suggestions of stakeholders to the Regulatory Cooperation Body; concrete suggestions would refer only to ‘further regulatory cooperation’ and would be given ‘careful consideration’; proposals considered by the Regulatory Cooperation Body would be given a written reply, which would be published together with the Annual Programme.

This is as far as the proposal of the Commission goes at the moment regarding opportunities of participation. Far enough, some would argue, to ensure that regulatory cooperation would be a process open to the input of the various persons concerned. Yet, very little in the above ensures that participation takes place *during* the procedures in which regulatory cooperation *stricto sensu* is actually defined. The point here is not that participation should permeate all stages of regulatory cooperation. One should critically consider how such process should be organized – including the moment in which participation should take place – in order to ensure inclusive and due consideration for the various competing interests involved. The point is that the moments of participation currently envisaged in the Commission’s proposal would exist either at the domestic level as a legally binding duty on domestic authorities, and irrespective of a concrete proposal on regulatory cooperation (Article 6); or at the international level, provided by the Regulatory Cooperation Body, but not during the procedures in which regulatory cooperation is decided. There are only two access points that the TTIP defines for decision-making taking place at the TTIP level. One gives stakeholders the possibility to submit initiatives for regulatory cooperation (Articles 14(2)(d)). No further details or requirements are specified in this respect, leaving significant leeway (at present) to the Regulatory Cooperation Body on how to regulate this possibility; depending on how it is used, this discretion could confirm the fears that ‘a corporate lobby paradise’ would be institutionalised via regulatory cooperation.¹² The other access point

¹¹ Art.14(6) of the Commission’s textual proposal on regulatory cooperation.

¹² One of the criticisms that NGO’s have advanced against TTIP is the predominance of corporate interests in the TTIP negotiations. See <<http://corporateeurope.org/international-trade/2015/07/ttip-corporate-lobbying-paradise>>.

refers to the Annual Regulatory Co-operation Programme, which the Regulatory Cooperation Body prepares and publishes (Article 15). This is a policy programme, which will probably not contain legal commitments on specific possibilities of regulatory compatibility.¹³ It is unclear how influential this programme would be regarding specific instances of regulatory cooperation. With regard to participation, in this instance (as mentioned above) the proposal specifies constraints on how to organize participation in a way that it would be open to whoever would be interested, inclusive of the various competing interests and transparent.

In fact, the proposal and other documents of the European Commission on regulatory cooperation neither indicate *who* would adopt specific decisions on regulatory cooperation, nor *how* they would be adopted. Presumably, assuming that there will be specific TTIP institutions, regulatory compatibility – via mutual recognition, harmonisation, or ‘simplification’ – would be decided by a Joint Ministerial Body.¹⁴ The respective decision-making procedures are not specified in the Commission’s proposal on regulatory cooperation. Therefore, participation during such procedures is also not provided for.

Regulatory cooperation would be happening via a bilateral cooperation mechanism (Article 8), regulatory exchanges (Articles 9 and 11), joint examination of proposals for regulatory compatibility (Article 10) and cooperation in international fora (Article 11). As it stands now, the Commission’s proposal indicates that these processes would most likely be *closed* to outside input. They would be decided by regulators and competent authorities of both Parties,¹⁵ subject to the monitoring role of the Regulatory Cooperation Body.¹⁶ In this scenario, the decisions on which technical requirements are unnecessarily duplicated, and on how health safety and other public policy matters would be kept compatible with domestic standards would not be subject to public input.¹⁷

Most likely, decisions adopted by TTIP bodies (e.g., a Joint Ministerial Body) will be incorporated in the domestic legal orders, possibly via the adoption of domestic legal acts. These would then be subject to consultations under Article 6. This provision would ensure effective opportunities of input from any natural

¹³ If it would, such an inclusion could *de facto* counter the Commission’s claims that the Regulatory Cooperation Body will not have decision-making powers, depending on the relationships between this body and the Joint Ministerial Body who would possibly adopt the Programme.

¹⁴ The European Commission has repeatedly indicated that the Regulatory Cooperation Body will not have the power to adopt legal acts, see European Commission, ‘TTIP and regulation: An overview’, Factsheet (10 February 2015), available at <http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153121.pdf>, at 9. This point is now a placeholder in Art. 14(2)(c) for the cases of updates, modifications or additions (the object of such updates, modifications or additions is not specified; one would assume they refer to the Treaty itself). It is not clear what “simplification” could mean as a means of achieving regulatory compatibility.

¹⁵ See Arts. 8(1), 9(4), 11(2) to (4) of the Commission’s textual proposal; see also, more generally, Arts. 10 and 13.

¹⁶ Art. 14(1) of the Commission’s textual proposal.

¹⁷ Except if the regulatory bodies of each Party would voluntarily open consultations on these matters. Whether they would have the legal duty to do so, by force of domestically applicable rules, is a matter that needs to be looked at.

and legal person, irrespective of their place of residence or registered office. It would open the decision-making procedures of each Party to the input of persons residing or having their offices in both the EU and the US and, presumably, to natural and legal persons from third states.

However, the decisive question is how far prior decisions by TTIP bodies would preclude an effective discussion at this stage.¹⁸ If regulatory compatibility is to be decided at the TTIP level, such international decisions would seem to preclude, at least, a discussion on issues where ‘mutual benefits may be realised’. It is noteworthy that, according to the Commission’s better regulation guidelines, ‘acts implementing international standards into EU law without any (or limited) discretion’ are one of the cases where consultations would not take place during the adoption of delegated and implementing acts; the reason given for this exception is ‘lack of policy alternatives’.¹⁹

Upon closer scrutiny, the textual proposal on regulatory cooperation raises important issues regarding the scope of participation. A careful delimitation of where and how participation will occur – and should occur – is arguably an important aspect to consider when assessing whether participation could be a forum where different interested persons voicing different interests could influence decision-making on equal terms.

3. THE DIFFERENT FACES OF PARTICIPATION: GOVERNANCE AND FREEDOM

From which normative angle may one assess the possibilities of participation proposed in the current Commission’s proposal? Participation by interested persons may have different rationales.²⁰ From a governance perspective (in want of a better term), participation is a tool for evidence-based policy-making, and thereby directed at those who may strengthen the evidence basis of regulation. It is an instrument to ensure better regulatory outcomes, not only in terms of quality and reduction of costs on business and citizens, but also, in this case, in view of the objectives of regulatory cooperation under the TTIP. There are two strong indications that this would be the rationale of the duty to consult that Article 6 proposes: its systematic insertion in a section dedicated to ‘good regulatory practices’, and the fact that it is restricted to acts undergoing impact assessment. It is not surprising that this would be the approach to consultation followed in a proposal from the European Commission. Consultation as an instrument of better regulation is the prevailing approach to participation in rulemaking in the EU. Arguably, the main concern underlying such procedures

¹⁸ Generally, on the problems that the articulation between international and domestic decision-making procedures poses to procedural guarantees, see J. Mendes, *supra* note 3.

¹⁹ Commission Staff Working Document, ‘Better Regulation Guidelines’, SWD(2015) 111 final, (19 May 2015), at 67.

²⁰ Public participation, not limited to holders of affected interests, only seems to be admitted in Art. 15 (on participation in the Annual Regulatory Co-operation Programme), where it is indicated that participation of “stakeholders” (sic!) “shall not be conditioned on them being directly affected by the items on the agenda of each meeting” (Art. 15(2)).

is to 'target the evidence needed to make sound decisions'.²¹ From this perspective, participation is mainly valued in its ability to enhance problem-solving capacities, process efficiency and policy outcomes. It is a means to ask 'the right people [...] the right questions about the right initiatives, so as to feed into Commission decision-making in an efficient manner',²² and to 'ensure *broadest public validation and support* for an initiative'.²³

Participation procedures created to optimize decision-making in the sense indicated above may be open and inclusive. Taking as a reference the institutional practice in the EU, the 2015 better regulation guidelines indicate that officials should '[seek] the whole spectrum of views in order to avoid bias or skewed conclusions ("capture") promoted by specific constituencies'; they specify that 'target groups that run the risk of being excluded' should be identified, 'balance and comprehensive coverage' should be sought, and 'privileged access for some stakeholders should be avoided'.²⁴

Yet, despite these concerns for inclusiveness, one may doubt whether procedures designed to target evidence to regulatory problems (defined and framed by regulators) and to ensure the public validation of the solutions eventually adopted are the best suited to ensure due consideration of the legally protected interests and rights potentially affected, the plurality of the views heard and contestation to possibly preferred options. Arguably, the latter points are particularly relevant in a setting where bureaucratic decision-making is not framed by parliamentary debates. Hearing interested persons as a means to help officials making better decisions, or hearing them to give voice to those concerned are two different realities – or at least, they may be, depending on the rules or practices followed and the respective enforcement mechanisms. In a 'governance' conception of participation, ensuring equal procedural opportunities to all those concerned to influence decision-making, equal treatment of the views heard irrespective of the regulatory preferences of decision-makers and due consideration of the range of competing public and private legally protected interests and rights at stake, may or may not be a priority.²⁵ Biases in favour of expert knowledge and, possibly, of specific types of expert knowledge, may not be considered a problem – collection of evidence is, after all, the goal (or one of the goals) of such procedures – as long as they do not take the form of privileged access to decision-making. But privileged access may be nuanced. For example, input given by participants may be too easily dismissed as unusable if it is not framed in a way that is in line with accepted language and

²¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Better regulation for better results – An EU agenda', COM(2015) 215 final (19 May 2015), point 2.1.

²² Commission Staff Working Document, 'Review of the Commission Consultation Policy', SWD(2012) 422 final (12 December 2012), p. 10.

²³ European Commission Staff Working Document on Better Regulation, *supra* note 19, at 76, emphasis added.

²⁴ European Commission Staff Working Document on Better Regulation, *supra* note 19, at 73–76.

²⁵ See, further, J. Mendes, 'Participation and the Role of Law after Lisbon: a Legal View on Article 11 TEU', 48 (6) *Common Market Law Review* 2011, at 1864.

prevailing discourses, thereby reinforcing existing power imbalances between different participants.²⁶

From the governance perspective that prevails in the better regulation agendas (at least in the EU), participation is not directed either at the protection of the legal sphere of those whose rights and legally protected interests may be affected by the exercise of public authority, or at giving them voice in a process where competing public interests will be considered and weighed. This dimension of the relationships between natural and legal persons, on the one hand, and public authority, on the other, is largely absent. The procedural setting of such participation – better regulation – is not one that would value participation as an exercise of political freedom, as an active engagement in the way one is governed,²⁷ or as an exercise of individual freedom (even if mediated by representative organisations), by which rights and legally protected interests would be voiced.²⁸

Why would a perspective centred on participation as an exercise of freedom matter in the context of the TTIP? Regulatory cooperation will be the institutional setting in which decisions will be made on the differences between EU and US regulation that could be usefully overcome, on the technical requirements that are unnecessarily duplicated, on the standards that should remain in place because they contend with health safety in a way that would not be compatible with domestic standards, on the areas that are too distinct to justify attempts at mutual recognition or other forms of regulatory compatibility. Notwithstanding the clauses directed at ensuring appropriate levels of protection of public interests,²⁹ there is little doubt that such decisions will entail important political choices (e.g., what is the suitable level of health protection) of a type that is likely to shape the legal relationships between the various persons they will affect (between traders, and traders and consumers around the globe). Such decisions will involve weighing competing public interests, legally protected interests and rights as part of a process in which economic and social choices will be made. Bodies implementing TTIP will either take such decisions directly, or will frame the legal acts of domestic actors by non-binding recommendations, guidelines or standards. These will either be voluntarily adhered to or incorporated in the domestic legal orders, as a matter of implementation of an international decision binding on the Parties. Whichever their form, decisions taken in the context of regulatory cooperation will most likely represent an

²⁶ See B. Farrand, 'Trading Information for Influence: Forms of Knowledge and the Power of Legitimacy' in M. Bartl and E. Tauschinsky (eds.), 'Knowledge, Power and the Law Beyond the State', *UvA-Architecture Working Paper*, 7–8.

²⁷ J. Waldron, 'The Rule of Law and the Importance of Procedure' in J.E. Flemming (ed.), *Getting to the Rule of Law* (New York/London: New York University Press 2011), at 20.

²⁸ J. Mendes, *supra* note 25, at 1864–65; A. von Bogdandy, M. Goldmann, and I. Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (18 September 2015), available at <<http://ssrn.com/abstract=2662391>>, at 23, defining authority by its impact on collective and individual freedom.

²⁹ Art. 1(2) and (3) of the Commission's textual proposal

exercise of public authority.³⁰ They will constrain the freedom of others, including those who may not be present at the negotiation tables.

Procedures in which such decisions are made should be subject to participation in a way that is inclusive of the various interests affected – including those of third states – heedful of the plural views that interest holders and citizens may wish to express, and that provides fora of contestation and deliberation. Inclusive procedures, accompanied by justification, ought to be constructed as a means to avoid biases that would deny the material justice of the decisions finally adopted.³¹ Arguably, participation, understood in this way, should not be framed and constrained at the outset by an agenda of cost-reduction (which better regulation fosters), and by the primary goal of removing barriers to trade. In view of the possible reach of TTIP, the latter should be one public interest among others to be weighed in regulatory cooperation. The exact framing of TTIP and of the public interests that ought to be pursued by its bodies is, ultimately, a decision of the Parties to the agreement when negotiating and defining its terms. Be that as it may, the opportunities of participation that it will enshrine should be a means of avoiding decision-making modelled by the powerful ‘stakeholders’ in an institutional and legal context, which, albeit informed by a basic value choice (the promotion of trade), will give rise to decisions with potentially far-reaching social, economic and political impacts. Depending on how participation procedures would be implemented and enforced, it is not excluded that they could avert such an outcome. This should, at least, be one of the effects of fora where participation is conceived as an exercise of freedom.

Such a perspective on participation is all the more important in view of the ability of regulatory cooperation to remove decision-making further away from parliaments. Participation ought not to serve as window dressing to sealing off of ‘done deals’ presented to parliaments – and to other domestic actors excluded from decision-making – as legitimate *because* they were subject to public input. In this respect – and no matter which perspective one adopts on participation – one crucial question is the extent to which participatory procedures may impact on representative democracy, namely how far they may end up precluding the role of domestic parliaments, in particular in a setting where decision-making is removed from domestic regulatory contexts. To what extent may participatory procedures be a way of reinforcing the role of the executives via their external action in regulatory cooperation procedures, to the prejudice of parliaments? It is worth stressing that, as now envisaged in the Commission’s textual proposal, both parties would have to comply with a legally binding duty of consultation prior to the adoption of *legislative* and non-legislative acts. How may such a binding duty of consultation impact on parliamentary debates and decision-making? Arguably, this is one question that should be considered when designing and implementing the framework of regulatory cooperation.

³⁰ Cf. A. Bogandy, M. Goldmann and I. Venzke, *supra* note 28.

³¹ J. Mendes, *supra* note 3, at 387.

4. CONCLUDING REMARKS

The extent to which regulatory cooperation under the TTIP may impact on domestic decision-making procedures depends on institutional and procedural issues that neither the textual proposal of the Commission on regulatory cooperation nor, to the author's knowledge, other official documents have addressed at the time of the writing. In this respect, one important issue that regulatory cooperation under the TTIP raises is the role of participation of interested parties in decision-making and the extent to which it may conflict with the democratic features of domestic procedures, including those of the European Union (which are formally molded along the model of a representative democracy).

At first sight, participation in regulatory coordination would be a way of opening the ancillary procedures to public input, or at least to input of interested parties. Yet, a closer scrutiny of the Commission's textual proposal indicates that participation would hardly ever occur during the procedures in which regulatory cooperation is actually defined. Rather, participation of interested parties would take place at the domestic level, in legislative and non-legislative procedures, outside of regulatory cooperation *stricto sensu*. It would become a general legally binding duty for the Parties, which is unprecedented in the EU but not a novelty in the US legal system. The formal access points given to interested parties at the international level do not happen during the procedures in which regulatory cooperation is decided, on which the existing proposal is silent. Unlike the first impression of openness, nothing in the Commission's proposal suggests that the procedures via which the assessments of regulatory recognition, compatibility or incompatibility could take place would be in any way subject to public input. How far that may be the case will depend on the extent to which decisions taken by bodies implementing TTIP may preclude substantive decisions at the domestic level, where participation would be the rule. Yet, the way international and domestic procedures covered by regulatory cooperation could be articulated is far from clear.

While participation may be valued as a means of making regulatory cooperation open and inclusive (irrespective of the issues of scope pointed out in this chapter), whether it may have this role will largely depend on how it is framed and designed. Participation may simply be a means of empowering the most powerful stakeholders, if approached as a tool for evidence-based policy making rather than an act of engagement in the way one is governed, without any democratic concern, and further removed from parliamentary processes that may filter out or contain (even if imperfectly) possible biases that participation may produce in public decisions. The risk is enhanced if the purported openness and inclusiveness that participation may convey dresses the decisions subject to participatory procedures with a veneer of legitimacy that they lack. This would arguably be the case when such procedures have not been designed in a way that would support contestation and deliberation involving the plurality of those affected, including representatives of public interests. In view of the political significance of the decisions that may be taken by bodies implementing TTIP, or by domestic executive actors under regulatory

cooperation, the ambiguity of participation and the risks that it may entail should be borne in mind when designing and assessing the procedures that will support regulatory cooperation. It is not excluded that these risks could be dealt with in participatory procedures set up to ensure better regulatory outcomes from a governance perspective. Nevertheless, the Commission's current approach at least sheds doubt on the ability of participation to serve as a forum where different interested persons voicing different interests may influence decision-making in equal terms.

TTIP, PROTECTION OF THE ENVIRONMENT AND CONSUMERS

Wybe Douma

1. INTRODUCTION

The Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States of America is the subject of heated debates and unprecedented public response to EU Commission consultations. TTIP is meant to boost economic growth and create new jobs on both sides of the Atlantic. The proposed treaty between the two largest economies of the world has been presented as a ‘no brainer’¹ and as ‘the cheapest stimulus package one can imagine’ as it could stimulate income effects between 0.5 and 1% of GDP,² and annual economic growth of 50–95 billion euros in the United States and by 68–119 billion euros in the EU.³ This would amount to returns of around 545 euros for a family of four in Europe,⁴ or a cup of coffee per person per week as critics have pointed out.⁵ Other critics voiced scepticism about the calculation of economic benefits.⁶ Recent studies confirmed that the predicted large-scale economic benefits are far from certain.⁷

This contribution does not focus on the economic debate, however, but on wider societal aspects, notably the alleged negative environmental and consumer protection effects of TTIP and its arbitration system. Many fear that TTIP will lead to a race to the bottom where protection norms are concerned, and allow large corporations to claim compensation outside regular court systems

¹ C. Malmström and J. Hill, ‘Don’t believe the anti-TTIP hype – increasing trade is a no-brainer’, *The Guardian* (16 February 2015) available at <<http://www.theguardian.com/commentisfree/2015/feb/16/ttip-transatlantic-trade-deal-businesses>>.

² K. de Gucht, ‘A European Perspective on Transatlantic Free Trade’, speech at the conference *Europe 2.0: Taking the Next Step*, Harvard University, Cambridge (2 March 2013), available at <http://europa.eu/rapid/press-release_SPEECH-13-178_en.htm>.

³ J. Francois, M. Manchin, H. Norberg, O. Pindyuk and P. Tomberger, ‘Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment. Final Project Report’, Centre for Economic Policy Research (CEPR), (2013), available at <http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf>, at 95.

⁴ *idem*, at VII.

⁵ See G. Moody, ‘TTIP update XXI: TTIP is worth an extra cup of coffee per person per week’, Blog (27 March 2014, plus update February 2015), available at <<http://www.computerworlduk.com/blogs/open-enterprise/ttip-update-xxi-3569484/>>. According to the author, the numbers in the CEPR report do not refer to annual growth, but to the potential cumulative results of TTIP in the year 2027.

⁶ W. Raza, J. Grumiller, L. Taylor, B. Tröster and R. von Arnim, ‘Assessing the claimed benefits of the Transatlantic Trade and Investment Partnership’, Policy Note, *Austrian Foundation for Development Research (ÖFSE)*, No. 10/2014.

⁷ G. Moody, ‘Even after years of TTIP talks, new study still unable to point to any major benefits: Annual GDP boost to EU economy even lower than previously predicted (Op-ed)’, *Ars Technica UK* (29 January 2016), available at <<http://arstechnica.co.uk/tech-policy/2016/01/even-after-years-of-ttip-talks-new-study-still-unable-to-point-to-any-major-benefits/>>.

when governments adopt public policy measures that harm their profits, causing a 'regulatory freeze' when governments refrain from adopting protection measures out of fear of such claims. It is investigated here whether TTIP could indeed have such effects. Before turning to such potential effects, the manner in which the rules on integrating wider societal concerns into TTIP have been abided by will be investigated in part 2. The main rule in this respect is Article 11 TFEU, which expresses the EU's duty to integrate environmental protection requirements in its trade and other policies, in particular with a view to promoting sustainable development. This integration principle was operationalised by a system of impact assessments, intended to guide negotiators and other stakeholders. It will be set out how these assessments were and are being carried out, after having briefly looked at the report of the High Level Working Group that stood at the basis of TTIP negotiations.

After discussing the integration aspects, some of the commonly cited threats that TTIP is accused of will be scrutinised in part 3. Notably, opening the doors for chemicals that are not subject to the strict EU rules, to shale gas and tar sands oil. By examining these issues, and some ongoing disputes, it will be established whether there is indeed cause for concern. A cross-cutting issue to which attention will be paid is whether the EU would still be allowed to adopt precautionary measures once the TTIP enters into force, in situations where scientific evidence is not (yet) conclusive about potential threats to human health and the environment. Some examples of the kind of disputes that could arise in the European Union under TTIP are also discussed, and some remarks are made regarding the claims that judicial protection in some EU countries might be discriminating against non-EU companies, and that hence there is a need for ISDS or an Investment Court as proposed by the EU.

By addressing these aspects of the proposed transatlantic treaty, a distinction can be drawn between facts and exaggerations or downright myths that have been spread by both the opponents⁸ and proponents of TTIP. In that manner, it can be assessed whether TTIP stands a chance of being accepted in Europe in the end – or rather suffer the same faith as the Anti-Counterfeiting Trade Agreement (ACTA).⁹

2. INTEGRATING WIDER SOCIETAL CONCERNS

The European Union committed itself to integrating environmental concerns into its policies in 1987,¹⁰ while adding the goal of promoting sustainable devel-

⁸ Apart from the usual anti-globalisation movements, opposition against aspects of TTIP also stems from countries like Germany and France, as well as from unexpected sides like the German Society of Judges, which has recently voiced its concerns. See N. Nielsen, 'TTIP investor court illegal, say German judges', *EuObserver* (4 February 2016), available at <<https://euobserver.com/economic/132142>>.

⁹ Rejected by European Parliament in July 2012, see <<http://www.europarl.europa.eu/news/en/news-room/content/20120703ipr48247/html/European-Parliament-rejects-ACTA>> .

¹⁰ Through the Single European Act.

opment¹¹ ten years later.¹² Art. 11 TFEU nowadays reads: '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.' On top of this, in its relations with the wider world, the Union is to contribute to the sustainable development of the Earth,¹³ and it is to ensure sustainable development through its external policy.¹⁴ In the light of these treaty obligations, the EU is under the constitutional obligation to ensure that the TTIP will promote the protection of the environment and sustainable development. Over time, several instruments were developed that could help achieving this goal, notably *ex ante* Impact Assessments carried out by the Commission itself (as part of the Better Regulation efforts), and Trade Sustainability Impact Assessments (Trade SIAs) performed by independent consultants. It is safe to say that in complex situations, such as the negotiation of a trade and investment agreement with a major economic power like the US, the only way to give effect to Treaty provisions like Article 3 TEU and Article 11 TFEU is by properly carrying out an impact assessment. The manner in which the integration duty is formulated, notably where it says '*must be integrated into the definition and implementation of the Union's policies and activities...*' [emphasis added], has been explained as indicating that it is not merely a procedural duty for the Commission and other EU institutions involved, but also a substantive one.¹⁵ The integration principle necessitates that legislative processes are organised in such a manner that sustainable development aspects can duly be taken into account. This encompasses ensuring that impacts are assessed properly and timely so that findings can influence decision making. If the integration has not taken place at all, Article 11 would be violated. The same could be said if the integration has not been carried out properly, for instance because the assessment is not ready in time.

Before turning to the assessments, the report that stood at the basis of the negotiations will be looked at briefly. This report was issued by The United States-European Union High Level Working Group on Jobs and Growth in February 2013, hence had to be agreed upon with the US counterparts. *Nomen est omen*, it appears: the Working Group devotes merely two lines to social and environmental issues, explaining that both sides are 'committed to high levels of protection for the environment and workers' and recommending that they 'explore opportunities to address these important issues, taking into account work done in the Sustainable Development Chapter of EU trade agreements and the Environment and Labor Chapters of US trade agreements.'¹⁶

¹¹ Namely, economic development which takes environmental and social aspects of economic growth into account.

¹² Through the Treaty of Amsterdam.

¹³ Art. 3(5) TEU.

¹⁴ Art. 21 TEU and 205 TFEU. These requirements were introduced through the Treaty of Lisbon in 2009.

¹⁵ See B. Sjøfjell, 'The legal significance of Article 11 TFEU for EU Institutions and Member States', *LSN Research Paper Series*, No. 14–08/2014.

¹⁶ High Level Working Group on Jobs and Growth, *Final Report* (11 February 2013), available at <http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf>, at 5. The High

Furthermore, the lack of a reference to options for dealing with potential risks is striking. Instead of securing an opening for such regulatory space, in line with another Treaty provision ('Union policy [...] shall be based on the precautionary principle'),¹⁷ the Working Group recommends that 'SPS measures be based on science and on international standards or scientific risk assessments'¹⁸ – leaving little or no room for precautionary measures (such as the EU ban on beef hormones or prudence where chemicals with potential risks are concerned). In the light of the EU obligations regarding protection of the environment, if need be for lack of evidence by use of the precautionary principle, and promotion of sustainable development, the report forms a weak opening gambit.

Soon afterwards, another opportunity to tackle wider societal aspects of TTIP came up. This time around, the European Commission was free to set out the European Union's vision on various options and their consequences, in the form of an Impact Assessment (IA).¹⁹ This instrument assesses the need for EU action and the potential economic, social and environmental impacts of alternative policy options. It is employed for all the main legislative proposals in the EU, but plans for trade and investment agreements can also be subjected to this type of assessment. The TTIP IA was undertaken in advance of the decision to request a negotiating mandate, and was published in March 2013. It measures some sixty pages and largely focuses on economic aspects.²⁰ The social impact of TTIP and human rights issues are described in five pages. The section dealing with environmental impacts covers merely four pages, and only examines some of the climate change effects that could arise,²¹ as well as potential impacts on a couple of selected other topics. The issue of precaution is not touched upon, in spite of the fact that the impact of TTIP on the EU's possibilities to protect the environment in situations where scientific evidence is not (yet) conclusive about potential threats to human health and the environment constitutes a well-known controversy in EU-US trade relations that could very well be of relevance in various TTIP related situations, including issues

Level Working Group's name in the report, and in other US and EU references to it, consistently contains the words 'on Jobs and Growth' – contrary to assurances made by a representative of the EEAS at the Interdisciplinary Conference on the Transatlantic Trade and Investment Partnership, Gothenburg (14 March 2016).

¹⁷ Art. 191(2) TFEU. Note that Art. 191(3) also obliges the EU to take make use of available scientific and technical data, and that, also in accordance with Communication (2000)1 on the precautionary principle, it is always first examined how much evidence is available.

¹⁸ High Level Working Group on Jobs and Growth, *supra* note 16, at 4.

¹⁹ The new Better Regulation package of May 2015 did introduce measures to increase the independence of IA exercises by introducing three non-Commission staff members of what now is called the Regulatory Scrutiny Board. At the time when the TTIP IA was prepared, it was still called the Impact Assessment Board.

²⁰ European Commission, 'Impact Assessment Report on the future of EU-US trade relations', SWD(2013)68 final (12 March 2013), available at <http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150759.pdf>.

²¹ The impact on global emissions is expected to be small in the most extreme scenario, with changes of 3.9m tons CO₂ in the US and 3.6m tons in the EU because of growth in their economies. Potential additional EU emissions will have to be dealt with under the EU Emission Trading Scheme (ETS), it is added at p. 49.

covered by the proposed regulatory cooperation chapter. In the Executive Summary on the IA, it was noted that in line with the WTO rules, the EU usually includes general exceptions in its trade agreements with respect to the environment and public health, which can legally override the trade obligations. The EU, it was added, will therefore keep its 'policy space' with regards to these matters.²² Whether that will always be the case can be doubted, especially because the EU did not insist on being allowed to adopt precautionary measures and did subscribe to a 'science-based' approach in CETA, for instance.²³ Hence, where environmental issues are concerned, the TTIP Impact Assessment did not constitute a move that made up for the weak opening gambit.

Besides the general Impact Assessment that was just discussed, there exists an instrument called Trade Sustainability Impact Assessment (Trade SIA). It was designed by DG Trade and first employed in 1999 for the WTO Doha Development Agenda negotiations. Since then, over twenty Trade SIA have been conducted. The Commission itself explained that they are 'essential for the conduct of sound, evidence-based and transparent trade negotiations.'²⁴ Trade SIAs are prepared by an independent consultant when the negotiations have already started, and identify the potential economic, social and environmental impacts of a trade agreement. Public consultations form a part of the process of preparing a Trade SIA. The consultant also formulates recommendations on policy measures to counter negative impacts that were identified. After the publication of a Trade SIA, the Commission issues a reaction in the form of a so-called Position Paper. The document notably explains which recommendations on policy measures are supported, and which are not.

Trade SIAs have two main purposes: to integrate sustainability into trade policy by informing negotiators of the possible social, environmental and economic consequences of a trade agreement; and to make information on the potential impacts available to all actors (NGOs, aid donors, parliaments, business etc.).²⁵ In line with these purposes as set out in the Commission's own Handbook with guidelines on Trade SIAs, the European Commission stipulated in its TTIP tender that 'Trade SIA findings must be available *well in advance of the end of the underlying negotiation, and sufficiently early to be capable of informing decision-making relating the proposed agreement*' [emphasis added]. Hence, the contractor was asked to be delivered by the end of 2014.²⁶ In light of these specifications, the purposes of Trade SIAs, the intention to ensure trans-

²² European Commission, 'Executive Summary of the Impact Assessment Report on the future of EU-US trade relations', SWD(2013)69 final (12 March 2013), available at <http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/swd_2013_0069_en.pdf>.

²³ In Art. X.03(2) Chapter 29 CETA, the EU and Canada promise to promote "efficient science-based approval processes for products of biotechnology."

²⁴ European Commission, 'Sustainability Impact Assessments', available at <<http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/>>.

²⁵ European Commission, External Trade, 'Handbook for Trade Sustainability Impact Assessment' (March 2006), available at <http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf>, at 7.

²⁶ European Commission, 'Invitation to tender to a contract to provide a Trade Sustainability Impact Assessment (Trade SIA) in support of negotiations of a comprehensive trade and investment agreement between the European Union and the United States of America' (24 July 2013),

parency, and the controversies surrounding the environmental and consumer protection aspects of TTIP, it is very unfortunate that the TTIP Trade SIA is still not ready at the start of the year 2016, and is expected to be published only by September 2016.²⁷ This is shortly before the EU hopes to conclude negotiations²⁸ and hence too late for the assessment to fulfil its purpose of influencing the negotiations.²⁹

It is also contrary to European Parliaments recommendation to ensure that the economic, employment, social, and environmental impact of TTIP is examined by means of a thorough and objective *ex-ante* trade SIA with clear and structured involvement of all relevant stakeholders, including civil society,³⁰ and to the Commission's own Handbook which sets out the process by which trade agreements under negotiation are to integrate environmental protection requirements with a view to promoting sustainable development. By not abiding by these internal rules that operationalised the integration principle of Article 11 TFEU, the Commission did not act in line with this provision. Asked about the delays by the author of this chapter, Commissioner Malmström recently did assure that an advance draft Trade SIA will be made available to the negotiators so that they can still take the recommendations into account. Such a line of action, however, would stand in the way of properly involving stakeholders, including civil society, in the process.³¹

In sum, the opening gambit in the form of the High Level Working Group report could have been stronger where preserving regulatory space is concerned, the general Impact Assessment also offered room for improvements

available at <http://trade.ec.europa.eu/doclib/docs/2013/august/tradoc_151696.pdf>, 22–23. The budget was estimated not to exceed Euro 200,000, see p. 23.

²⁷ Asking about the delays in May 2015, MEP Bas Eickhout was directed to the announcement of December 2014 by the independent consultant Ecorys on its website regarding the timeline for the Trade SIA, which 'clarifies that the final report will not be available until towards the end of 2015 [...] because Ecorys identified in its consultations with stakeholders a need for more detailed sectoral analysis'. The answer of 12 June 2015 added that this 'additional work is in its last stages'. The fact that the Commission has to agree to delays in advance was not mentioned. See <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+P-2015-007211+0+DOC+XML+V0//EN>>.

²⁸ As recently confirmed by Trade Commissioner Malmström. See T. Mayer, 'Malmström auf TTIP-Werbetour in Wien', *Der Standard* (22 February 2016), available at <<http://derstandard.at/2000031531366/Malmstroem-Habe-von-TTIP-Gegnern-einiges-gelernt>>.

²⁹ Others have warned about the negative effects of delays in the past. Tom Jenkins, Chief adviser at the European Trade Union Confederation (ETUC), noted the delays and asked at an *EMPL/INTA Hearing on Employment and Social Aspects of TTIP* (2 December 2014), available at <<https://www.etuc.org/speeches/discussion-points-empl-inta-hearing-employment-and-social-aspects-ttip#.Vs4z45XQCkU>>, where the synergies between the SIA work and the negotiations were, and M. Vander Stichele from SOMO expressed her concerns about the SIA delays at an expert meeting in Brussels, 'TTIP and regulatory cooperation: Benefits and costs in the financial services sector', presentation at the GUE/NGL expert meeting *TTIP, Trade and Regulatory Cooperation*, European Parliament (5 March 2015), available at <<http://www.somo.nl/news-en/gue-workshop-correct>>, at 1.

³⁰ European Parliament Resolution (8 July 2015) 'containing recommendations to the European Commission on the negotiations for the TTIP', (2014/2228(INI)). The Resolution also recommends 'full respect of the EU Directive on SIA', but since no such piece of legislation exists it is unclear what is meant here.

³¹ Interdisciplinary Conference on the Transatlantic Trade and Investment Partnership, Centre for European Research, Gothenburg, Sweden (15 March 2016).

regarding aspects of sustainable development, and the opportunity to make up for all this in the form of a detailed Trade Sustainability Impact Assessment delivered well in advance of the end of TTIP negotiations is being passed by, in violation of Article 11 TFEU and European Parliament's recommendations. This does not fit well with Juncker's assurances about the Commission's last chance to win back the trust of EU citizens,³² and its better regulation efforts.³³ Still, the TTIP in the end could encompass a Sustainable Development chapter and other provisions, notably on regulatory cooperation, that substantively would ensure that the environment will be protected with a view of promoting sustainable development. Whether that is going to be the case is too early to tell, but it can be investigated whether a CETA like treaty would still allow the regulator to adopt precautionary measures in spite of a lack of full scientific evidence, and what TTIP might imply where topics such as chemicals, shale gas and tar sands oil are concerned.

3. ENVIRONMENT AND CONSUMER CONCERNS ABOUT TTIP

There exists widespread fear that ISDS as a part of TTIP would lead to the lowering of standards that protect human health and the environment, or at least stand in the way of adopting new protection measures in these and other areas (the 'regulatory freeze' or 'regulatory chill' effect). Chlorinated chicken,³⁴ beef hormones,³⁵ GMO's, drilling for shale gas, tar sands oil, smoking, chemicals, nuclear energy and nano-materials all form examples of issues that are mentioned in this respect. And in cases where scientific evidence is not yet conclusive, will the EU still be able to adopt (provisional?) precautionary measures once TTIP is in place? While some of these issues in reality might hardly be affected by TTIP, and even be called myths that are spread as part of NGO campaigns, others could very well lead to arbitration and the imposition of limits on EU or EU Member States' public policy measures. In this paper, it is not possible to look at all examples in detail, hence the focus will be on the examples of chemicals and of 'non-traditional' (tar sands and shale) oil and gas. At the

³² See 'Juncker wins support for "last chance" Commission', *EurActiv* (22 October 2015), available at <<http://www.euractiv.com/section/eu-priorities-2020/news/juncker-wins-support-for-last-chance-commission/>>.

³³ In his in-depth analysis prepared for European Parliament's Policy Department for External Policies, R. Bendini, 'The future of the EU trade policy' (July 2015) proposes improvements to the Commission's system of impact assessments (p. 22–23), and recommends a strengthening of European Parliament's function of scrutiny and assessment of the Union's foreign trade policies and initiatives (p. 24).

³⁴ See S. Capelouto, 'European Activists Say They Don't Want Any U.S. "Chlorine Chicken"', *NPR News* (30 September 2014) available at <<http://www.npr.org/blogs/thesalt/2014/09/30/351774240/european-activists-say-they-dont-want-any-u-s-chlorine-chicken>>, and M. Goyens, 'What is wrong with chlorinated chicken,' *Food*, (14 July 2014), available at <<http://www.beuc.eu/blog/what-is-wrong-with-chlorinated-chicken/>>. Meanwhile, the Commission has made known that chlorinated chicken will not be entering the EU market as a result of TTIP.

³⁵ The EU maintains an 'unscientific ban' on raising cows with the help of growth hormones according to the USTR 2015 report on TBT available at <<https://ustr.gov/sites/default/files/2015%20NTE%20Combined.pdf>>, at 134.

same time, some examples of disputes that could also occur under TTIP if it is to include ISDS or a system of dispute settlement as advocated by the EU with an Investment Court will be discussed, and a general question about the need for a separate system instead of domestic courts.

3.1. Chemicals

Where chemicals are concerned, the European Union has adopted a progressive stance on ensuring frequently used chemicals are registered and tested, and is in the process of tackling substances of very high concern. The main piece of EU legislation in this respect is the REACH regulation.³⁶ Under REACH, the manufacturing and use of numerous (groups of) chemicals has been restricted, and even more substances have been identified as Substances of Very High Concern (SVHC) which implies that they are subject to an obligation of communication for the suppliers of these chemicals and for suppliers of products that contain these chemicals.³⁷ Besides REACH, there also exist separate EU regulations, such as the ones on pesticides and biocides, aimed at prohibiting or limiting as far as possible the use of substances which are carcinogenic, mutagenic and toxic for reproduction, or which have endocrine disrupting properties.

In the US, the main piece of legislation is the Toxic Substances Control Act (TSCA) from 1976. It puts the burden on government to prove a toxic chemical is a risk. As a result, only a limited number of existing chemicals were restricted under the TSCA. In the area of chemicals, it is thus generally accepted that the EU has a stronger health-protective approach than the US.

Given the varying levels of protection between the EU and US in the area of chemicals, many fear that TTIP in this respect could come at the expense of the protection of human health and the environment.³⁸ If we take note of the manner in which REACH was described by the Office of the US Trade Representative (USTR) – namely as being discriminatory, lacking a legitimate rationale, and posing unnecessary obstacles to trade,³⁹ such fears might not be completely unwarranted. The Commission has assured that there are no causes for concern where closer cooperation on chemicals between US and EU regulators is concerned. EU regulators would not be slowed down when

³⁶ Regulation 1907/2006 on Registration, Evaluation, Authorisation and Restriction of Chemicals, *OJ* [2006] L 396/1.

³⁷ The CJEU recently ensured that the rules regarding SVHC are interpreted in a strict manner. See *infra* note 39.

³⁸ Centre for International Environmental Law (CIEL), 'Toxic partnerships revealed', *Client-Earth* and *NRDC* (September 2014), available at <http://ciel.org/Publications/TTIP_Leaked_29Sep2014.pdf>.

³⁹ USTR, '2014 Report on Technical Barriers to Trade', available at <<https://ustr.gov/sites/default/files/2014%20TBT%20Report.pdf>>, at 70. Another specific US concern was the difference between the interpretation of the word 'article' between the EU and some of its member states. This issue has recently been tackled by the CJEU in the *FCD and FMB* case C-106/14, ECLI:EU:C:2015:576, *Jurisprudentie Milieurecht* 2015/156, 1330–1337, with annotation W.T. Douma.

they propose new legislative measures on chemicals, and if the EU and US cooperate more closely on new or emerging scientific issues, this would not weaken or delay new EU laws. In the view of the Commission, the EU will fully preserve its right to regulate and to act whenever needed.⁴⁰ There might very well be challenges that are being downplayed here, notably where it concerns delays that occur when a new scrutiny body would have the right to investigate proposed legislation, and where situations are concerned involving risks for which science is not (yet) able to provide clear answers. CETA for instance seems to fail to sufficiently ensure that the EU could continue to adopt precautionary measures where this is felt necessary.⁴¹ Thus, difficult as this might be, it seems important to ensure that the TTIP will contain clearer provisions in this respect. However, the EU seems to be approaching its regulatory freedom to adopt precautionary measures in a rather circumvent manner. Instead of mentioning the precautionary principle, the latest proposal for a chapter on regulatory cooperation stipulates that '[n]othing in this Chapter shall affect the ability of each Party to [...] apply its fundamental principles governing regulatory measures in its jurisdiction, for example in the areas of risk assessment and risk management'. In a footnote, it is explained that '[f]or the EU, such principles include those established in the Treaty on the Functioning of the European Union as well as in Regulations and Directives adopted pursuant to Article 289 of the Treaty on the Functioning of the European Union.'⁴² It could be argued that the precautionary principle, laid down in Article 191 TFEU, is one of these fundamental principles.

Meanwhile, endocrine-disrupting biocides⁴³ seem to form a case in point where EU-US relations on chemicals are concerned. The Commission was to propose new scientific criteria for the determination of endocrine-disrupting (ED) properties by the end of 2013⁴⁴ and had contemplated introducing a system whereby different categories would be introduced: 'known EDs' and 'suspected EDs'. US industry had expressed its concern about the proposed latter category. The reasons for this illustrate the US opposition to dealing with chemicals in a precautionary manner. The introduction of a 'suspected EDs' category would likely precipitate decisions to stop using those products or promote the switch to alternatives; the health effects of alternatives might be less well understood; and no scientific demonstration that the products cause harm would be available.⁴⁵ As precautionary measures per definition deal with situations where science cannot (yet) demonstrate that a product causes harm,

⁴⁰ European Commission, 'Chemicals in TTIP', Factsheet (January 2015), available at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153005.pdf>.

⁴¹ See P.T. Stoll, P. Holterhus and P. Abel, 'Das Vorsorgeprinzip im CETA-Entwurf', Rechtsgutachten erstellt im Auftrag des *foodwatch e.V.* (October 2015).

⁴² TTIP – EU proposal for Chapter: Regulatory Cooperation, 21 March 2016, available at <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf>.

⁴³ To be more exact: the duty to specify scientific criteria for the determination of endocrine (hormone)-disrupting properties of active substances to be used in biocides.

⁴⁴ This obligation stems from Art. 5(3) Biocides Regulation 528/2012, available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:167:0001:0123:en:PDF>>.

⁴⁵ USTR, '2014 Report on Technical Barriers to Trade', available at <<https://ustr.gov/sites/default/files/2014%20TBT%20Report.pdf>>, at 68.

the EU would need to abandon or significantly alter its plans regarding the ED criteria if it were to accommodate the US concerns. Whether it was for these reasons or not might remain uncertain, but fact is that the Commission failed to come up with a proposal by the deadline. Hereupon, Sweden initiated a case at the General Court, which it won. The Court found that the Commission breached its obligation to act by failing to adopt the required scientific criteria.⁴⁶ Afterwards, a representative of the European Commission made known that note was taken of the judgment, but maintained that any decision had to be based on solid scientific ground. It was explained that an impact assessment, including a cost-benefit analysis of the impact of the criteria on business, was 'on track' and will be concluded in the course of 2016, and that the actual decision identifying criteria for endocrine disruptors will follow 'as soon as possible' afterwards.⁴⁷ The statement seems to be disregarding the judgement of the General Court⁴⁸ and the precautionary principle as enshrined in Article 191 TFEU.

In the light of these issues, it is worth taking note of a report ordered by the UK House of Commons⁴⁹ which explains that the EU and US have some environmental standards which deliver similar safeguards, but there are others which differ – a result in part of different approaches to standard-setting, and recommends that the EU's 'stronger focus on applying the precautionary principle in setting regulations should not be weakened as a result of efforts under TTIP to align regulatory standards.' Furthermore, it is stressed that '[w]here "mutual recognition" of environmental standards is used to smooth trade between the EU and US, it will be important that this is applied only in cases where the "safety equivalence" test is genuinely satisfied. Where it is not, such as for chemicals, existing regulation should be maintained. Failing to keep to such a course risks an unacceptable "race to the bottom".'⁵⁰ In a similar vein, the European Parliament in its TTIP resolution recommended, 'based on the experience of several years of talks in a variety of fora including the Transatlantic Economic Council and the High Level Regulatory Cooperation Forum to ensure similarly that it will not affect standards that have yet to be set in areas where the legislation or the standards are very different in the US as compared with the EU, such as, for example, the implementation of existing (framework) legislation (e.g., REACH), or the adoption of new laws (e.g., cloning), or future definitions affecting the level of protection (e.g., endocrine disrupting chemicals); to ensure that any provisions on regulatory cooperation in the TTIP do not set a procedural requirement for the adoption of Union acts concerned by it nor

⁴⁶ See CJEU *Sweden v. Commission* (scientific criteria for Substances of Very High Concern), Case T-521/14 [2015] ECLI:EU:T:2015:976.

⁴⁷ EC Press briefing (16 December 2015), available at <<http://ec.europa.eu/avservices/vid-eo/player.cfm?ref=I114375>>.

⁴⁸ And in that way also Art. 266 TFEU: 'The institution [...] whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union'.

⁴⁹ Environmental Audit Committee, 'Environmental risks of the Trans-Atlantic Trade & Investment Partnership', *House of Commons* (10 March 2015).

⁵⁰ *ibid.*, p. 12

give rise to enforceable rights in that regard'.⁵¹ In spite of these recommendations, the latest EU proposals still leave the possibility open that regulatory cooperation could affect the implementation of EU chemical law.⁵² The proposal explains that in case of any inconsistency between the provisions of the regulatory cooperation chapter and the provisions laid down in specific or sectoral provisions concerning goods and services [to be identified], the latter shall prevail, while adding that '[i]t remains open at this stage whether in some sectors, such as for example chemicals, such specific or sectoral provisions might have a comprehensive character.' The fact that EU decisions on chemicals thus could still be subject to regulatory cooperation, in spite of the EP's recommendations, immediately brought about strong reactions from the side of several NGO's.⁵³

3.2. Unconventional Oil and Gas

Shale gas is one example of an unconventional gas and forms a contentious issue. Hydraulic fracturing in order to pump up shale gas (popularly known as 'fracking') involves inserting large amount of water mixed with a small percentage of chemicals into the soil, in order to release gas trapped there. In spite of the environmental dangers involved in using this technique, and its carbon-intensity,⁵⁴ it is clear that large parts of the US have embraced this novel source of energy production.⁵⁵ whereas in the more densely populated European Union drilling for shale gas is not happening at a large scale, for the time being.⁵⁶

Several challenges arise in this respect. The first concerns the possibility that TTIP would lead to increased export of US gas to the EU.⁵⁷ This could bring about a rise in shale gas production in the US, with the corresponding rise in greenhouse gas emissions (notably because of the manner in which shale gas is produced; hence this is notably a production related issue).

⁵¹ European Parliament Resolution (8 July 2015) 'containing recommendations to the European Commission on the negotiations for the TTIP', (2014/2228(INI)), point c(i).

⁵² TTIP-EU proposal for Chapter: Regulatory Cooperation (21 March 2016), available at <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf>.

⁵³ See ChemistryViews.Org, 'Regulations of toxic chemicals under TTIP' (22 March 2016), available at <<http://www.ciel.org/news/european-commission-continues-to-ignore-parliament-on-ttip/>>, and CIEL press release, 'European Commission Continues to Ignore Parliament on TTIP' (21 March 2016), available at <<http://www.ciel.org/news/european-commission-continues-to-ignore-parliament-on-ttip/>>.

⁵⁴ See J. Romm, 'Methane Leaks Erase Climate Benefit Of Fracked Gas, Countless Studies Find', *ClimateProgress* (17 February 2016), available at <<http://thinkprogress.org/climate/2016/02/17/3750240/methane-leaks-erase-climate-fracked-gas/>>.

⁵⁵ Exceptions include US states Vermont and New York that banned fracking in 2012 and 2014 respectively.

⁵⁶ See W. Th. Douma, 'Enige Europeesrechtelijke aspecten van schaliegaswinning', 1 *Nederlands Tijdschrift voor Europees Recht* 2014, 44–51, in which the argument is made that existing EU secondary law shows several gaps that mere recommendations can not solve.

⁵⁷ See J. Crisp, 'Commission gives "green light" to fracked gas imports', *EurActiv* (17 February 2016), available at <<http://www.euractiv.com/section/climate-environment/news/commission-gives-green-light-to-fracked-gas-imports/>>.

Secondly, US companies with experience in fracking are ready to start up the exploration of European shale gas reserves. The EU, for the time being, has decided that existing European environmental law⁵⁸ norms sufficiently cover fracking, so that the introduction of new EU norms is not necessary. Instead, mere recommendations were issued that *inter alia* serve as a means of reminding the Member States of the correct way of interpreting these existing rules in such a way that shale gas is indeed covered, while promising to check whether this leads to the desired results and if not, proposing EU legislation after all.⁵⁹ Thus, it is quite possible that an EU Member State or the EU itself might allow for shale gas drilling at first, but impose restrictions or even a ban on drilling in certain areas (for instance in the vicinity of drinking water sources) at a later stage and / or decide to revoke licences. Hence, the stage is set for disputes that could arise under a future TTIP. Where shale gas is concerned, it can thus be presumed that TTIP could very well bring about a regulatory freeze effect out of fear of being confronted with claims similar to the ongoing dispute under the NAFTA that can serve as an example in this respect.

The dispute between the US based mother company Lone Pine⁶⁰ and Canada concerns the Government of Quebec's 'arbitrary, capricious, and illegal revocation of the Enterprise's valuable right to mine for oil and gas under the St. Lawrence River', in violation of NAFTA according to Lone Pine. The Enterprise is the Canadian daughter of Lone Pine. The company claims that Quebec decided to impose a moratorium on the drilling for shale gas on its territory, 'without due process, without compensation, and with no cognizable public purpose' and in violation of the obligation to ensure 'fair and equitable treatment'.⁶¹ Quebec's moratorium meant that Lone Pine's daughter company's permits for drilling were revoked. Lone Pine claims to be entitled to compensation for damages of up to 250 million US \$. Hearings are scheduled to take place in September 2016.

Another NAFTA example concerns TransCanada's recent claim against US President Obama's veto over the Keystone XL pipeline intended to transport tar sands oil from Canada to the US. Notably because of its production process, tar sands oil emits 23 percent more CO₂ than regular oil.⁶² The Presidential

⁵⁸ Such as the directives on Environmental Impact Assessment and on water protection, and REACH where chemicals are concerned.

⁵⁹ Commission Recommendation (22 January 2014) 'on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing' (2014/70/EU), OJ [2014] L 39/79. Note that this was decided by the (previous) European Commission, with the support of European Parliament and several Member States that had warned that they were not willing to accept any more 'red tape' standing in their way of exploring shale gas. Notably, the UK's prime minister had been vocal on the latter point.

⁶⁰ Lone Pine Resources Inc. is a corporation organised under the laws of the State of Delaware in the United States of America. It put the claim forward on behalf of its wholly owned subsidiary, the Enterprise – a corporation organised under the law of the Province of Alberta, Canada. While the Canadian daughter company was not in a position to invoke NAFTA, the US based mother company could do so.

⁶¹ Available at <<http://www.italaw.com/sites/default/files/case-documents/italaw1596.pdf>>.

⁶² A.R. Brandt, 'Upstream greenhouse gas (GHG) emissions from Canadian oil sands as a feedstock for European refineries' peer reviewed study for the European Commission (Stanford,

veto was intended to stress the Administration's leadership on climate change and intention to move towards renewable energy. The company claims that Obama's veto of the bipartisan bill, that had already been approved by both houses of Congress, was arbitrary and unjustified and thus forms a violation of NAFTA. 'Environmental activists [...] turned opposition to the Keystone XL Pipeline into a litmus test for politicians – including U.S. President Barack Obama – to prove their environmental credentials. The activists' strategy succeeded,' TransCanada stated in its filings. The company seeks to recover costs and damages that it claims to be suffering, amounting to over 15 billion US \$ (some 14 billion Euro).⁶³

It needs to be noted that both disputes have not been decided yet, and hence that the companies might see their claims dismissed, or awards being much lower than demanded. What the disputes⁶⁴ do illustrate is that introducing ISDS into the TTIP (and CETA) carries with it potential claims such as the ones described in these examples. The mere prospect of such huge claims could very well have a regulatory freeze effect.

It can be added that one of the unconventional energy sources discussed above might already have brought about the freezing of EU plans. This concerns the plan to take the higher carbon intensity of tar sands oil into account, and to dissuade the use of this type of 'dirty oil' under the EU Fuel Quality Directive (FQD). These plans were probably put on hold under the influence of arguments put forward from the side of Canada and the United States.⁶⁵ What is certain is that the phasing out of carbon-intensive fossil fuels and the transition towards

2011), available at <https://circabc.europa.eu/sd/d/06a92b8d-08ca-43a6-bd22-9fb61317826f/Brandt_Oil_Sands_Post_Peer_Review_Final.pdf>. It remains to be seen whether the fact that the production process is one of the reasons why tar sands oil are opposed to (rather than the characteristics of the product itself) will influence the outcome of the arbitration.

⁶³ TransCan, 'TransCanada Commences Legal Actions Following Keystone XL Denial', Press Release (January 2016), available at <<http://worldtradelaw.typepad.com/ielpblog/2016/01/transcanada-files-a-nafta-isds-claim.html>>.

⁶⁴ An example in the area of public health is the Asian arm of tobacco group Philip Morris suing the Australian government for introducing plain white cigarette packaging at the end of 2011. Philip Morris claims the measure constitutes an expropriation of its Australian investments in violation of the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments (available at <<http://www.austlii.edu.au/au/other/dfat/treaties/1993/30.html>>), that it forms an unreasonable and discriminatory measure, and that investments have been deprived of full protection and security. In December 2015, the arbitral tribunal issued the decision that it had no jurisdiction to hear Philip Morris Asia's claim. Meanwhile, several countries instigated WTO claims against the Australian measure. See <<https://www.ag.gov.au/tobaccoplainpackaging>>.

⁶⁵ See N. Urbancic, 'Lessons learned from an eight-year battle for cleaner fuels', *EurActiv* (9 January 2015), available at <<http://www.euractiv.com/section/transport/opinion/lessons-learned-from-an-eight-year-battle-for-cleaner-fuels/>>; F. Flues, 'Dirty deals. How trade talks threaten to undermine EU climate policies and bring tar sands to Europe', *Transport and Environment* (July 2014), available at <http://www.transportenvironment.org/sites/te/files/publications/foee-fqd-trade-ttip-170714_0.pdf>; M. Dearn, 'EU-US trade deal will unleash oil sands and fatally undermine climate efforts', *The Guardian* (27 November 2015), available at <<http://www.theguardian.com/global-development/2015/nov/27/oil-sands-transatlantic-trade-and-investment-partnership-climate-talks-cop21-paris>>; and US Trade Representative M. Froman (lead TTIP negotiator for the US) who stated at a hearing on 18 July 2013 that he had raised his concerns regarding the EU's oil sands plans during TTIP meetings, and pressed the Commission to take the views of

renewable energy sources is not served by the manner in which the EU decided to alter its original plans with the FQD.

3.3. Need for ISDS between EU & US?

Having focused on some disputes and environmental aspects of TTIP, and on the potential regulatory freeze effects the agreement allegedly has, a couple of further remarks need to be made on ISDS. Traditionally, it is included in investment treaties between developed and developing countries. The tradition dates back to 1959, when ISDS provisions were included in a treaty concluded between Germany and Pakistan for the first time. Host states that have a dispute with foreign investors are required to outsource the resolution of the case to arbiters. In this way, rule of law challenges (like biased or corrupt judges) in the host states' judicial systems can be circumvented. Given the state of the legal system in large parts of the world (not limiting ourselves to developing countries) this makes sense. Which begs the question: do we need to include ISDS in the TTIP? The US and the EU legal systems are among the most advanced systems of the world. Couldn't we do without ISDS then?

According to Joseph Weiler, investors are right in being scared by the legal systems on the other side of the Atlantic.⁶⁶ Bronckers also forwards the argument that we cannot expect the US to rely on EU domestic courts. Interestingly enough, he refers to Germany in this respect. Foreign investors in that country do not have the same legal protection as domestic investors, he states⁶⁷ – referring to an article by Reinhard Quick. In his turn, that author refers to Stephan Schill's blog⁶⁸ where it is argued that the German constitution (Grundgesetz, GG) stands in the way of foreign investors invoking that constitution and addressing the German constitutional court (Bundesverfassungsgericht, BVerfG).

The provision in question, Article 19(3) GG, states that the basic rights 'shall also apply to domestic artificial persons to the extent that the nature of such rights permits.'⁶⁹ Some remarks seem at place here. First of all, it can be noted that the Bundesverfassungsgericht has already allowed legal persons from

U.S. refiners under consideration when finalising the FQD amendments, available at <<http://big.assets.huffingtonpost.com/FromanWaysandMeansResponse.pdf>>.

⁶⁶ J. Weiler, 'European Hypocrisy: TTIP and ISDS', *EJIL:Talk! Blog entry* (21 January 2015), available at <<http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/>>.

⁶⁷ M. Bronckers, 'Is Investor-State Dispute Settlement (ISDS) superior to litigation before domestic courts? An EU view on Bilateral Trade Agreements', 18 *Journal of International Economic Law* 2015, 655–677, at 658.

⁶⁸ S. Schill, 'Internationaler Investitionsschutz und Verfassungsrecht', *Verfassungsblog* (14 Mai 2014), available at <<http://verfassungsblog.de/internationaler-investitionsschutz-und-verfassungsrecht/>>.

⁶⁹ Basic Law for the Federal Republic of Germany, translated by Professor Christian Tomuschat and Professor D.P. Currie, as revised, available at <http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0101>. The term 'domestic' is explained in such a manner that all companies whose centre of activities is in Germany can bring a claim, independent from their ties to a foreign based parent company. See Epping/Hillgruber, GG. Art. 19, in *Beck'scher Online-Kommentar Grundgesetz*, 27. edition (1 December 2015).

other EU Member States to invoke the same protection as German companies.⁷⁰ In itself, that might not help US companies (although a US subsidiary active in Germany itself would probably qualify as a domestic artificial person under the German constitution), but there might actually be another way in which exactly US legal persons could still successfully bring a claim under the German constitution: the 1956 U.S.-FRG Treaty of Friendship, Commerce and Navigation,⁷¹ which affords U.S. investors national treatment in Article V. The same provision also specifies that neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital which they have supplied, and prescribes that the taking of property is only possible for the public benefit, provided that just compensation is paid. The next Article VI makes clear that 'nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defence of their rights.'⁷² Hence, from this treaty it looks like U.S. investors should have no problems to bring their cases, even to the German Constitutional Court.

Last but not least, the US Department of State itself has reported that there are no legal challenges for US companies operating in Germany. 'The German legal, regulatory and accounting systems can be complex, but are transparent and consistent with international norms. Businesses enjoy considerable freedom within a well regulated environment. Investors are treated equally when it comes to investment incentives, establishment, and protection of real and intellectual property.'⁷³

In sum – it does not seem certain that US companies actually have the kind of problems with German law that were identified by the authors cited above. Of course, there might be challenges in other EU Member States, for instance in the ones that joined recently – even when the German Association of Judges recently underlined that the notion that EU Member States' courts could not provide effective legal protection to foreign investors lacks factual findings.⁷⁴ Challenges might also exist in some U.S. states, as the Loewen dispute indi-

⁷⁰ BVerfG, Beschluss des Ersten Senats vom 19. Juli 2011, – 1 BvR 1916/09 – Rn. (1–100), available at <http://www.bverfg.de/e/ers20110719_1bvr191609.html>.

⁷¹ BGB1.1956 II, S. 488.

⁷² It can be added that a treaty that awards the right to be treated equal to Germans implies that this would include the right to bring forward claims regarding violation of German constitutional rights. See K. Doebling, 'Die Staatsrechtliche Stellung der Ausländer in der Bundesrepublik Deutschland', *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, (Berlin/New York: 1974), available at <<http://www.degruyter.com/viewbooktoc/product/169189>>, at 15.

⁷³ US Department of State, '2014 Investment Climate Statement' (June 2014), available at <<http://www.state.gov/documents/organization/226815.pdf>>, at 1.

⁷⁴ Deutscher Richterbund, 'Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015', Stellungnahme Nr. 4/16 (February 2016), available at <http://www.dr.b.de/cms/fileadmin/docs/Stellungnahmen/2016/DRB_160201_Stn_Nr_04_Europaeisches_Investitionsgericht.pdf>, at 1.

ates.⁷⁵ But even if it were to be the case, could this not be regarded as a competitive disadvantage for these countries and U.S. states, in the sense that well-informed investors would shy away from investing their money there?

4. CONCLUDING REMARKS

TTIP could bring about advantages in the area of growth and jobs, but it should also bring about advantages in the area of protection of the environment and promotion of sustainable development. This is possible if the treaty would ensure that 'the only way is up' where standards differ and takes care of a number of specific issues. It was explained that from the point of view of integrating environmental concerns, in spite of the increased transparency, the manner in which TTIP negotiations are carried out does not convince. Notably, the considerable delay in producing the Trade Sustainability Impact Assessment of TTIP is of such a magnitude that in all likelihood, it will not be ready well in advance of the end of the negotiations. That means that its recommendations cannot be used by the negotiators in a meaningful manner any more, and discussed with stakeholders, contrary to the Commission's internal rules on carrying out Trade SIAs and European Parliament's recommendations. As those internal rules operationalise the integration duty of Article 11 TFEU, it was argued that this course of (in)action can be labelled a violation of that provision.

When turning to some examples of issues where concerns about environmental and consumer protection effects of TTIP have been raised, it was set out that there are several issues that need careful consideration in order to alleviate these concerns. In the field of chemicals, it needs to be ensured that no 'race to the bottom' will occur, and that the EU will be able to follow a precautionary approach in cases where risks are identified but full scientific evidence is not (yet) there, without being hindered unreasonably by cost/benefits analysis demands. This should be warranted throughout TTIP, including where food safety and human health are concerned. U.S. trade representative Michael Froman has said that the U.S. 'is not trying to force anybody to eat anything, but we do feel like the decision as to what is safe should be made by science.' The EU should stay firm on this point and insist that following a precautionary approach⁷⁶ will stay possible. The March 2016 EU proposal on regulatory cooperation contains a slightly improved reference to principles laid down in the TFEU compared to a previous version, but fails to actually mention the precautionary principle.

As for unconventional fuels like tar sands oil, it was set out that the EU seems to have shied away from taking the higher carbon intensity of tar sands oil into account, and from dissuading the use of this type of 'dirty oil' under the EU Fuel Quality Directive (FQD). US and Canadian pressure is suspected to have been

⁷⁵ Available at <<http://www.state.gov/documents/organization/22094.pdf>>.

⁷⁶ While observing conditions like the ones set out in Communication (2000)1 on the precautionary principle.

among the reasons for the EU to abandon such plans. Where shale gas, another unconventional fuel, is concerned, it was argued that TTIP could very well bring about a regulatory freeze (chill) effect out of fear of being confronted with claims similar to the ongoing Lone Pine dispute under the NAFTA. Considering the Paris Agreement that both the EU and the US have just agreed to, the closer relationship between the two parties should bring about positive climate effects rather than more greenhouse gas emissions.

Finally, where adjudication is concerned, it was explained that a separate investment protection adjudication system might not be warranted between two developed legal systems such as the EU and the US. Furthermore, it was demonstrated that some of the arguments about the German law system discriminating against US companies might be exaggerated, and definitely not reflected in a recent official US report which admits that the German law system is complex, but well regulated, and explains that investors are treated equally when it comes to the protection of their property.

ON THE FUNCTIONS, AUTHORITY AND LEGITIMACY OF INVESTOR-STATE ARBITRATION: THE CASE OF THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP)*

Ingo Venzke

1. INTRODUCTION

With its proposal for an international Investment Court System (ICS) of fall 2015, the European Commission purports to react to critiques of settling investor-state disputes through *ad hoc* arbitration. The proposal forms part of the negotiations between the European Union (EU) and the United States on the Transatlantic Trade and Investment Partnership (TTIP), but the Commission's ambitions and repercussions are wider. EU Commissioner Cecilia Malmström makes clear that the proposal 'sets out a series of far-reaching reforms'¹ that shall not be confined to the context of TTIP. Rather, according to Malmström, 'the EU is committed to leading the way globally.'²

Things are moving quickly for the EU. After a concluding a meeting on the EU-Vietnam Free Trade Agreement (FTA), Commissioner Malmström already announced in December 2015 that 'Vietnam has agreed to the EU's new approach to investment protection with a permanent tribunal rather than ad-hoc arbitration panels.'³ Repercussions are even felt in the context of the Comprehensive Economic and Trade Agreement (CETA) that the EU has negotiated with Canada.⁴ While those negotiations were concluded in August 2014, the EU has now reportedly tested the waters with Canada's new government to reconsider the mechanism of investor-state dispute settlement, trying to integrate more elements of the ICS that it has proposed for TTIP.⁵

* The present contribution further develops my contribution to the expert roundtable on 'Tiptoeing to the TTIP: What Kind of Agreement for What Kind of Partnership?', held at the Asser Institute on 18 September 2015. Parts of this contribution have appeared as a new postscript to the paperback edition of Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press 2016). I thank Armin von Bogdandy as well as Michael Ioannidis for their helpful comments.

¹ C. Malmström, 'Proposing an Investment Court System', European Commission Blog Post (16 September 2015), available at <https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en>.

² *ibid.*

³ C. Malmström, 'Done deal with Vietnam', European Commission Blog Post (2 December 2015), available at <https://ec.europa.eu/commission/2014-2019/malmstrom/blog/done-deal-vietnam_en>.

⁴ For an overview of the negotiations as well as the full text of the agreement, see <<http://ec.europa.eu/trade/policy/in-focus/ceta/>>.

⁵ J. McGregor, 'EU quietly asks Canada to rework trade deal's thorny investment clause', *Canadian Broadcasting Corporation* (21 January 2016), available at <<http://www.cbc.ca/news/politics/canada-europe-trade-isds-ceta-1.3412943>>.

There are many dimensions to the existing critiques and to these developments and ambitions. The proposal that moves away from *ad hoc* arbitration towards a permanent investment court has been met with reluctance, if not criticism, from the side of the EU's negotiating partners as well as from within the EU. It is certainly not a given that the EU *can* lead the way globally. While that is a matter of the constellation of interests and power politics, it is also a matter of the normative appeal and of the persuasiveness of its proposal. The present contribution takes a step back from the immediate details of the negotiations and the politics of the European Commission's stance on investor-state arbitration. Building on extensive research on the functions, authority, and legitimacy of international adjudication over the past five years, the present contribution aims at clarifying the phenomenon of adjudication in the context of investor-state disputes. Together with Armin von Bogdandy, I have developed a public law theory of international adjudication that provides the basis for analysis and normative assessment.⁶ The public law theory of international adjudication has dealt with investor-state arbitration, but also with a number of other significant international courts and tribunals. Upon closer scrutiny, they are certainly very different. The present contribution will attune our theory further to the specific questions of adjudicating investor-state disputes.

The main proposition of our public law theory of international adjudication is that international courts and tribunals should be understood as multifunctional actors who exercise public authority and therefore require democratic legitimacy. They are multifunctional actors because they do much more than settling disputes in concrete cases. They contribute to the stabilization and development of the law, they make law through their decisions, and they review as well as legitimize the authority exercised by other actors on different levels of government – be it decisions of international bodies or, above all, measures of domestic administration. They exercise public authority because they have the capacity to affect the freedom of others in pursuance of a common interest.⁷ They require democratic legitimacy just like any other exercise of public authority on the domestic, supranational or international level of governance. The *modus* of democratic legitimacy differs depending not only on the level of governance but also on the kind of actor that is involved.

This analytical and normative framework provides the basis for clarifying and assessing arguments in the debate about the legitimacy of different mechanisms for settling investor-state disputes, especially of a permanent investment court when compared to *ad hoc* arbitration. The present article argues that *if* a choice is made in favour of an international mechanism to settle investor-state

⁶ A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press 2014).

⁷ For the definition of international public authority see *ibid.*, chapter 3 section A 2 a; for a slightly different framing definition of international public authority, see A. von Bogdandy, P. Dann, and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* 2008, 1375–1400; A. von Bogdandy, M. Goldmann, and I. Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (18 September 2015), available at <<http://ssrn.com/abstract=2662391>>.

disputes, then the ICS, together with other features of TTIP, in principle provides a welcome response to some of the more egregious shortcomings of investor-state arbitration. It is in particular remarkable that the architects of TTIP as well as the critics of this edifice seem to share a core point – the demand, namely, that the law be spoken in the name of the peoples and citizens.

The analysis present here stands under the significant caveat, however, that it is not at all sure that foreign investors should be granted the possibility of directly bringing claims before an international court or tribunal at all – no matter which shape or form this judicial mechanism would ultimately take. The debate about the features of the judicial mechanism leaves largely untouched the concerns about which standard of protection investors should enjoy or which remedies they ought to be able to claim. Furthermore, the debate has difficulties in doing justice to the more fundamental critiques of international (investment) law's Western origins and of its obvious ties to the interests of capital.⁸ Notwithstanding the fact that according to some such critiques there should better be no ISDS mechanism to begin with, also fundamental critiques can and should inform the more targeted debates about the features of ISDS mechanisms. Even if one were to suggest that international mechanisms of investment protection are inherently flawed and best undone, the debate on the right features of ISDS should not be left to those voices which see its partial virtues alone.

The present contribution develops its argument as follows: First, it presents TTIP as an example of international public authority's increasing contestation and politicization (Section 2). Second, it clarifies judicial functions and judicial authority in the context of investor-state dispute settlement. What is really the bone of contention? How should we make sense of the practice of adjudication? (Section 3) The contribution then zooms in on two outstanding new features of the current draft for TTIP: the appellate mechanism and opportunities for political-legislative input (Section 4). Against the background of the past experience with adjudication trade disputes in the World Trade Organization, it argues that appellate review adds an accelerating dynamic to judicial lawmaking and is likely to increase not only legal certainty, but also judicial authority. It should thus go hand in hand with increased opportunities for renewed input from political-legislative processes. In a fourth step, and still strongly guided by the analytical and normative framework of our public law theory of international adjudication, the contribution will focus on three specific sets of features of the proposed Investment Court System: the panelists and judges, the judicial process, and the making of the decisions (Section 5). Those are the three main pathways for supporting the democratic legitimacy of international adjudication. Special attention will be paid to the way in which the international judicial decision relates to the domestic level of governance. Section 6 concludes with an

⁸ Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press 2005) 211–216; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press 2011), ch. 3; Matthias Kumm, 'An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege', 4 *ESIL Reflections* 2015.

emphasis on the core belief in public institutions – a belief that the project of TTIP as well as its critics in fact share.

2. TTIP AS AN EXAMPLE OF THE INCREASED POLITICIZATION OF INTERNATIONAL PUBLIC AUTHORITY

Investor-state arbitration has become one of the primary examples of an exercise of international public authority whose legitimacy is increasingly questioned in an emerging public sphere. At least in Europe, this public sphere has clearly become transnational due to TTIP-negotiations. It is the prospect of the exercise of authority on the international level – both in the form of adjudication and of regulation – that is of main concern. The two focal points of debate and critique are the mechanism of the settlement of investor-state disputes, on the one hand, and the reach of the Regulatory Council, on the other. The fear is deregulation and the imposition of standards that are at odds with the outcome of parliamentary decision-making – be that through the backdoor of arbitral tribunals or through (de)regulatory cooperation.⁹ Other concerns connect to the veritable business of arbitration and the immense costs that it imposes. Whatever the specific concerns may be, the politicization that TTIP negotiations have sparked is remarkable. It even surpasses the attention that the World Trade Organization received during the Ministerial Council meetings in Seattle in 1999. While earlier instances of vocal contestation mostly went hand in hand with a more general criticism of globalization, it is with regard to TTIP that public opinion and parts of civil society have entered into a more specific and detailed dialogue with policy-makers.

The starting point for the EU's presence and practice in this matter was the member states' conferral to the EU of exclusive competence in the field of 'foreign direct investment' as part of the EU's common commercial policy (Article 207(1) TFEU). As a new actor in the field, and with a mandate from all member states, the European Commission started a series of negotiations with countries such as Canada, Singapore, China, Vietnam and, notably, the United States. During those negotiations – initially led by then-Commissioner for Trade Karel De Gucht – the Commission purported to react to past experiences of investor-state arbitration, to some criticism, and to some lessons learned. When the negotiations for the Comprehensive Economic and Trade Agreement (CETA) with Canada were closed in August 2014, the Commission hailed the agreement's chapter on investor-state dispute settlement (ISDS) as 'a significant break with the past' and as 'the most progressive system to date [...] for Investor-

⁹ See, e.g., the critique presented on <www.stop-ttip.org>. For a summary overview of this criticism see also J. von Bernstorff, 'Streitigkeiten über gemeinwohlorientierte Regulierung von Investoren gehören im demokratischen Rechtsstaat vor die nationalen Gerichte', *Verfassungsblog* (VerfBlog) post (15 May 2014), available at <<http://verfassungsblog.de/streitigkeiten-ueber-gemeinwohlorientierte-regulierung-von-investoren-gehoren-im-demokratischen-rechtsstaat-vor-die-nationalen-gerichte/>>.

to-State Dispute Settlement'.¹⁰ But as was reported recently, the Commission has approached the new Canadian government in order to reconsider the mechanism of dispute settlement yet again.¹¹

During the TTIP negotiations with the United States, increasing public attention prompted the European Commission to suspend the negotiations on investor-state arbitration and to pause them in order to hold a public consultation.¹² The Commission presented the CETA chapter on ISDS as a point of reference and asked for input on twelve key issues surrounding substantive investment protection and the mechanism of ISDS. The question was notably how to design the investment chapter, not whether to include it or whether to have ISDS in the first place. The Commission received close to 150.000 online contributions, most of which went beyond the narrow scope of the consultations and voiced broader concerns about TTIP or about the net merits of ISDS.¹³

Commissioner De Gucht's successor, Cecilia Malmström, went on record to express her continued support for an investment chapter as part of TTIP, but also to announce proposals for further changes, especially with regard to ISDS. She noted prominently in May 2015 that

I have heard many concerns about dispute settlement between investors and states (ISDS) and the rules included in many of the existing agreements. To a large extent, I share these concerns, especially when it comes to the sometimes unclear definitions that leave too much room for interpretation and possible abuse, and the lack of transparency. [...] My assessment of the traditional ISDS system has been clear – it is not fit for purpose in the 21st century.¹⁴

Among other things, she proposed to move toward an international investment court system *in lieu of ad hoc* arbitration.¹⁵ This proposal is now spelled out in

¹⁰ European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)', Factsheet (26 September 2014), available at <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf>.

¹¹ See J. McGregor, *supra* note 5.

¹² F. Hoffmeister, 'Wider die German Angst—Ein Plädoyer für die transatlantische Handels- und Investitionspartnerschaft (TTIP)' 53 *Archiv des Völkerrechts* 2015, at 35, 50, with reference to K. De Gucht 'The Transatlantic Trade and Investment Partnership – Where Do We Stand on the Hottest Topics?' (22 January 2014), available at <http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152075.pdf>.

¹³ For the summary of the submissions see European Commission, 'Commission Staff Working Document, Report, Online Public Consultations on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)', SWD (2015) 3 final, (13 January 2015), available at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>; for the full statistical report see European Commission, 'Preliminary Report (Statistical Overview): Online Public Consultation on Investment Protection and Investor-to-state Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' (18 July 2014), available at <http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf>.

¹⁴ C. Malmström, 'Investments in TTIP and beyond – towards an International Investment Court', European Commission Blog Post (5 May 2015), available at <http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en>.

¹⁵ *ibid.*

a new draft text of the investment chapter, which the Commission presented to the US in November 2015.¹⁶ This proposal will provide the main basis for the following application of our public law theory of international adjudication.

3. JUDICIAL FUNCTIONS AND JUDICIAL AUTHORITY

More so than other international courts, investor-state arbitral tribunals have been understood as institutions of a specific regime, that of investment protection. They have thrived on the functional logic of that regime and have built their sociological legitimacy narrowly on the economic rationale for foreign direct investment – above all economic development. At the same time, many observers have increasingly developed a multifunctional understanding of international adjudication. There is ever more awareness that, beyond settling specific disputes, investment tribunals participate in the making of investment law. Furthermore, they control and legitimize the authority exercised by other actors, especially domestic administrations and courts.¹⁷

What is more, the understanding of investor-state arbitral tribunals and institutions of the specific investment law regime remains troubled by the weakness of its functionalism – i.e., the effective pursuit of regime interests. This weakness is not only exposed when the underlying economic rationale is called into question but also when normative conflicts between the predominant regime interests and other public policy objectives become increasingly tangible. In its ambition to renew the field of international investment law, the European Commission thus continues to identify the main challenge as ‘achiev[ing] the right balance between protecting investors and safeguarding the EU’s and Member States’ right and ability to regulate in the public interest.’¹⁸ The goal of economic development by investment protection does not tell how to strike such a balance either when negotiating a treaty or when applying it down the line. It requires, after all, being balanced with something else.

Together with Armin von Bogdandy I have developed an account of international courts and tribunals as actors which exercise international public authority. We have placed this understanding against the background of other established basic conceptions of international courts and tribunals. International courts and tribunals, on our account, are not just instruments in the hands of disputing parties whose activity is entirely justified by party consent, or organs of the international community which protect its core values. Nor are they best understood as *institutions* of specific legal regimes furthering regime interests. They should be considered as *actors* who exercise international public authority,

¹⁶ European Commission, ‘Draft Text: Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce: Chapter II Investment’ (TTIP Draft), available at <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf>.

¹⁷ See A. von Bogdandy and I. Venzke, *supra* note 6, ch. 2 section C 3.

¹⁸ The Commission uses this formulation repeatedly, for example European Commission, ‘Online Public Consultations on Investment Protection and Investor-to-state Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’, Staff Working Document SWD(2015) 3 final (January 2015), at 2, 25.

which is to say that they enjoy the capacity, based on legal acts, to impact others in the exercise of their freedom, be it legally, or only *de facto*.¹⁹ It seems highly likely that the practice of adjudication as it will unfold under the Commission's draft will have that capacity. It can award monetary damages, applicable interest, or the restitution of property (Article 28 TTIP Draft). Its enforcement mechanism is as robust as that of international investment law generally. An arbitral award shall be final, 'not subject to appeal, review, set aside, annulment or any other remedy' (Article 30(1) TTIP Draft), and it shall be enforced 'as if it were a final judgment of a court [within either party]' (Article 30(2) TTIP Draft). In short, those awards will come with effective obligations that matter. They will amount to exercises of international public authority

4. APPELLATE REVIEW AND POLITICAL-LEGISLATIVE LAWMAKING

While judicial authority under TTIP is thus similar to the general practice of investor-state dispute settlement, there are also some important differences. I wish to draw attention to two outstanding features before highlighting and assessing further differences from the perspective of a public law theory of international adjudication: appellate review and political-legislative lawmaking.

The Commission's draft negotiation text proposes that an 'Appeals Tribunal' be established. That would be a stark change compared to the investment law regime generally. Under the ICSID-Convention, awards may only be challenged before an Annulment Committee on a very limited number of grounds. Those grounds notably do not provide a possibility for arguing that the tribunal erred in its legal reasoning, unless that was found to lead to a manifest excess of power (Article 52(1)(b) ICSID-Convention) or a failure to state the reasons on which the award is based (Article 52(1)(e) ICSID-Convention).²⁰ If the investment tribunal was constituted under arbitral rules other than ICSID, the New York Convention governs the question under which conditions the award may be set aside or enforcement may be refused (Article V New York Convention). In neither case is there an opportunity for appeal.

What to expect from the possibility of appellate review under the TTIP and what to make of it? Appellate review not only controls and contributes to the legitimization of judicial authority, it also adds a new layer of judicial authority. What is more, appellate review increases judicial authority because it forcefully stabilizes and develops normative expectations. Especially in light of the experience with the Appellate Body of the World Trade Organization (WTO), but also with reference to appellate review in other fields, such as international criminal law and in human rights law, appellate review is likely to usher in a new dynamic of judicial lawmaking. When state delegates discussed the establishment of

¹⁹ See von A. Bogdandy and I. Venzke *supra* note 6, ch. 3 section A 2 a; for a slightly different framing definition of international public authority, see von A. Bogdandy, M. Goldmann, and I. Venzke, *supra* note 7.

²⁰ C. Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope', 10 *The Law and Practice of International Courts and Tribunals* 2011, 211–225.

the WTO Appellate Body in the final stages of the negotiations leading to the WTO and its Dispute Settlement Understanding (DSU), many of them expected appellate review to be used only sporadically in order to correct egregious mistakes.²¹ Reality turned out differently. Last year, 2014, all but two of the 15 adopted panel reports were appealed. That is 87%. The overall average since 1996 lies lower but still at 67%.²² Notably, even parties that had won but still disagreed with the panel's reasoning appealed the first instance panel reports because they did not want to leave undesired precedent uncontested.²³

The dynamics of judicial lawmaking through precedents is likely to accelerate in a system with appellate review, allowing for a check on the authority of the first instance but adding to the overall judicial authority. In the WTO, the Appellate Body has famously argued that earlier reports create legitimate expectations among members and should therefore be taken into account.²⁴ It added to the weight of its own reports by arguing that a panel's departure 'from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues [...] has serious implications for the proper functioning of the WTO dispute settlement system.'²⁵ Appellate Body reports thus become practically inescapable reference-points for litigants, judges, and participants of the legal discourse.²⁶ The experience of regimes with appellate review points in the direction of a significantly different, stronger dynamic of judicial lawmaking. Some investment tribunals have already suggested that earlier awards create legitimate expectations and thereby justified their reference to those awards or even argued for a duty to refer to them and to thereby 'contribute to the harmonious development of the law.'²⁷ But in the still flat, decentralized system of investment arbitration, arbitrators are much more at ease to ignore or to sideline earlier decisions. This comes at the cost of certainty and consistency while diminishing the contribution of arbitral awards to the creation of general international investment law. Although appellate review in principle constitutes a welcome innovation, its further assessment will depend on how it compares to, and is embedded within, political-legislative mechanisms.

²¹ P. van den Bossche, 'From Afterthought to Centrepiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System' in G. Sacerdoti *et al.* (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge: Cambridge University Press 2006), at 289.

²² For those current statistics see <http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm>.

²³ See A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4 section B 3.

²⁴ *Japan: Taxes on Alcoholic Beverages – Appellate Body Report* (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 14.

²⁵ *United States: Final Anti-Dumping Measures on Stainless Steel from Mexico – Appellate Body Report* (30 April 2008) WT/DS344/AB/R, para 162.

²⁶ A. von Bogdandy and I. Venzke, 'The Spell of Precedents: Lawmaking by International Courts and Tribunals', in C.P. R. Romano *et al.* (eds.), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press 2013), at 503; also see K.J. Pelc, 'The Politics of Precedent in International Law: A Social Network Application', 108 *American Political Science Review* 2011, 547–564.

²⁷ *Saipem SpA v. People's Republic of Bangladesh* (Decision on Jurisdiction and Recommendation of Provisional Measures) ICSID Case No ARB/05/07 (21 March 2007), para 90.

The second new feature of TTIP that I wish to highlight can be understood as a reaction to judicial lawmaking and to judicial authority in general: denser legal provisions and more opportunities for political-legislative input. The European Commission emphasizes how CETA and TTIP contain more detailed standards of protection. This notably includes the standard of fair and equitable treatment standard (FET), which generates particular uncertainty for the parties and accords the arbitrators broad discretion. It is now defined by a closed, enumerative list of elements which defines possible breaches (Article X.9 CETA and Article 3.2 TTIP Draft).²⁸ The treaty texts also react to past uncertainty and unwelcome past developments by defining in clearer detail the standards of indirect expropriation, of national treatment, and of most-favoured-nations treatment. While the new treaty texts certainly do not settle all possible doubts and will raise new questions of interpretation, it is also clear that TTIP structures in a more detailed fashion the normative space for all participants in the legal discourse, including litigants and arbitrators.

Very important is the accompanying political mechanism that allows for control of the interpretations of investment provisions by the dispute settlement mechanism. Like CETA, TTIP is planned to establish a Trade Committee that is charged, among other things, with the interpretation of the treaty.²⁹ In the words of the TTIP Draft:

Where serious concerns arise as regards matters of interpretation relating to [the Investment Protection or the Resolution of Investment Disputes and Investment Court System Section of this Agreement], the [...] Committee may adopt decisions interpreting those provisions. Any such interpretation shall be binding on the Tribunal and the Appeal Tribunal.

This institutional set-up follows the NAFTA Free Trade Commission (FTC) which has notably intervened in the past to react to the judicial treatment of the fair and equitable treatment (FET) standard.³⁰ Whereas earlier bilateral investment treaties (BITs) did not usually set up such a body, newer BITs increasingly do.³¹ Of course, treaty parties always could have reached an interpretative agreement even in the absence of any such treaty provision,³² but bodies such as the NAFTA FTC channel and facilitate those efforts. They further add to the

²⁸ The standard of indirect expropriation provides another notable example, see Art. 5 and Annex I.

²⁹ Art. X.27 CETA (consolidated version) published on 26 September 2014, available at <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf>; Art. 13(5) TTIP Draft ('Committee').

³⁰ NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001), available at <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng>>; see also A. Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' 104 *American Journal of International Law* 2010, at 179.

³¹ S.W. Schill and M. Jacob, 'Trends in International Investment Agreements, 2010–2011: The Increasing Complexity of International Investment Law', *Yearbook on International Investment Law & Policy* 2012, 141–79.

³² That is already a matter of treaty law and treaty interpretation, see especially Art. 31(3)(a) Vienna Convention on the Law of Treaties (VCLT): 'There shall be taken into account, together

authority of treaty parties' agreements conferring them binding force *vis-à-vis* the tribunal.³³ By way of comparison, Article IX of the WTO Agreement gives '[t]he Ministerial Conference and the General Council [...] the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements' to 'be taken by a three-fourths majority of the Members.' Even though this provision does not require a unanimous decision, the threshold has still been too high for the now 161 members³⁴ to ever act accordingly and to possibly react to judicial authority and judicial lawmaking.³⁵ In a bilateral setting of two parties with rather analogous interests such as in CETA or TTIP, such renewed political-legislative input may be more likely. The TTIP draft specifically invites parties to continuously develop the content of the FET standard political-legislative input (Article 3.3 TTIP Draft). It furthermore provides that tribunals 'shall accept, or after consultation with the disputing parties, may invite written or oral submissions on issues relating to the interpretation of this Agreement from the non-disputing Party' (Article 22.3 TTIP Draft). All this provides opportunities for increased political-legislative input. At the same time, it should be noted that political-legislative processes at the WTO remain largely paralyzed.

In sum, the establishment of the WTO Appellate Body has contributed to a new dynamic of judicial lawmaking that has further distanced the law from political-legislative processes, curing some problems of judicial authority, but adding new ones arising from the fact that the political-legislative processes continue to lag behind. In TTIP, this political-legislative process is at least mildly strengthened when compared to traditional BITs. Against the backdrop of this general new set-up, marked by appellate review and increased opportunities for inter-governmental co-operation, I now turn to a brief assessment of other elements of institutional innovation within TTIP from the perspective of a public law theory of international adjudication. I thereby stick to the three main pathways of democratic legitimacy: connecting to the judges, the judicial process, and the decision itself.³⁶

with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.

³³ Art. 31(3) VCLT indeed creates an obligation to take into account subsequent agreements ('shall'). But those agreements, being taken into account, are not necessarily determinative of the outcome. They are an element of the interpretative factor. An interpretation by a treaty body such as the FTC of which the treaty also says that it be binding on the tribunal ought to be determinative of the outcome.

³⁴ As of 26 April 2015, see <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

³⁵ See R. Howse, 'The Legitimacy of the World Trade Organization' in J.-M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo: United Nations University Press 2001) 355–407; A. von Bogdandy, 'Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship', 5 *Max Planck Yearbook of United Nations Law* 2001, 609–673; P.J. Kuijper, 'WTO Institutional Aspects' in D. L. Bethlehem *et al.* (eds.), *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press 2009), 79–128.

³⁶ A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4.

5. PATHWAYS OF DEMOCRATIC LEGITIMACY

5.1. The Judge

The European Commission has identified striking the right balance between investment protection and member states' regulatory autonomy as the key challenge – a challenge that treaty design has to meet. Next to the explicit, and as such rather novel, recognition of a right to regulate (Article 2 TTIP Draft), the Commission has tried to do so by more detailed standards of substantive investment protection.³⁷ The effect that this will have most crucially depends on those individuals who end up interpreting and applying the law. The European Commission submits that now 'a clear, closed text defines precisely the standard of treatment without leaving unwelcome discretion to arbitrators.'³⁸ While differences in the density of treaty provisions make a difference in the adjudication of disputes down the road, both legal theory and practice teach that varying – and oftentimes unpredicted – levels of discretion inevitably remain.³⁹ In turn, the composition of the bench continues to make a significant difference. Who decides?

The legitimacy of arbitrators and judges arises from the process of their appointment or election, their qualities and their actions.⁴⁰ In investment arbitration, the common procedure has been that each party appoints one arbitrator and presiding arbitrators is appointed either by agreement of the parties, agreement of the party-appointed arbitrators, or by an appointing authority in a process specified in the rules of arbitration.⁴¹ Of course the demand has always been that arbitrators act independently and impartially. While the interest in repeat appointment may have supported such demands,⁴² the ease with which individuals move between the roles of arbitrator and counsel, the relatively lax rules on conflicts of interest, as well as the interest in future appointments has been identified as problematic.⁴³

³⁷ For an earlier example see, e.g., Art. 268 Trade Agreement between the European Union and Colombia and Peru, signed 2012, available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=691>>. Also see M. Wagner, 'Regulatory Space in International Investment Law and International Trade Law', 36 (1) *UPenn Journal of International Law* 2014.

³⁸ European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)', *supra* note 10.

³⁹ See in detail, I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press 2012), 46–57.

⁴⁰ A. Von Bogdandy and I. Venzke, *supra* note 6, 158–171; see also, in agreement, E. De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge: Cambridge University Press 2014), 74–89.

⁴¹ See, e.g., Arts. 8–10 UNCITRAL Arbitration Rules; Arts. 37–38 ICSID Convention.

⁴² C.N. Brower and S.W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?', 9 *Chicago Journal of International Law* 2009, at 471.

⁴³ On those problems see J.D. Fry and J.I. Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes', 30 *Arbitration International* 2014, at 189; A. Reinisch and C. Knahr, 'Conflict of Interest in International Investment Arbitration' in A. Peters and L. Handschin (eds), *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge: Cambridge University Press 2012), at 103; A. Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', 107 *American Journal*

In the proposed ICS, it would now be the Trade Committee, composed of equal parts by representatives of the US and the EU, which appoints fifteen judges to the Tribunal of First Instance (Article 9(2) TTIP Draft). Investors play no part, at least not formally. One third of these judges come from the US, one third from EU member states, and one third from other countries. Furthermore, the disputing parties have no say regarding which three judges sit in any specific case. That decision is made by the President of the Tribunal, 'ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Judges to serve' (Article 9(7) TTIP Draft). All judges choose the President by lot among judges from third countries (Article 9(8) TTIP Draft). The permanent Appeal Tribunal, which counts a total of six members (Article 10 TTIP Draft), is composed in the same way.

The appointment process for both the Tribunal of First Instance and the Appellate Tribunal stands in stark contrast to traditional investment arbitration, where typically two of three arbitrators are appointed by the disputing parties and the third one either by them or by an appointing authority such as the Secretary General of the Permanent Court of Arbitration. Under normal BITs, the composition of the investment tribunal lies principally in the hands of the parties. While subject to exceptions and generally a matter of degree, the corresponding conception of arbitrators used to be more one of agents acting on behalf of the parties rather than of judges acting in a broader interest. This conception as well as the prevailing ethos is pushed to change within TTIP. In light of the courts' multifunctionality and in realization of their exercise of international public authority, it makes sense to not leave the appointment process in the hands of the parties alone. At the same time, the current draft leaves yet open the process by which members of the ICS would be nominated and then appointed by the Trade Committee. It should be borne in mind that the acclaimed success of the WTO Appellate Body at its inception was largely due to its composition and its relative distance to the group of trade lawyers and diplomats that were dominant under the GATT regime.

What is explicitly required from ICS judges is that they possess a 'demonstrated expertise in public international law' (Article 9(4) TTIP Draft) next to the requirement that the judges 'possess the qualifications required in their respective countries for appointment to judicial office', or else that they 'be jurists of recognized competence.' This reference to public international law, and notably not to commercial law, clearly places investment arbitration within that realm – as it should be. The TTIP provisions on the qualifications of judges do not make reference to something like a 'high moral character' (Article 2 ICJ Statute). However, what is most relevant to ensuring their impartiality and independence – and thus something like 'moral character' – is the avoidance of conflicts of interest. It is in this regard that the TTIP Draft makes a welcome leap forward and sets up strict rules. The whole of Article 11 of the TTIP Draft is dedicated

of International Law 2013, at 45, 87; J. Paine, 'The Project of System-Internal Reform in International Investment Law: An Appraisal', 6 *Journal of International Dispute Settlement* 2015, at 332.

to 'ethics' and, inter alia, precludes judges 'from acting as counsel in any pending or new investment protection dispute under this or any other agreement or domestic law.' A yet more detailed Code of Conduct is annexed (Annex II to the TTIP Draft). This is a significant improvement compared to the problems concerning the legitimization of traditional arbitral tribunals' exercise of public authority that arise from arbitrators' conflicts of interests.⁴⁴ At the same time, problems remain. The TTIP Draft does not seem to preclude members of the tribunals to continue to act as arbitrators in other, 'traditional' investor-state cases.⁴⁵ And it leaves unresolved the financial gains from accepting and continuing disputes, which creates incentives that might possibly question judges' impartiality.⁴⁶

5.2. The Process

In the Commission's proposal for an ICS, is it more or less likely that the judicial process contributes to the democratic legitimization of the exercise of international public authority through adjudication when compared to the system of arbitration as we know it from past practices? The public law of international adjudication stresses the importance of publicness, transparency, participation, and links with relevant publics.⁴⁷ The TTIP Draft provides that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules), which only entered into force on 1 April 2014, shall apply. Together with the Mauritius Convention on Transparency of December 2014,⁴⁸ the new UNCITRAL rules meet demands for transparency half-way. TTIP goes yet further in these rules' effort at ensuring the 'transparency and accessibility to the public of treaty-based investor-State arbitration'⁴⁹ by adding documents to the list of those that shall be made public (Article 18(2) TTIP Draft), including the request for consultations, notices and decisions on the challenge of judges, and 'all documents submitted to and issued by the Arbitral Tribunal'. Article 3 of the UNCITRAL Transparency Rules itself provides that, among other things, 'transcripts of hearings, where available,' shall be made public. The text of the

⁴⁴ On those problems see J.D. Fry and J.I. Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes' 30 *Arbitration International* 2014, at 189; A. Reinisch and C. Knahr, 'Conflict of Interest in International Investment Arbitration' in A. Peters and L. Handschin (eds.), *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge: Cambridge University Press 2012), at 103.

⁴⁵ Art. 11(1) TTIP Draft does not mention the word 'arbitrator' in the list of prohibited side activities. See also the critique in G. Van Harten, 'Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP', 12(4) *Osgoode Legal Studies Research Paper* No 16 (2016).

⁴⁶ See the critique of the Deutsche Richterbund, 'Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015', Nr 4/16, February 2016, available at <<http://www.drj.de>>.

⁴⁷ A. von Bogdandy and I. Venzke, *supra* note 6, 172–184.

⁴⁸ United Nations Convention on Transparency in Treaty-based Investor-State Arbitration adopted on 10 December 2014.

⁴⁹ Available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html>.

TTIP Draft does not itself say anything about the publicness of the hearings; proceedings would thus by default continue to follow the rules and the practice of either the ICSID or UNCITRAL regime.⁵⁰ The ICSID rules provide since 2006 that proceedings may be opened to the public unless one party objects.⁵¹ Article 6 of the UNCITRAL Transparency Rules stipulates that hearings shall be public unless either confidential information or the integrity of the arbitral process does not allow that.

Turning from transparency and publicness to possibilities of participation, Article 22 of the TTIP Draft contains a number of obligations and possibilities that allow the non-disputing treaty party (i.e., the private claimant's state of nationality) to be informed about the proceedings. The non-disputing party can also actively participate as the '[t]he Tribunal shall accept [its] written and oral submissions on issues relating to the interpretation of this Agreement' (Article 22(3) TTIP Draft). Third parties – be they natural or legal persons – may intervene if they have an interest in the result of the disputes (Article 23 TTIP Draft). This is in line with the new Articles 4 and 5 of the UNCITRAL Transparency Rules. Furthermore, both the UNCITRAL Transparency Rules as well as the ICSID Rules contain provisions on the role of *amici curiae*, but the issue is better left aside until an apparent error in the present TTIP Draft is resolved.⁵²

Are there other hooks in the judicial process that would contribute to publicness, transparency, and participation? The deliberations of the judges remain confidential, as is overwhelmingly the case.⁵³ At the same time, dissenting and separate opinions are possible. That corresponds to the practice of investment arbitration and is overall a beneficial feature as it has the potential of adding to the clarity of the award, to the possibilities of critique, and to the opportunities for change.⁵⁴

5.3. The Decision

The third pathway that we identified as contributing to the democratic legitimacy of the public authority exercised by international investment tribunals connects to the decision itself, especially to how it is justified and how it is placed within the broader institutional contexts across levels of governance.⁵⁵ TTIP clearly places the practice of investment arbitration within the field of public international

⁵⁰ We are bracketing the practical questions arising from the fact that the EU is not a party to ICSID and, as a supranational organization, cannot become so without further ado.

⁵¹ See A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4 section B 1 a.

⁵² Art. 23(5) TTIP Draft provides that 'the right of intervention conferred by this Article is without prejudice to the possibility for the Tribunal to accept amicus curiae briefs from third parties in accordance with Article 19'. Presumably there is thus a possibility for *amicus curiae* participation, but neither does Art. 19 TTIP Draft, which deals with 'interim decisions,' say anything about it. Nor is there another article that deals with *amicus curiae* participation. For the provisions on *amicus curiae* see Art. 4 UNCITRAL Transparency Rules; Rule 37 Section 2 ICSID Rules of Procedure for Arbitration Proceedings.

⁵³ A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4 section B 1 b.

⁵⁴ A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4 section B 1 c.

⁵⁵ A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4 section C.

law. It prescribes that the treaty shall be interpreted ‘in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention of the Law of Treaties’ (Article 13 TTIP Draft). Even newer BITs do not regularly make that commitment.⁵⁶ Quite a bit can be made of the VCLT and its rule of interpretation which again places emphasis on those who use it. Overall, the VCLT is still taken to demand an objective, textual approach.⁵⁷ Granted, such a textual approach can become absurd in the extreme.⁵⁸ It also hides policy choices where they should better be articulated. And yet the approach of the VCLT is likely to curb the overly presumptive or reductionist decision-making which can be found in some investment awards’ reasoning.

As regards the possibilities of arbitral decisions to react to legitimacy concerns, proportionality analysis has frequently and prominently featured as part of the solution in recent debates.⁵⁹ However, such proportionality analysis, rather than being part of the solution, can easily aggravate problems of judicial authority. As a tool, proportionality analysis broadens the judicial reach and, hence, adds to the legitimacy burden it would have to carry. How to balance investment protection with other public policy process is a question that is best settled at the level of political-legislative lawmaking, not at the moment of adjudication. The practice of WTO adjudication has notably steered clear of weighing and balancing different policy objectives and instead asks the less incisive and more suitable question whether there is an alternative, less trade-restrictive measure that is equally effective in pursuing legitimate public-policy objectives that conflict with trade liberalization.⁶⁰ The way in which the new right to regulate is now phrased in Article 2 of the TTIP Draft offers a similar solution: ‘[t]he provisions of this section shall not affect the right of the Parties to regulate within their territories through *measures necessary to achieve legitimate policy objective* such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity’ [emphasis added]. The analysis of the question of whether a measure is necessary should not lead to a policy review as under the principle of proportionality. Such a review could mean that a measure is unnecessary because restrictions on foreign investments could outweigh the possibly

⁵⁶ See, for instance, 2012 US Model Bilateral Investment Treaty, available at <<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>.

⁵⁷ With regard to bad examples or even a ‘textual fetish’ in the practice of WTO adjudication, see D. Irwin and J. Weiler, ‘Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)’ 7 *World Trade Review* 2014, at 71, 89. For our assessment on the scope of reasons in judicial justifications see A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4 section C 1.

⁵⁸ D. Irwin and J. Weiler, *supra* note 62.

⁵⁹ S.W. Schill, ‘International Investment Law and Comparative Public Law: An Introduction’. In S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press 2010), 3–38; critically: J. Paine, ‘The Project of System-Internal Reform in International Investment Law: An Appraisal’, 6 *Journal of International Dispute Settlement* 2015, 332–354; C. Foster, ‘A New Stratosphere? Investment Treaty Arbitration as “Internationalized Public Law”’, 64 *International and Comparative Law Quarterly* 2015, at 461.

⁶⁰ The language of weighing and balancing that the WTO Appellate Body still uses does not change this. It is rather directed at establishing whether there is an effective alternative that members can reasonably be obliged to use.

marginal contribution that a measure makes to the legitimate policy objective in question. Rather, as is the case in the WTO, Article 2 of the TTIP Draft should be understood as asking whether there is a reasonably available alternative which makes *at least the same* contribution to the legitimate policy objective. In other words, as long as there is no such alternative measure, strong restrictions on foreign investments would still be considered necessary even if they only make a marginal contribution to achieving a legitimate policy objective. There should, however, be no balancing between those restrictions and the policy objective in question.

The standards of review are one way in which, at the moment of the judicial decision, the practice of adjudication places itself in relation to public choices on the domestic level of governance. It remains to be seen how political-legislative processes such as within the Trade Committee will unfold and how much input they will provide for the practice of adjudication as it is presently envisioned. Returning to the interaction with the domestic level, it should be noted that TTIP makes no changes to the role of domestic courts in the lead-up or enforcement of awards when compared to established investment law and practice. There is no requirement to exhaust local remedies before bringing a claim. Rather, it sets up a strongly worded fork-in-the-road provision according to which a claim is inadmissible before an international tribunal if a claim concerning the same treatment has been brought before a domestic court and a final judgment by the domestic court has not yet been delivered (Article 14(1) TTIP Draft). The side-lining of ordinary courts in largely functional constitutional democracies has possibly been among the most solid reasons for criticism.⁶¹ Would it not be an option to at least give national courts a first go in taking up complaints by foreign investors – indeed, even if they did not directly apply the international standards of investment protection?

The enforcement of awards in the TTIP Draft follows the rules of either the ICSID or the New York Convention. Under the New York Convention, domestic courts enjoy but a rather narrow role in possibly refusing its enforcement for reasons of public policy.⁶² Under the ICSID Convention, domestic courts are not even given the possibility of refusing enforcement for those limited grounds.⁶³ Since the possibilities of contesting the judicial authority exercised within the ICS at the domestic level are thus limited, the justification of that authority, if it comes to pass, must thus mostly occur at the international level – through appellate review as well as the increased input of politico-legislative processes, through the legitimacy of judges, the judicial process, and through the way that the judicial decision is crafted.

⁶¹ See the pointed argument by the Deutsche Richterbund, *supra* note 47.

⁶² Art. V New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

⁶³ Art. 54 ICSID Convention.

6. IN CLOSING: THE BELIEF IN PUBLIC INSTITUTIONS

The recent developments in the international law of investment protection, as they have been carried forward by the European Commission, egged on by civil society and social movements, prove the point of a public law theory of international adjudication. That theory shows analytical purchase and normative guidance in this case. It clarifies what it is that we are talking about – the multifunctional practice of adjudication under TTIP as an exercise of public authority. And it provides a basis for arguments as to how that practice should be framed and justified. It does not carry the weight of any conclusion as to the overall legitimacy of a particular institutional arrangement. That would require a much more detailed assessment including, notably, a comparison with the alternatives. What, for instance, are really the net merits of international investment adjudication in the transatlantic context when compared to domestic adjudication? Is such a mechanism, even if thoroughly reformed, possibly still more troublesome than the problems of domestic adjudication to which it purports to respond? Would it perpetuate a bias in favour of investment protection? Would domestic adjudication perpetuate a nationalist bias against foreign investors? Which bias to chose?

The present assessment of the proposed ICS has stood under the caveat set out at the beginning – that it is unsure whether foreign investors should be granted the possibility of bringing a case directly to an international judicial mechanism at all, no matter which shape or form such a mechanism might take. The present assessment, it was added, neither gets to more fundamental critiques of investment protection. *If* the choice for international mechanisms for the settlement of investor-state disputes is made, a public law theory of international adjudication provides a basis for understanding the phenomenon, for framing it, and for supporting its democratic legitimacy.

In closing, it merits emphasis that the sheer project of Trans-Atlantic institution-building in the form of TTIP as well as its critics in fact share a core point – the demand, namely, that the law be spoken in the name of the peoples and citizens. By clearly opting for public institutions within TTIP, not only the critics but also the negotiators reject the idea that international arbitral tribunals are but an instrument of dispute settlement in the hands of the parties alone. The basic conceptions of international courts and tribunals as organs of the international community or as institutions of specific legal regimes also do not hold sufficient sway. Negotiators and citizens, at least implicitly, share the belief that nothing can ultimately carry the legitimacy of international judicial authority – including under TTIP – other than peoples and citizens.⁶⁴

⁶⁴ That is the formula that we propose in response to the leading question ('In whose name?') in A. von Bogdandy and I. Venzke, *supra* note 6.

LIGHTS AND SHADOWS OF THE TTIP INVESTMENT COURT SYSTEM

Luca Pantaleo

1. INTRODUCTION

On 16 September 2015 the European Commission published a draft proposal (hereinafter: the Proposal) to establish the 'investment court system' under the TTIP. The Proposal has been reviewed and slightly modified in the following weeks. It has been finalised and officially presented on 12 November 2015.¹ The Proposal is the result of months of heated debate.² The establishment of a permanent arbitration court under the TTIP would represent an unprecedented step towards the institutionalisation of international investment disputes. At the time of writing, such court features also in the EU-Vietnam FTA and has made its way into the EU-Canada Comprehensive Economic and Trade Agreement (hereinafter: CETA).³ The text of the latter had been finalised in late 2014. CETA in its original version included an investor-State dispute settlement (hereinafter: ISDS) that already seemed to successfully address some of the most controversial features of investment arbitration that recent practice had brought into the open.⁴ However, that ISDS was no more than a reformed investment arbitration in the traditional sense. On the contrary, CETA 2.0 includes a TTIP-like investment court that would more resemble an international court proper than an ISDS traditionally understood.

The Proposal is certainly a very ambitious project. Regardless of whether it will eventually be approved, it already represents the most audacious attempt to eliminate the halo of mistrust that often surrounds investment arbitration. Many tend to regard the latter as some sort of private justice. Although this

¹ European Commission, 'EU finalises proposal for investment protection and Court System for TTIP', Press Release, (12 November 2015), available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396&title=EU-finalises-proposal-for-investment-protection-and-Court-System-for-TTIP>>.

² The (now closed) consultation is available at <http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179>. From now on, all reference to the TTIP Proposal has to be understood as referred to the final version of the proposal, and not the initial draft. Given its limited practical relevance, the latter will not be taken into consideration in this paper. be beyond the scope of this article of the Contracting Parties may be a challengeal iinvestment court as opposed to a multilater

³ The investment court was apparently inserted in the text of CETA while it was undergoing legal scrubbing (sic!). See European Commission, 'CETA: EU and Canada agree on new approach on investment in trade agreement', Press Release, available at <http://europa.eu/rapid/press-release_IP-16-399_en.htm>.

⁴ See L. Pantaleo, 'Investment disputes under CETA. Taking the best from past experience?', in L. Pantaleo and M. Andenas, *The European Union as a Global Model for Trade and Investment*, University of Oslo Faculty of Law *Legal Studies Research Paper Series* No. 2016-02, 74-75.

view is to some extent misplaced, the Union's endeavour to enhance the legitimacy and the quality of investment arbitration is surely commendable. Despite this, to borrow from a popular saying, all that glitters is not gold. The Proposal as it currently stands also raises a number of issues and leaves some questions open to debate.

This paper is divided into two parts. The next section will give a succinct account of some positive innovations introduced by the Proposal. In this part, the latter will be compared with other existent arbitration mechanism, including CETA's original ISDS. The following section will instead focus on the dark sides, or 'shadows' as they are called in the title of this chapter, of the Proposal. In particular, it will examine a) the structure and nature of the TTIP tribunals, and b) some potential challenges that the appellate mechanism established by the Proposal may face. Some conclusions will be presented in the final section of this paper.

2. THE LIGHTS OF THE TTIP INVESTMENT COURT SYSTEM

This section will provide the reader with a brief overview of the main innovations brought forth by the Proposal. Given the limited space at my disposal, not all innovations will be scrutinised. The analysis will be focused on some selected issues that, in my opinion, will bring about remarkable reforms. In particular, the paper will focus on the content of the final award (2.1), the appointment and challenge of arbitrators (2.2), and transparency (2.3).

2.1. The Allocation of Costs and Remedies Awarded

Two main issues arise when it comes to the content of the final award in the context of investment arbitration. First and foremost, the award is supposed to allocate the costs of the arbitration between the parties. In addition, if the claim turns out to be successful, the award needs to identify the remedies necessary to compensate the claimant for the losses incurred.

The allocation of the costs of the proceedings is not tackled uniformly by existing arbitration rules. Under UNCITRAL Arbitration Rules such costs are in principle to be borne by the unsuccessful party (Article 40). Both the ICSID Convention and Arbitration Rules, as well as the ICC Rules (Article 31), leave the decision on the matter up to the tribunal's discretion. In the context of ICSID there are two exceptions to this rule, namely a) in case of conciliation, the costs of the procedure have to be equally divided between the parties, and b) each party bears any additional costs it may have incurred in connection with the dispute (typically legal fees). Moreover, ICSID provides the possibility for the parties to agree on a different allocation of costs should conciliation fail. Against this background, arbitral tribunals in non-UNCITRAL cases have developed a diversified case law. Although the case law appears to be developing in this area,⁵ cases in which the loser is ordered to bear all costs are quite rare. In the

⁵ See C.H. Schreuer, *The ICSID Convention. A Commentary*, (Cambridge: Cambridge University Press 2009, 2nd ed.), 1229–19.

majority of cases, arbitral tribunals tend to be more inclined to award only part of the costs to the victorious party. Equal sharing is still quite frequent but seemingly declining.⁶ In cases of misconduct on the part of the loser, arbitral tribunals have demonstrated a propensity to award costs to the winning party.⁷

As regards damage and remedies available to arbitrators, the rules of general international law concerning state responsibility apply. Reparation for an internationally wrongful act can take the form of restitution, compensation or satisfaction, separately or in conjunction.⁸ Given the nature of investment disputes, however, restitution and satisfaction play a very limited role. Monetary compensation for losses and interests are by far the most frequent remedies awarded by arbitral tribunals.⁹ Damages are generally only awarded to compensate investors for material damages incurred. Arbitral tribunals have occasionally awarded monetary compensation for non-material damages,¹⁰ such as moral and punitive damages. As for the latter, however, it is doubtful whether such case law is compatible with international law.¹¹

EU Member States' bilateral investment agreements (hereinafter: BITs) are usually silent as regards the content of the final award.¹² The question of costs is therefore governed by the arbitration rules chosen by the disputing parties in each case, and the remedies are those identified above in accordance with general international law. The same does not hold true in respect of the practice of the United States and Canada, at least insofar as it concerns the determination of remedies available to arbitrators. The most prominent example of such different practice is Article 1135 NAFTA. The provision in question specifies what remedies a tribunal may award, and that punitive damages cannot be awarded. Unsurprisingly, a similar solution is adopted in both the US and the Canada Model BIT.¹³ As regards the costs of arbitration, all these instruments state that a tribunal can award costs in accordance with the applicable arbitration rules. Hence, from this perspective, North American investment agreements do not much differ from the prevailing European template.

In this respect, TTIP follows the example set by CETA (Article X.36). The 'loser pays' maxim governs the allocation of costs between the parties as a

⁶ See C.H. Schreuer, *supra* note 5, 1232–33; L. Reed, J. Paulsson and N. Blackaby, *A Guide to ICSID Arbitration*, (Alphen aan den Rijn: Kluwer Law International 2010), at 155.

⁷ See L. Reed, J. Paulsson and N. Blackaby, *supra* note 5, at 155.

⁸ See Art. 34 of Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the ILC in 2001.

⁹ See C.H. Schreuer and R. Dolzer, *Principles of International Investment Law*, (Oxford: Oxford University Press 2012, 2nd ed.), at 294.

¹⁰ The leading cases are *Benvenuti et Bonfant v. People's Republic of the Congo*, 21 ILM 740–766 (1982); *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17 (6 February 2008).

¹¹ On moral damages see S. Jagusch and T. Sebastien, *Moral Damages in Investment Arbitration: Punitive Damages in Compensatory Clothing?*, 29 *Arbitration International* 2013, 45–62. On punitive damages see Jessica J. Fei, D. McDonald and E. Bai, 'Awards of Punitive Damages', in D. Bray and H.L. Bray (eds.), *Post-Hearing Issues in International Arbitration*, (New York: Juris 2013), 49–75.

¹² See, for example, Netherlands-Bahrain BIT Art. 9(4).

¹³ See US Model BIT Art. 34 and Canada-Benin BIT Art. 37 respectively.

general principle. The main aim of this principle is to reduce the risk of vexatious litigation. It applies not only to the costs of arbitration but also to 'other reasonable costs' parties may have incurred. Besides, the 'loser pays' principle applies also to cases of partially successful claims. In such cases the apportionment of costs is proportionate to the extent of the successful elements of the claims. In this regard, TTIP replicates the provisions of CETA almost identically.¹⁴

As far as remedies are concerned, TTIP also follows CETA – which, in turn, is modelled on the aforementioned Article 1135 NAFTA. Article 28 specifies the calculation method in case of compensation for expropriation. It affirms that the damages awarded should represent 'the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier'. This method is generally regarded as corresponding to the best practice when it comes to the determination of compensation due as a result of an illegal taking.¹⁵ Moreover, and again similarly to NAFTA and CETA, TTIP rules out the award of punitive damages.

2.2. Appointing and Challenging Arbitrators

The way in which arbitrators are appointed and challenged has proved to be one of the most controversial issues of investment arbitration. As regards the appointment of arbitrators, the main point of contention is that the parties to investment disputes have a strong, direct role in the choice of those who will be sitting on the bench. It has been suggested that some individuals, who are supposedly unfit to serve as a judge in any international dispute, only manage to make their way to arbitral tribunals because they are directly appointed by a private party.¹⁶ In addition, there are instances in which the appointment of some individuals has allegedly been made because of those individuals' sympathy to one party's particular case or situation, and not because of her/his quality as adjudicator.¹⁷ For these and other reasons the appointment of arbitrators in the traditional system has met with strong opposition.

Challenges of appointed arbitrators have also proved problematic. Especially under the ICSID Convention, challenging an arbitrator has proved extremely difficult. Only a handful of challenges have been upheld since the establishment of ICSID. On the contrary, challenges to arbitrators under other arbitration rules have been successful in approximately 30–40% of cases.¹⁸ The reason behind

¹⁴ See L. Pantaleo, *supra* note 4, at 71.

¹⁵ On this issue see more thoroughly C.H. Schreuer and R. Dolzer, *supra* note 8, 296 ff.

¹⁶ See M. Kumm, 'An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege', 4(3) *European Society of International Law Reflections* 2015, at 7.

¹⁷ See J. Gill, 'Inconsistent Decisions: an Issue to be Addressed or a Fact of Life?' in F. Ortino, A. Sheppard and H. Warner (eds.), *Appeals and Challenges to Investment Treaty Awards*, (British Institute of International and Comparative Law 2006), at 61.

¹⁸ See K. Daele, *Investment Treaty Arbitration: Similar Challenge, Different Outcome*, in *Global Arbitration Review*, available at <<http://globalarbitrationreview.com/journal/Art./30410/investment-treaty-arbitration-similar-challenge-different-outcome/>>.

such a remarkable disproportion is that under the ICSID Convention the threshold for challenging an arbitrator is higher than under other instruments. Namely, ICSID requires a manifest lack of requirements to be arbitrator, as opposed to the reasonable doubt test requested by other arbitration rules. EU Member States BITs contain usually no provisions governing these issues, while NAFTA, the US Model BIT and the Canada Model BIT lay down somewhat more detailed rules on appointment of arbitrators and, as a consequence, on the grounds for their challenge.¹⁹ On its part, CETA's original ISDS largely borrowed from North American practice with some significant adjustments.²⁰

TTIP contains some veritable ground-breaking innovations on this point. First and foremost, the TTIP Proposal does away with the involvement of private parties in the appointment of arbitrator(s). Private parties have no role whatsoever under TTIP. In fact, TTIP sets up a permanent tribunal – whose structure will be examined below – that will consist of members appointed by a Committee established by the TTIP itself. Although the composition of the Committee is yet to be unveiled, it will certainly consist of representatives of the United States, of the one part, and of the EU and its Member States, of the other. In other words, all members of the tribunal will be appointed by the parties to the agreement. Hence they will be publicly appointed in the sense that private parties will play no role whatsoever. Secondly, such members are not referred to as arbitrators but as judges (Tribunal of First Instance) and Members (Appeal Tribunal). It is not just a matter of titles. The members of both the Tribunal of First Instance and the Appeal Tribunal have to be in possession of the requirements to be appointed to judicial offices in their respective jurisdictions.²¹ They shall have demonstrated experience in international law, and possibly experience in investment and trade law. Furthermore, one third of the members will be nationals of the EU and one third of the United States. The remaining third will consist of nationals of third countries. Cases will be heard in divisions of three judges and will have the same composition of the tribunal itself in terms of nationality of the members.²² TTIP also lays down a quite extensive list of ethical requirements for the judges, and contains a rather detailed code of conduct.²³

Some of these innovations are surely to be welcomed. This holds true in respect of setting a higher ethical threshold for the members of the tribunals, requiring them mastery of international law, and demanding the possession of the qualifications necessary to be appointed to judicial offices in domestic jurisdictions.²⁴ All these rules are certainly aimed at enhancing the overall quality

¹⁹ See NAFTA Art. 1125, US Model BIT Art. 20(3) and 27(4), and Canada-Benin BIT Arts. 25(2), 29 and 43.

²⁰ See L. Pantaleo, *supra* note 4, at 74.

²¹ To the *highest* judicial offices in case of members of the Appeal Tribunal.

²² See Arts. 9 and 10 of the Proposal.

²³ See Art. 11 of the Proposal and Annex II.

²⁴ However, it has been argued that on the basis of these requirements, only very few people will make the cut, and they will mainly be retired judges. See ISDS Blog, 'A quick read of the EU Commission's Investment Court Proposal', available at <<http://isdsblog.com/2015/09/17/a-quick-read-of-the-eu-commissions-investment-court-proposal/>>.

of the tribunals. However, the presence of nationals of the contracting Parties directly appointed by the Parties themselves may have its disadvantages. In particular, despite the criticism raised by the traditional system, the rules concerning the composition of arbitral tribunals contained in the main arbitration rules are inspired by the idea of guaranteeing maximum objectivity on the part of the tribunal.²⁵ It is certainly true that in practice such objectivity has not always been guaranteed. The whole debate concerning the 'moral hazard' connected with party-appointed arbitrators speaks for itself.²⁶ However, the complete removal of (private) party-appointed arbitrators in the TTIP goes hand in hand with the heavy role played by the Contracting Parties in shaping the composition of the TTIP tribunals. As a result, one may suspect that this particular innovation is not, or not only, motivated by the need to increase objectivity and impartiality. The imbalance between the public and the private party to the dispute may disguise an attempt to intensify the control of the Parties over the outcome of the dispute.

2.3. Transparency

Another feature of investment arbitration that has attracted criticism is its perceived lack of transparency. Such perception has increased in recent times and affected the debate surrounding the TTIP.²⁷ Leaving aside the question concerning whether or not confidentiality is a legal obligation under arbitration rules,²⁸ it is undeniable that investment disputes are often kept confidential by the parties.²⁹

EU Member States have traditionally not favoured transparency in investment arbitration.³⁰ Their BITs are generally not very advanced when it comes

²⁵ See C.H. Schreuer and R. Dolzer, *supra* note 11, at 279.

²⁶ As is well known, the question has ignited the scholarship in recent years, following the publication of an article by the prominent scholar and arbitrator Jan Paulsson. See J. Paulsson, 'Moral Hazard in International Dispute Resolution', 25(2) *ICSID Review* 2010, 339–355. This article triggered a very lively debate that is largely still ongoing. The most vigorous – and famous – critical reaction to Paulsson's opinion was signed by C.N. Brower and C.B. Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy is Wrongheaded', 29(1) *Arbitration International* 2013, 7–44.

²⁷ See Stop TTIP, 'Stop TTIP: Malmström's ISDS proposal misses the point', available at <<https://stop-ttip.org/stop-ttip-malmstroms-ids-proposal-misses-the-point/>>, where investment arbitration is referred to as 'private parallel justice'.

²⁸ In general arbitration rules favour but do not impose confidentiality. For example, ICSID Convention Art. 48(5) prevents the Secretary General from publishing awards without the parties' consent. There is, however, no similar provision applicable to the parties. The latter are therefore free to disclose documents to their liking. Roughly the same reasoning applied to UNCITRAL before the recent amendments that will be discussed below.

²⁹ The many reasons why lack of transparency in investment arbitration is a point of concern cannot be examined in-depth in this study. For a thorough analysis see N. Jansen Calamita, 'Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy', 15 *Journal of World Investment and Trade* 2014, 645–678.

³⁰ See, in general, the rather sceptic views expressed by EU Member States in the context of the debate concerning the modification of UNCITRAL rules on transparency. See United

to provisions laying down transparency obligations. They virtually contain no such provisions. The picture is different across the pond, as NAFTA and both the US and Canada Model BITs are more advanced on the matter.³¹ On its part, CETA incorporates the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration as the starting point,³² with a few additions towards even greater transparency.³³ In this matter, the TTIP court largely follows the example set by CETA, hence going beyond UNCITRAL Rules on transparency in many respects. It also explicitly adds that the rules on transparency extend to documents submitted to and issued by the Appeal Tribunal.³⁴ Contrary to CETA's original ISDS, there is no provision in the Proposal stating that hearings are open to the public. This may appear to be in slight conflict with the general shift towards greater transparency that is supposed to characterise EU new trade and investment policy.³⁵ However, it is established that both the Tribunal of First Instance and the Appeal Tribunal will adopt their own respective procedural rules. The participation of the public to their hearings will most probably be governed by the provisions of such rules. It can be expected that the rules in question will be modelled on CETA's original ISDS, which granted the public the right to attend hearings with virtually no limitations.³⁶

Compared to the traditional attitude of some EU Member States on transparency in investment arbitration, the adoption of a 'UNCITRAL-Plus' model in TTIP represents an unprecedented development.³⁷ It is certainly true that investment arbitration may give rise to confidentiality concerns. However, the choice between transparency and secrecy should not be left entirely in the hands of the parties to the dispute. To be sure, the need to protect certain information only justifies the protection of that information only but not of other parts and documents of the proceedings. Hence, the solution adopted by TTIP deserves to be welcomed.

Another question related to transparency is the participation of third parties to investment disputes. The role of so-called *amicus curiae* has traditionally been carried out by NGOs or other organisation that are deemed to protect interests of public relevance.³⁸ In virtually all investment cases the *amicus*

Nations Commission on International Trade Law, Working Group II (Arbitration and Conciliation), Fifty-third session, Vienna, A/CN.9/WG.II/WP.159/Add.2, 7, emphasis added (4–8 October 2010).

³¹ See L. Pantaleo, *supra* note 4, 68–69.

³² Adopted by UN General Assembly Resolution 68/109 of 16 December 2013 and come into force on 1 April 2014.

³³ See Luca Pantaleo, *supra*, note 4, 67–68.

³⁴ See Art. 18(2) of the Proposal.

³⁵ See the European Commission Communication 'Trade for All. Towards a More Responsible Trade and Investment Policy', (14 October 2015), available at <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf>, 18 ff.

³⁶ The only exception to public hearings occurred under CETA's original ISDS when the tribunal deemed that appropriate arrangements were necessary to protect confidential or protected information. However, to avoid misuse, the provision in question made it clear that only that part of the hearing requiring special protection was to be held behind closed door.

³⁷ A prominent scholar has referred to such development as a 'radical step', and a 'bold decision' made in particular by the Commission. See N. Jansen Calamita, *supra* note 28, at 672.

³⁸ See L. Bastin, 'Amici Curiae in Investor-State Arbitration: Eight Recent Trends', 30 *Arbitration International* 2014, 125, 127–129.

curiae has intervened in favour of the respondent State. Hence, the possibility to allow third parties to intervene in an investment dispute is often regarded as a tool to secure greater consideration of public concerns. In general, investment agreements say little or nothing on the participation of non-disputing parties to arbitration. EU Member States BITs are silent on this issue, and so are NAFTA and the US and Canada Model BIT. The question is therefore governed by the chosen arbitration rules – which only grant limited rights to intervene.³⁹ In short, under both the ICSID Arbitration Rules and UNCITRAL Rules on Transparency third parties are only granted the right to submit written observation upon certain conditions.⁴⁰

The TTIP Proposal is quite straightforward in this matter. Article 23 is entirely devoted to this issue and provides for two different types of intervention. First of all, it stipulates that the Tribunal ‘shall’ allow the participation of third parties ‘which can establish a direct and present interest in the dispute’ and whose intervention is ‘limited to supporting, in whole or in part, the award sought by one of the disputing parties’ (par. 1). The use of the imperative mood suggests that there is little room for the tribunal’s discretion. Third parties which are granted intervention under this provision are given the right to make oral statements on top of written submissions. The exact same rules apply to the appeal stage. Secondly, Article 23(5) safeguards the right of the TTIP court to accept *amicus curiae* briefs proper in accordance with the rules laid down in the UNCITRAL Rules on Transparency as incorporated in Article 18.

The effort made by the TTIP to guarantee increased transparency and broader participation of the public is considerable. No doubt it would represent a radical innovation, and not only in the field of investment law. No other international dispute settlement provides for such a broad participation of third parties.⁴¹ To my knowledge, the TTIP would be the first instrument to institutionalise the intervention in favour of one party to the dispute. This would be a true novelty. However, and despite the fact that the partisanship of *amici curiae* in investment disputes is not a new phenomenon, the institutionalisation of the

³⁹ The ICSID Arbitration Rules have been substantially improved by the 2006 amendments when it comes to third-party intervention. Rule 32 allows third parties to attend or observe all or part of the hearings. Such vague formulation leaves room for arguing that non-disputing parties may be authorised to make oral submissions. No ICSID tribunal, however, has ever granted such authorisation. Moreover, Rule 32 contains a caveat granting disputing parties *de facto* veto powers by blocking altogether the *amicus curiae*’s request to take part in the hearing. Rule 37 allows the tribunal to authorise written submissions of non-disputing parties provided that such submissions would assist the tribunal, and that the party in question has a significant interest in the proceedings. In this circumstance the parties to the dispute must be consulted but have no veto.

⁴⁰ ICSID cases in which such authorisation has been granted include, *ex plurimis*, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (09 April 2015); *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa* ICSID Case No. ARB(AF)/07/01 (4 August 2010).

⁴¹ For an overview of the rules governing the intervention of *amicus curiae* in international dispute settlement see S. Santivasa, ‘The NGOs’ Participation in the Proceedings of the International Court of Justice’, 2 *Journal of East Asia and International Law* 2012, 377–406.

'friend of the party', as opposed to the 'friend of the court', may increase the risk of a (re)politicisation of investment disputes.⁴²

3. THE SHADOWS OF THE TTIP COURT

3.1. The Nature of the TTIP Court and the Enforcement of Its Decisions

One of the major innovations of the Proposal is the intention to establish a brand new dispute settlement system alternative to investment arbitration as we know it. Article 6 concerning the submission of claims stipulates at paragraph 2 that a claim can be submitted to the TTIP tribunals under the ICSID Convention, ICSID Additional Facility Rules, UNCITRAL Rules and any other rule as agreed by the parties. However, Article 6(3) immediately makes it clear that those rules apply only insofar as they do not conflict with the provisions of the TTIP. In other words, the provision in question provides an incorporation of those arbitration rules limited to the issues that are not already regulated in the TTIP and provided that they are not otherwise incompatible with the latter. Article 6 therefore constitutes an offer to settle disputes according to the rules of the TTIP supplemented by other arbitration rules only if necessary to fill possible gaps. It is a one-way relationship. A TTIP Tribunal would be able to resort to and apply ICSID and other arbitration rules to the extent necessary to settle the dispute brought before it. It would not be possible the other way round. An arbitral tribunal established under the ICSID Convention would find itself with no jurisdiction under Article 25 to settle a dispute arising out of the TTIP.

This circumstance is likely to affect the enforcement of decisions rendered under the TTIP. In the context of ICSID, for example, such a decision would not qualify as an ICSID award. Section 6 ICSID concerning recognition and enforcement would not be applicable. It is true that Article 30 TTIP contains a provision intended to make sure that awards issued pursuant to the TTIP qualify as ICSID awards within the meaning of Section 6 ICSID. However, it appears safe to assume that an investor that has obtained a TTIP award would not be able to seek enforcement in a Contracting State of ICSID that is not at the same time also a Contracting Party of the TTIP. A TTIP award would not be 'an award rendered pursuant to this Convention' within the meaning of Article 54 ICSID. It would be a decision rendered pursuant to the TTIP. As such it would only be enforceable in the United States or in the EU (or one of its Member States) as courts of other ICSID Contracting States would not be bound by Article 30 TTIP. It could be objected that the conclusion of the TTIP would represent an *inter se* amendment of the ICSID Convention in accordance with Article 41 of the Vienna Convention on the Law of Treaties. The objection is however not very convincing. First of all, such modification would have to be notified to all other

⁴² On this question see in general N. Blackaby and C. Richard, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?', in M. Waibel, A. Kaushal, K.H. Liz Chung and C. Balchin (eds.), *The Backlash against Investment Arbitration. Perceptions and Reality* (Alphen aan den Rijn: Kluwer Law International 2010), at 273.

Contracting States of ICSID in order to be effective. Secondly, not all (future) parties to the TTIP are also Contracting States of the ICSID Convention, such as the Union itself and Poland.⁴³ Finally, such an amendment would most probably be at odds with the object and purpose of the ICSID Convention and, as such, ruled out by Article 41.

Pushed to the extreme, this line of reasoning could be used to argue that decisions rendered under the TTIP would not constitute arbitral awards altogether, thus excluding (also) the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: New York Convention). One of the most important innovations brought about by the TTIP concerns the permanent structure of the tribunals and the way in which their members are appointed. Articles 9 and 10 establish a permanent Tribunal of First Instance and a permanent Appeal Tribunal respectively. They will both consist of 15 judges appointed for a six-year term renewable once. One third of the members will be nationals of the EU and one third of the US. The remaining third will consist of nationals of third countries. President and Vice-President of both tribunals will be nationals of third countries, and so will the chairs of each division made of three judges that will hear the cases. The composition of the divisions will be decided by the two Presidents.

As one can easily see there is no role for (private) party autonomy, which is one of the quintessential characteristic of arbitration. The TTIP tribunals so established will hardly resemble arbitral tribunals in the traditional understanding of such expression. They will be somewhat reminiscent of an international tribunal proper, or a WTO-like quasi-judicial body. It could therefore be argued that the TTIP investment court system would not create arbitral tribunals, and their decisions, as a consequence, would not possess the constitutive elements required to be qualified as arbitral awards within the meaning of Article 1 of the New York Convention. The point is of crucial importance and would deserve much more space than available here to be analysed in full detail. For the purpose of this paper a few considerations will suffice. As is well-known, neither 'arbitral award' nor 'arbitral tribunal' are defined by the New York Convention. Article 1(2) only clarifies that arbitral awards 'shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted'. Given the permanent structure of TTIP tribunals the awards rendered by them would fall under the second type. Permanent arbitral tribunals are rather uncommon in international practice. The provision in question was in fact only inserted to please some (by then) Soviet countries and has nowadays little practical significance.⁴⁴

There are only a handful of bodies that have been recognised by the case law as permanent arbitral tribunals. The most famous contingency is certainly

⁴³ This is based on the assumption that the TTIP will be a mixed agreement. Should the TTIP be concluded exclusively by the Union, the argument in question would be entirely devoid of significance.

⁴⁴ See H. Bagner, 'Article I', in H. Konke, P. Nacimiento, N.C. Port and D. Otto, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Alphen aan den Rijn: Kluwer Law International 2010), at 21.

the Iran-United States Claims Tribunal. As is well known, the nature of the latter has given rise to much discussion in its early years.⁴⁵ This is not to say that the TTIP tribunals and the Iran-United States Claims Tribunal are entirely comparable. Nor is this to say that the qualification of the TTIP tribunals as arbitral tribunals within the meaning of Article 1 of the New York Convention would be excluded from the outset. Article 30 TTIP even contains an indication to the opposite in that it prescribes that awards issued pursuant to the TTIP shall qualify as arbitral awards under Article 1 of the New York Convention. Such a rule, however, would not be binding on domestic courts of third countries.

A closer look into the structure of the TTIP tribunal may cast some doubts as to its arbitral nature. The scholarship has long debated the question concerning the differences between judicial settlement and arbitral settlement of disputes in international law. In brief, the literature seems to agree that the demarcation between these two forms of settling international disputes has to do precisely with the structure of the bodies vested with the power to settle the dispute in question. The existence of a permanent structure and of a roster of predetermined judges – as opposed to party appointed arbitrators on a case-by-case basis – are usually considered as elements that differentiate judicial from arbitral settlement of international disputes.⁴⁶ The TTIP Proposal would confer to its tribunals a great deal of institutionalisation. The Parties to the disputes, at least the private parties, would have no role in shaping the composition of the divisions that will hear each single case. Let alone the composition of the tribunals themselves. For this and other reasons the arbitral nature of an award rendered pursuant to the TTIP may very well be questioned at the enforcement stage.

3.2. The Appeal Tribunal: An Ill-conceived Facility?

The establishment of an Appeal Tribunal constitutes yet another ground-breaking innovation of the TTIP proposal. The composition of such tribunal has already been dealt with in the previous pages and will not be repeated here. This sub-section will concentrate on other aspects of the appeal procedure.

Article 29 stipulates that an award issued by the Tribunal of First Instance can be appealed within 90 days of its issuance on the grounds:

- a) That the Tribunal has erred in the interpretation or application of the applicable law;
- b) That the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or,
- c) Those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).

⁴⁵ See B. Ehle, 'Article I [Scope of Application]', in R. Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Commentary* (München, Oxford, Baden-Baden: Beck, Hart, Nomos 2012).

⁴⁶ C.F. Amerasinghe, *Jurisdiction of International Tribunals* (The Hague: Kluwer Law International 2003), 19–20.

In brief, the Appeal Tribunal would have the power to reject, reverse or modify the award on both legal and factual grounds. It would also have the power to annul the award in case of one of the grave breaches laid down in Article 52 ICSID. Article 29(3) further states – rather optimistically – that the Appeal Tribunal shall reach a decision within 180 days unless it is estimated that more time is necessary. In no case, however, the appeal proceedings ‘should’ exceed 270 days.

The establishment of an appellate mechanism is a much discussed issue in international investment law.⁴⁷ In the traditional regime arbitral awards are not subject to appeal. Some have argued that the establishment of an appellate mechanism would increase the overall legitimacy of the investment regime,⁴⁸ in view of the real or imaginary inability of arbitral tribunals to develop a *juris-prudence constante*.⁴⁹ In my opinion, some of the concerns often adduced to justify the creation of an appellate mechanism are misplaced. Be that as it may, it is a fact that the US Trade Act of 2002 was the first instrument to mention the possibility to establish such investment appellate facility. It enabled the creation of an appellate mechanism in future investment agreements, with a view ‘to provide coherence to the interpretations of investment provisions’.⁵⁰ No such appellate body has been created so far. Since then, however, the US Model BIT includes an open-ended clause that enables the creation of an appellate mechanism in the future.⁵¹ CETA’s original ISDS borrowed from the American experience in that it provided the establishment of a Committee on Services and Investment entrusted, among other things, with the task of exploring the

⁴⁷ See A.H. Qureshi, ‘An Appellate System in International Investment Arbitration?’, in P. Muchlinsky, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International* (Oxford University Press 2008), 1154–1170.

⁴⁸ See D.P. Steger, ‘Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism’, in A. De Mestral and C. Lévesque (eds.), *Improving International Investment Agreements*, (London: Routledge 2013), 247–264.

⁴⁹ One may immediately think of a few emblematic examples, such as the diverging interpretation of the standard of fair and equitable treatment given by a trio of NAFTA awards rendered within a relatively short time frame. See *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL Award (13 November 2000); *Metalclad Corporation v. The United Mexican States*, ICSID Case no. ARB(AF)/97/1 (30 Aug. 2000); *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL Award on the Merits of Phase II (10 April 2001). Even more meaningful is the case of two awards involving Czech Republic on the same contested measures. The case was raised by the shareholder of a company and by the company itself. Since they were of a different nationality the case was brought to two different tribunals and on the basis of two different BITs. The Tribunals rendered their awards within 10 days of each other but reached very different conclusions on many issues, despite the fact they were confronted with very similar if not identical questions (they were, however, based on two different BITs). See *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Award (3 September 2001) and *CME Czech Republic BV v. The Czech Republic*, UNCITRAL Partial Award (11 September 2001). See also Lord Mustill’s foreword in T. Roe and M. Happold, *Settlement of Investment Dispute under the Energy Charter Treaty* (Cambridge: Cambridge University Press 2011), at xiii, where it is noted that ‘the entire area of study seems to be heading for a thrombosis.’

⁵⁰ See US Code 19, §§ 3803–3805 approved on 6 August 2002, HR 3009–63.

⁵¹ See US Model BIT Art. 28(10).

possibility of creating an appellate mechanism (Article X.42 CETA).⁵² No actual appeal facility was however established under the original text of CETA.

The TTIP Proposal is the first legal text aiming to establish an appellate body. The latter, however, seems to present some problematic features, at least in its current form. First and foremost, the existence of an appeal stage would inevitably make disputes arising out of the TTIP longer than other investment disputes.⁵³ Given that investment disputes are already quite long and costly the importance of this aspect should not be underestimated.⁵⁴ One may argue that an increased duration is a price worth paying in order to enhance the legitimacy and the predictability of arbitral awards. The rule of law comes at a price. While this might be true, it is unclear why the Appeal Tribunal will be empowered to review the award not only on points of law but also on points of (manifest errors of) fact. This leads me to another critical remark concerning the ultimate function of an appeal facility.

Traditionally, the right to appeal represents the exception rather than the rule in international adjudication.⁵⁵ Existing appellate mechanisms have been justified essentially by two different considerations. First of all, an appeal facility can be seen as a means to offer an additional remedy to the parties to the dispute. The main interest served by such a facility, and the rationale to justify it, is inherently private in that it guarantees a second chance to the parties involved. Examples of this type of appeal in international adjudication can be found in the context of international criminal tribunals and, to a limited extent, the European Convention of Human Rights.⁵⁶ Secondly, an appellate mechanism can serve the purpose of guaranteeing predictability and consistency of the case law developed under a certain regime. The main interest served in such instance is inherently public in that it is aimed at increasing the overall credibility and legitimacy of a certain dispute settlement system. A textbook illustration of this second function is clearly carried out by the WTO Appellate

⁵² Or, alternatively, to make awards rendered under CETA subject to a (hypothetical) appellate mechanism created pursuant to other investment instruments.

⁵³ In this sense, Arts. 28 and 29 of the Proposal seem to be overly optimistic as to the total duration of a TTIP dispute. According to such provisions TTIP disputes in a best-case scenario would last no longer than 24 months. This target is certainly ambitious.

⁵⁴ According to a recent estimation made by a major law firm, the average duration of an ICSID case is 3 years and 8 months, and the average cost per party is approximately 4.5 million USD. See Allen & Overy, *Investment Treaty Arbitration: How much does it cost? How long does it take?*, available at <<http://www.allenoverly.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-How-much-does-it-cost-How-long-does-it-take-.aspx>>.

⁵⁵ This characteristic of the international legal order as opposed to domestic legal systems is so deeply rooted that a prominent scholar in 1991 declared that a “domestic lawyer [...] might be forgiven for thinking it strange that the international community, though apparently well-equipped with means of judicial settlement, appears to lack what seems to be a natural or inherent feature on national judicial systems, namely, a comprehensive system of appeal”. See E. Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge: Cambridge University Press 1991), at 99.

⁵⁶ See the considerations of the UN Secretary General in relation to the creation of the ICTY, *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, par. 116 et seq.

Body.⁵⁷ The different justification of the ultimate function of these different forms of international appeal is mirrored by the provisions concerning their respective powers. Usually, and unsurprisingly, appeal facilities whose main function is to offer a second chance to the parties involved have the power to review both the law and the facts. An appellate mechanism – such as the WTO Appellate Body – that serves the (public) purpose of guaranteeing internal consistency is usually only empowered to review legal questions. As in the context of the WTO, the creation of an appellate system in international investment law is usually often by the need to increase consistency and predictability, as exemplified by the aforementioned US Trade Act. A TTIP Appeal Tribunal whose powers extend to both legal and factual questions would hardly be reconciled with this logic. The (public) function to increase legitimacy would risk to be overwhelmed by the (private) function to guarantee a second chance to the parties involved. It is no accident that this has been one of the first objections voiced by the United States against the TTIP proposal.⁵⁸ This leads me to a final but central remark.

As is well-known, investment disputes are settled by arbitral tribunals on the basis of the rules contained in the basic treaty from which the disputes originated. In the majority of cases such treaty is a BIT. BITs usually present some common features. Many States have developed a Model BIT to which they tend to stick to the extent possible. However, they are not identical to each other. This means that arbitral tribunals are often confronted with a different legal framework when settling disputes. Therefore, some degree of inconsistency between arbitral tribunals is somewhat inevitable. It may seem obvious but consistency is only partly possible between decisions taken by tribunals that are applying different laws. One may wonder, however, if and to what extent an Appeal Tribunal like the one established by the TTIP can contribute to strengthening the uniformity of arbitral case law. The TTIP Appeal Tribunal will only have jurisdiction over disputes between the parties to the TTIP. It will settle disputes in accordance with the rules of the TTIP. As it has been rightly pointed out by a prominent scholar, in order to bring about consistency an appeal facility ‘would have to be comprehensive, or at least competent to hear appeals in a large majority of cases. In contrast, systems of piecemeal appeal would probably produce no more than piecemeal consistency’.⁵⁹ Only a centralised appeal system established under a common multilateral investment treaty can guarantee predictability and uniformity. It is true that in the intentions of the EU the TTIP tribunals are to be regarded as an interim solution that will cease to exist

⁵⁷ See M.J. Andrianarivony, ‘L’Organ d’appel de l’OMC: une institution originale investie d’une mission constitutionnelle et normative (ou de la structuration d’un droit international de la concurrence)’, 33 *Revue belge de droit international* 2000, 276–340.

⁵⁸ See ISDS Blog, *The U.S. is Sceptical of the European Commission’s ISDS Proposal*, <<http://isdsblog.com/2015/11/13/the-u-s-is-sceptical-of-the-european-commissions-isds-proposal/>>, where it is reported that the U.S Trade Representative Michael Froman declared ‘[i]t’s not obvious to me why you would want to give companies a second bite of the apple’.

⁵⁹ See C. Tams, ‘Is There a Need for an ICSID Appellate Structure?’, in R. Hofmann and C. Tams (eds.), *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock After 40 Years* (Baden-Baden: Nomos 2007), at 238.

once such a multilateral instrument will come into being. However, until that day the function of the TTIP Appeal Tribunal will be mainly that of offering a two-legged tie to the disputing parties.

4. CONCLUSIONS

The analysis carried out in the previous pages has shown that the TTIP investment court system presents upsides and downsides. Some innovations are certainly to be welcomed. This holds true in respect of the provisions laying down more detailed and more far-reaching obligations concerning transparency and third party intervention in the dispute, the incorporation of the 'loser pays' principle and the exclusion of punitive damages, as well as the adoption of strict ethical rules for the members of the tribunals. Most of these innovations were already included in CETA's original text but the TTIP would obviously go much further in many respects, the most obvious one being the establishment of a permanent Tribunal of First Instance and a permanent Appeal Tribunal.

Some aspects are however not immune from criticism. First of all, the enforcement of the decisions of the TTIP tribunals outside the territorial boundaries of the Contracting Parties may be a challenge. Secondly, the Appeal Tribunal seems to be flawed in many respects. This is partly inevitable. Investment arbitration is traditionally characterised by a mixture of private and public legal components. The strong role traditionally played by party autonomy is inherent to private litigation. Arbitral tribunals, however, interpret and apply treaties concluded between sovereign entities and are often called upon to review State's sovereign acts that are public in nature. This ostensible contradiction inexorably looms over the whole proposal. The TTIP Proposal clearly aims at institutionalising investment disputes. It attempts to judicialise them by eliminating those features that are more traditionally connected with private litigation. From this perspective, it is clear that the TTIP Proposal is intended to replace investment arbitration and create a brand new system for the settlement of investment disputes. In brief, it is intended to do away with ISDS. At the same time, an attempt to retain some aspects of the old system clearly emerges from the Proposal. An example of this is the effort made to benefit of the advantageous enforcement regime laid down in the ICSID and New York Convention. An effort that will almost certainly prove pointless. This ambivalence towards investment arbitration is probably motivated by the need to preserve the attractiveness of the TTIP investment court system. For the perception that settling disputes under the TTIP is less advantageous than under other investment instruments may convince investors to structure their investment in order to sidestep the TTIP. This is clearly yet another disadvantage of creating a bilateral investment court as opposed to a multilateral one.

At the current stage of development of international law, a reformed ISDS such as the one established by CETA's original text seems to be a more realistic and perhaps also a more palatable achievement. However, and regardless of whether or not it will eventually be approved in its current form, the TTIP Proposal will remain a momentous development and a source of inspiration for

years to come. To name but one example, it has been noted that the TTIP's proposal has most probably inspired Article 29 of India's new Model-BIT, which opens the door to a future appeal facility and a multilateral investment agreement.⁶⁰ It seems reasonable to predict that more and more States will take concrete steps to the same direction in the near future.

⁶⁰ See J. Dahlquist and L.E. Peterson, 'Analysis: in Final Version of its New Model Investment Treaty, India Dials Back Ambition of Earlier Proposals – But Still Favours Some Big Changes', IA Report (3 January 2016), available at <<https://www.iareporter.com/articles/analysis-in-final-version-of-its-new-model-investment-treaty-india-dials-back-ambition-of-earlier-proposals-but-still-favors-some-big-changes/>>.

SOME FINAL QUESTIONS AND CONCLUSIONS

1. INTRODUCTION

The present collection of papers issued from the Asser Institute's Roundtable on the Transatlantic Trade and Investment Partnership (TTIP) on 16 September 2015 concentrates on two controversial subjects which are part of the draft texts that have been circulating: the Investor-State Dispute Settlement (ISDS) mechanism and the idea of making the TTIP into a 'living agreement' equipped with organs that can discuss, advise about, and perhaps even decide on, certain matters. Just as large segments of the 'informed classes' and the population at large in Europe were most 'shocked' by the old 1958 EEC provisions or the Constitution for Europe in 2005, in the case of TTIP people were unnerved by investment protection and ISDS provisions that had been present in much less refined form in Bilateral Investment Treaties (BITs) of which many Western-European States had concluded between fifty and a hundred or more each since 1958. Similarly, the political class and the broader public were worried about 'living agreement provisions', whilst the EC/EU since 1958 has been concluding dozens of Association Agreements outfitted with Association Councils that have taken binding decisions on such subjects as the free movement of Turkish workers in the EU. The controversial TTIP Regulatory Cooperation Board (RCB), however, has no such decision-making power.¹ We will leave open the question whether the seemingly deep worry about these points is due to the oft-mentioned failure of the political class in Europe to tell the European citizens the truth about the EU or a sign that many European citizens are bad learners.

It is interesting to note that the two contributions that principally concern ISDS are on a much more optimistic note about the ISDS provisions than the two other contributions that take a closer look at the organs and committees that are created by a future TTIP are about the powers and legitimacy of these organs and their decisions and recommendations. Venzke, on the basis of an analysis that refers to a study by Armin von Bogdandy and himself about the legitimacy of international courts,² and Pantaleo, on the basis of more practice-oriented research, both take the view that the reforms to the 'old-school' ISDS of the Member State BITs proposed in the European Commission's May 2015 draft of the relevant chapter of TTIP are a great step forward. It is indeed an 'audacious attempt to eliminate the halo of mistrust that [...] surrounds investment arbitration', as Pantaleo puts it. It bears pointing out, however, that this

¹ The latest EU proposals on transparency in regulatory cooperation published on 21 March 2016 do no longer mention the RCB and develop another method for arriving at a common agenda for regulatory reform. See <ec.europa.eu/trade/ttip-texts>.

² A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press 2014).

mistrust was often inspired by opponents of ISDS, who refused to see or to properly value the numerous attempts by the sector itself to reform its practices. Intergovernmental initiatives, such as the UNCITRAL transparency rules in Investor-State arbitration (2014),³ and private initiatives such the Burgh house (2005)⁴ and the Hague principles (2010)⁵ on ethical standards, respectively for judges and arbitrators of, and for counsel appearing before, international courts and tribunals, including investment tribunals, and finally the ASIL-ICCA joint Task Force Report on Issue Conflicts in Investor-State Arbitration (2016) were all royally ignored.⁶ Similarly, the many new so-called model BITs that were developed by major BITs users such as the US, UK, France, the Netherlands and others during the years 2004–2008 were not taken into account by the critics either.⁷ It is on all these efforts and improvements that the Commission initiative builds and takes the additional and revolutionary step of judicialising the whole process, including the establishment of an Appeals Court. It would seem, therefore, that, apart from their own solid arguments, Venzke and Pantaleo have these underlying reform movements as a solid basis for their optimism, at least if the opponents are willing belatedly to look at the facts. On the other hand, Douma in his contribution on the environmental aspects of TTIP, sounds a skeptical note about the need for ISDS between developed countries with (at first sight) well-functioning legal and court systems. Whether this skepticism holds up in the light of the ISDS of NAFTA continuous functioning, the CETA's improved system of investment dispute settlement and the need to explain to China that the EU wants ISDS with it because presumably it is underdeveloped and has a mal-functioning court system, is another matter.

Mendes and Jancic remain much more skeptical and critical of the Commission's efforts in the field of regulatory cooperation and its attempts to bring about a regular review of both sides' regulatory efforts in the RCB, so as to arrive at better mutual recognition of the results of the regulatory processes on both sides of the Atlantic. Jancic rediscovers the democratic dilemma that was always inherent in fitting out Association Councils with decision-making power. Within the Union it was believed to have been made bearable by two processes: (1) the advance political legitimation inherent in the conclusion of the Association Agreement that created these Councils by the EU legislator (presently Council and Parliament) and (most of the times) also by the national

³ UNCITRAL *Rules on Transparency in Treaty-based Investor-State Arbitration*, available at <www.uncitral.org>.

⁴ International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, *The Burgh House Principles On The Independence Of The International Judiciary*, available at <www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf>.

⁵ International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, *The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals*, available at <www.ucl.ac.uk/laws/cict/docs/Hague_Sept2010.pdf>.

⁶ ICCA-ASIL Joint Task Force on Issue Conflicts in Investor-State Arbitration, available at <<https://www.asil.org/asil-icca-joint-task-force>>.

⁷ M. Papirinskis (ed.), *Basic Documents on International Investment Protection* (Oxford: Hart Publishing 2012), Nos. 45 – 52.

legislative power of the Member States, and (2) the procedure of Article 218(9) TFEU, defining the common position to be taken by the Union delegation in the Association Council, when a binding decision was about to be adopted.⁸ The crucial question is why this time-tested doubly secured method of legitimation of decisions of organs created by EU agreements with third States would now all of a sudden be inadequate, while the RCB's acts remain mere recommendations.

Mendes looks more at the influence on the EU regulatory process itself and especially how responsive it is to civil society groups, but from time to time also returns to the democratic legitimation of the influence of the recommendations of the RCB. She usefully draws the attention to the question posed by the European Parliament whether acceptance of the recommendations of that Board does not constitute a distortion of the institutional structures of the Union. Here one is left to wonder what the Parliament can have meant by such a suggestion. Presumably it would be the Commission that would take the RCB's recommendation into account when making a regulatory proposal. The Commission would have to explain why it did so and would have to take the responsibility for having done so either in relation to the Union legislator, i.e., Council and Parliament, or, if it concerned an implementing act, in relation to the relevant Committee under Article 291 TFEU. These are both constitutionally ordained procedures that have been laid down in the Treaties and it is difficult to see what could be wrong with that. Mendes rightly draws the attention to other, subtler aspects of participation in such committees as the RCB, but the EU wants influence in that way on the US constitutional and parliamentary procedures, and it will have to accept the one in order to get the other. If the EU should remain immaculate in these negotiations, it should not even go to the negotiating table.

On the environmental aspects of TTIP, Douma has an important point, when he demonstrates that the sustainability impact assessment for the agreement has not been put on the rails in time to have a serious impact on the negotiations any longer.⁹

After this brief critical introduction to the contributions, which remain very interesting and pose questions that really demand an answer – to which the few lines above are a first attempt – I propose to discuss below two aspects of the context of the negotiations for TTIP that have been neglected, probably by necessity, in the five contributions to this book. Subsequently, I will bring up some questions of principle that confront those who would improve the democratic legitimation of agreements like TTIP by giving more influence respectively to the European Parliament and/or to the national parliaments. These are questions that have only increased in cogency and urgency by the way in which the

⁸ Art. 218(9) TFEU reads in part as follows: 'The Council, on proposal from the Commission [...] shall adopt a decision [...] establishing the position to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects [...].'

⁹ This must have irritated an organization like Greenpeace and may have contributed to its reading much more bad news in the leaked negotiating texts that it recently published than was possibly warranted by them.

recent Netherlands referendum purports to undo the Association Agreement with Ukraine.

2. TWO CONTEXTUAL QUESTIONS THAT DESERVE TO BE RECALLED

2.1. Why do the EU and the US want to negotiate TTIP?

During the roundtable, where the drafts for these contributions were discussed, it was striking that the underlying reasons why this agreement is being negotiated were not mentioned at all. The four contributions are representative of the roundtable in this respect. The answer is relatively simple, but should always be kept in mind. In 2013, when the initiative for the negotiations was taken, both parties needed to show that the bond between them was still important and strong. The US pivot to Asia needed a certain counterweight and a comprehensive free-trade agreement with the EU had the merit for the US to incite the Asian partners, and in particular Japan that was dragging its feet, to work seriously with the US in the TPP negotiations. For the EU it was interesting to try to emulate and go further than TPP and to show that, in spite of the Euro-crisis, the EU was and remains a true superpower in the field of trade – that field being the only one where it is truly of equal weight to the US. TPP and TTIP could set a model for trade agreements in a world where global trade agreements, in the sense of all-encompassing as far as subjects and participants are concerned, in the WTO could no longer be achieved. The EU and the US remain dominant in international trade, even in respect of China, and wanted to use this possibly last opportunity to set the model rules for international trade outside the WTO. This is an ambition that President Obama has expressed more than once with respect to TPP, but it applies equally to TTIP. Hence there is the continued ambition on both sides to try and reach new frontiers in regulatory cooperation. On the European side the need for re-forging the bond with the US only increased after 2014, when the confrontation with Russia over the Ukraine began. In a way both parties are condemned to succeed, although it remains to be seen whether they can maintain the level of their ambitions.

2.2. What is the US perspective?

It is perhaps inevitable that the US perspective is almost entirely lacking in this volume and hence it is useful to recall certain fundamentals of that position. In the US the TTIP must arguably remain a trade agreement; in that way TTIP can be concluded as a so-called congressional-executive agreement, that is to say that it is not a treaty within the meaning of the US Constitution and will not require the advice and consent of the US Senate, for which a two-thirds majority is required. This in turn means that one cannot be so ambitious that the scope of the agreement arguably goes beyond trade, as a two-thirds

majority in the Senate is very difficult, if not impossible, to obtain in the present political climate, characterized by extreme partisanship. Normally trade agreements pass both houses of Congress without too much difficulty, if the President has been authorized by both Houses beforehand to conclude such an agreement, described in some detail and subject to certain conditions in a so-called trade negotiation authority. This is also called fast-track authority, as the Congress promises not to modify the agreement in exchange for the mandate that it grants the President and, through him, the US Trade Representative (USTR), for what is normally a series of negotiations. The fast-track authority for TTIP, which included also TPP and a number of other agreements, was granted in June 2015.

The EU may have its fundamental problems with respect to certain aspects of ISDS, but the US certainly has its limitations on the matter as well. There is a considerable group of so-called 'sovereignists' in Congress, who have a great aversion to international dispute settlement in general. They will probably go along with WTO-like dispute settlement as is provided for in the trade portion of the agreement, but a complete judicialised approach to ISDS, including a Court of Appeals, as urged by the EU, may go much too far for these Congressmen and Senators. This same group is likely to be opposed to the idea of a 'living agreement'. There is a respectable conservative academic current in the field of US foreign relations law that has had long-standing problems with giving decision-making authority to 'treaty bodies'. In a US legal perspective this may constitute unlawful delegation of legislative powers to entities outside the US constitutional system.¹⁰ The 'sovereignists' in Congress have latched on to this view of what constitutes impermissible delegation in US foreign relations law and are also likely to oppose this aspect of the agreement's draft as presented by the Commission. They may even try to argue that it is not covered by the broad terms of the fast-track authority and convince USTR not to negotiate at all on this point.

With respect to regulatory cooperation, the EU side has to realize that there exists a large number of so-called independent regulatory agencies in the US, which are extremely powerful and will see no reason to limit their authority, unless there is considerable congressional and executive pressure brought to bear on them. Agencies such as the SEC, the FDA, the FAA, the NHTSA, the FTC and the EPA¹¹ and others of that kind may bring formidable obstacles to bear on the progress of negotiations and on the final result. In addition, the federated states of the US, and their relative freedom within the US constitutional system in such matters as preferential policies on procurement and local content, subsidization of in-state enterprises and 'buy local' or 'buy American' requirements, form in and of themselves an enormous trade barrier for European exporters. The EU tries to get a handle on these phenomena precisely

¹⁰ C.A. Bradley, *International Law in the US Legal System*, (Oxford: Oxford University Press 2013), 26–27 and 100–103.

¹¹ Security and Exchange Commission, Food and Drug Administration, Federal Aviation Authority, and National Highway Transportation Safety Administration, Federal Trade Commission and the Environmental Protection Agency respectively.

through detailed provisions in TTIP, but whether that is palatable to the US states and whether EU concessions on other issues may be deemed sufficient 'payment' for giving up part of their cherished State autonomy, remains very much an open question.¹²

More generally, the election campaign in the US has brought to the fore an almost universal anti-trade sentiment. It is generally felt that trade agreements have failed to deliver an equitable sharing of the advantages and disadvantages of increased trade as between lower, middle and upper class segments of the population, in spite of the labor provisions contained in these agreements and the so-called trade adjustment assistance accompanying them.¹³

3. HOW TO IMPROVE THE DEMOCRATIC LEGITIMACY OF TTIP?

3.1. By increasing the rights of the European Parliament

When one interprets the resistance of large segments of the public against TTIP as being caused by a sentiment of being 'left out' of the decision-making or to the fact that 'Brussels' is seen as physically or metaphorically 'too far away', the quick remedy is to increase parliamentary influence. Obviously the European Parliament may very well suffer of the same 'too far away syndrome' as the other EU institutions, but it is arguable that getting the Parliament closer involved with the controversial aspects of TTIP will in any case do no harm. Already long before the entry into force of the Lisbon Treaty, which gave the EP the right to approve trade agreements, Commissioner Mandelson decided to inform the EP of trade negotiations going on with third States and developed a mechanism to show negotiation documents to the EP's INTA Committee on condition of keeping them secret. For the TTIP negotiations Commissioner Malmström has gone even further and has put proposed negotiating texts from the Commission before all of the Parliament and in the public domain. What more can be done?

As was mentioned above, insofar as both parties still want to create an institution based on the Treaty that can at least make recommendations to both sides, the existing procedure of Article 218(9) TFEU is in principle not adapted to that situation, as it only aims to define the position of the EU delegation in a treaty body in cases where that body will make a binding decision. Moreover, that position will be fixed by the Council alone on a proposal of the Commission. It is not excluded, however, that the Parliament asks its co-legislator, the

¹² The US has considerable problems in practice with enforcing international legal rules in its States and municipalities. Oddly enough the EU has greater practical powers – used sparingly – to make unwilling Member States toe the line on the international obligations, as Art. 216(2), stating that international agreements of the EU bind the Member States, makes it possible to have recourse to the infringement procedure.

¹³ The new Commission Programme 'Trade for All' of 2015 states that the European Globalisation Adjustment Fund (EGF) has never been fully drawn down in any year since its creation a few years ago. In the US the long-standing (1962) Trade Adjustment Assistance (TAA) programme was terminated in 2015, because there were serious doubts about its effectiveness.

Council, to include a procedure on the model of Article 218(9), but that is better adapted to the TTIP. This could be a procedure that applies also to the preparation of recommendations in a possible TTIP treaty body and the position that is going to be taken there by the EU representation on that body. It ought also to include the EP as an institution that must agree to the Commission proposal next to the Council. Such a special procedure could be part of the decision approving TTIP and could be part of the conditions on which the EP will agree to TTIP.

3.2. **By giving national parliaments more to say about TTIP**

It may seem logical to carry over the reflex to give more powers to the EP also to the national parliaments and to involve them more in information, discussion and perhaps even decision-making. Suggestions to that effect are advanced fairly regularly. It would pose serious questions of principle about the proper functioning of the EU, if it were to be decided to give national parliaments actual decision-making powers with respect to what are basically trade agreements, such as TTIP and CETA. These agreements do not contain political clauses, as many association agreements do, and which for that reason are often considered mixed agreements, which have to be ratified by the EU and all its Member States. Trade agreements fall under the exclusive powers of the Union, as laid down in Article 3(1)(e) TFEU. The powers that national parliaments have to issue so-called yellow or orange cards to Commission proposals that are allegedly contrary to the subsidiarity principle and have entered into the normal legislative procedure involving the Council and the Parliament are not applicable to the exclusive powers of the Union,¹⁴ for the simple reason that they are exclusive.

A credible reason why agreements such as CETA and TTIP might be considered mixed rather than exclusive, is because the notion of foreign direct investment, newly included in Article 207 TFEU on the common commercial policy, would not include portfolio investment, whereas the agreements were to include portfolio investment among the matters that fall under foreign direct investment. Another reason might be that the agreement covers cultural matters, as did the agreement with Korea, and is also the case with CETA. However, even in such cases one can take the position that such limited exceptions to the EU's exclusive competence are of an ancillary nature and could thus be subsumed under the overall exclusive trade policy power. This issue is going to be decided by the Court of Justice in an Opinion requested by the Commission in respect of the Free Trade Agreement with Singapore.¹⁵

Even if TTIP would have to be considered mixed on the basis of the Court's future Opinion 2/15, one can still pose the question, if it is legitimate to give national Parliaments an important role in the negotiation and conclusion of an

¹⁴ See Protocols 1 and 2 of the Lisbon Treaty and in particular Art. 7 of Protocol 2, which triggers a decision-making procedure with special majorities in the Council.

¹⁵ Opinion 2/15 pursuant to Art. 218(11) TFEU requested by the European Commission, OJ [2015] C 363/18, 3.11.2015.

agreement that for 98 to 99% would fall under exclusive Union competence. National Parliaments thus would be seriously encroaching on the powers of the European co-legislators, Council and Parliament, and of the negotiator, the Commission, guaranteed by the Treaty of Lisbon.

3.3. The Impact of the Dutch Referendum on the Association Agreement with Ukraine

It is here that the full force is felt of the precedent that is being created by the Dutch so-called corrective referendum about the Dutch Parliament's act of approval of the mixed Association Agreement between the Union and its Member States of the one part and the Ukraine of the other part. This agreement is mixed largely out of tradition, because Association Agreements have always been mixed, except the now defunct Association Agreements with Cyprus and Malta. This was mainly done to emphasize their political importance and thus has a political rather than a legal justification. In the case of the agreement with Ukraine it was also legally justified on the basis of the political clauses at the beginning of the Treaty, which the Member States in the Council decided to base on their national foreign policy competence rather than on the CFSP, which would have been perfectly possible, and would have rendered mixity unnecessary.¹⁶ This would have cut off the eventuality of last minute national objections as caused by the Dutch referendum.

If no solution is found that permits the Union, the Netherlands and Ukraine all to escape without losing too much face, the Union can find itself in a position where the Netherlands feel constrained to say out loud that they are not able to ratify the agreement with Ukraine. The consequence would be that the agreement is dead or would have to be redrafted in the form of a trade agreement that would only be concluded by the Union alone, with next to it a political CFSP agreement or – more likely – a declaration on political cooperation. This would exclude the possibility for the Netherlands alone to stop the agreement from being ratified by the Union and the non-binding political declaration from being adopted.¹⁷

The movement that mobilized the necessary support for pushing through the corrective referendum has already declared that it looks towards TTIP as its

¹⁶ It has to be recalled that Art. 218 TFEU, after Lisbon, foresees the possibility to negotiate and to conclude international agreements that contain both CFSP elements and aspects of TFEU foreign relations and would thus make mixity caused by political provisions unnecessary. Thus far this option has not been used by the Member States in the Council as they preferred old-fashioned mixity in order to reassert their presence on the international scene. This is just one of the examples, where Member States have not been willing over the last years to make full use of the improvements of the external capacity for action of the EU, so much vaunted by them, when bringing about the Lisbon Treaty. See also 'From the Board. Litigation on External Relations Powers after Lisbon: The Member States Reject Their Own Treaty', 43 *Legal Issues of Economic Integration* 1/2016, 1–14.

¹⁷ It should be pointed out that many mixed agreements exist for years and are applied provisionally or not for a long time without the ratification of one or more Member States, since these are still seen as late ratifications that will arrive at some time. This would not be the case of the Netherlands ratification in this case.

next victim, not because it cares about TTIP, or cared about the Ukraine Association before it, but because it wants to derail the European Union. There is little doubt that the Union should look for ways to draft such agreements in a way that makes them referendum-proof, which can best be achieved by accepting that fundamentally they are trade agreements falling under the Union's exclusive competence. That would be nothing less than revolutionary.¹⁸

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¹⁸ It is also unlikely to happen, as so far none of the Member States' governments has been willing to stand up for their own creation after Lisbon and explain to their electorates that the improvements in EU foreign relations law are fully needed and must be embraced in order to construct Europe's place in the future international order. Leading from the front is a dying art in European politics.

