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# TTIP and Climate Change – How real are Race to the Bottom Concerns?

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Abstract

This paper examines concerns about the impact that TTIP could have on existing and future climate policies and laws from the inclusion of provisions on investment protection including investor-to-State dispute settlement (ISDS), the reduction of non-tariff barriers and the introduction of rules for trade in energy and raw materials. It argues that from an environmental perspective, ISDS should not necessarily be seen as a regime that goes against the defence of the environment or prevention of climate change. Although it might be used to challenge policies of an EU home State that increase levels of environmental protection, it can also be used to contest changes in an EU home State's environmental policies that would reduce the protection of the environment, if foreign investment is affected. To a large extent, this also holds true for other areas of TTIP negotiations. While the achievement of a balance between rules that promote trade and those that maintain policy space for governments to respond to environmental concerns has to be closely monitored, benefits for climate could be seized from harmonization of carbon laws at the level of the strictest regulations of two parties, provisions that promote trade in low carbon technologies and renewable energy and bilateral cooperation on climate change.

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In the summer of 2013, the European Union (EU) and the United States (US) launched negotiations for the conclusion of a bilateral free trade agreement, the Transatlantic Trade and Investment Partnership (TTIP). There has been no information so far as to whether the parties to TTIP (Parties) are discussing the inclusion in the agreement of provisions specifically related to climate change. Yet, in its initial position paper on trade and sustainable development, the EU has proposed to include an integrated chapter devoted to aspects of sustainable development, including climate change.<sup>1</sup>

Concerns have been expressed with respect to the impact that TTIP could have on existing and future climate and energy policies, particularly from provisions on investment protection including investor-to-State dispute settlement (ISDS), from the reduction of non-tariff measures (NTMs) and from a proposed chapter on raw materials and energy.

The main concern with respect to the inclusion of ISDS in TTIP comes from the purported introduction of a “new system of arbitration” which could lead to claims of foreign investors challenging national environmental policies.<sup>2</sup> On substance, it has been argued that clauses routinely contained in investment treaties, often vaguely worded, have the potential to reduce the “policy space” of States or even to provoke a “regulatory chill”, restricting the right of governments to take environmental measures.<sup>3</sup>

The concerns regarding the reduction of non-tariff measures, through the disciplines of technical barriers to trade (TBTs) and regulatory coherence, are related to its use as a backdoor mechanism to erode or reduce environmental protection, in particular with respect to measures for the mitigation of climate change.<sup>4</sup> The proposed chapter on energy has provoked strong criticism on the part of NGOs and green parties.<sup>5</sup> In a critical report, Earthjustice has voiced the concern that TTIP would expand fossil fuel exploration while restricting investment in renewable energy.<sup>6</sup>

According to the latest update provided by the EU, textual discussions of the investment chapter have been suspended pending the outcome of the EU public consultation on investment protection and ISDS expected for the coming months. Discussions on trade and sustainable development have included substantive environmental issues, including the prevention of a race-to-the-bottom of environmental regulations and the promotion of cooperation on trade-related issues of sustainable development. Both parties have exchanged information regarding the negotiation of a chapter dedicated to energy and raw materials.<sup>7</sup>

Draft texts of the TTIP are not yet publicly available either for the investment chapter or for the provisions related to regulatory coherence, energy and sustainable development. General information about TTIP has been released, in particular by European Officials<sup>8</sup> and the European Commission.<sup>9</sup> the latter

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<sup>1</sup> European Commission, ‘EU-US Transatlantic Trade and Investment Partnership: Trade and Sustainable Development. Initial EU Position Paper’ (July 2013).

<sup>2</sup> Christiane Gerstetter and Nils Meyer-Ohlendorf, ‘Investor-State Dispute Settlement Under TTIP—a Risk For Environmental Regulation?’ [2013] Heinrich Böll Stiftung TTIP Series; Nathalie Bernasconi-Osterwalder, ‘Reply To The European Commission’s Public Consultation On Investment Protection And Investor-To-State Dispute Settlement (ISDS) In The Transatlantic Trade And Investment Partnership Agreement (TTIP)’ [2014] International Institute for Sustainable Development.

<sup>3</sup> United Nations Conference on Trade and Development (UNCTAD), ‘Reform of Investor-State Dispute Settlement: In Search Of A Roadmap’ [2013] 12, 3.

<sup>4</sup> BEUC - The European Consumer Organisation, ‘Consumers at the Heart of the Transatlantic Trade and Investment Partnership (TTIP)’ (21 May 2014) 5–6.

<sup>5</sup> European Green Party, ‘Position Paper “TTIP – Too Many Untrustworthy Promises And Real Risks”’ [22 February 2014] European Greens.

<sup>6</sup> Earthjustice, ‘Trade in Energy in the Transatlantic Trade and Investment Partnership: An Analysis of the EU “Non-Paper” On Raw Materials and Energy’ (19 May 2014).

<sup>7</sup> European Commission, ‘State Of Play of TTIP Negotiations after the 6th Round’ (29 July 2014).

<sup>8</sup> Karel De Gucht (European Trade Commissioner), ‘Transatlantic Trade and Investment Partnership (TTIP) – Solving the Regulatory Puzzle’ (The Aspen Institute Prague Annual Conference / Prague, Czech Republic 10

reflects the initial position of the EU and includes papers on investment protection and ISDS,<sup>10</sup> regulatory coherence,<sup>11</sup> on raw materials and energy<sup>12</sup> as well as trade and sustainable development.<sup>13</sup> Therefore all the comments and observations in this memo are made on a preliminary basis, grounded in the information that is currently publicly available.

It is important to note that provisions relevant for climate change could be contained in all chapters of the TTIP.<sup>14</sup> As a thorough analysis of all chapters would exceed the scope of this memo, we will principally focus on the proposals related to investment, regulatory coherence and to the chapters on raw materials and energy as well as sustainable development.

## I. Investor to State Dispute Settlement

In recent years, we have witnessed an increasing sense of discomfort on the part of developed countries with respect to ISDS, a system to settle foreign investment disputes that they created and promoted over several decades. ISDS allows private foreign investors to use investor–State arbitration to sue a host State for the alleged violation of an international investment agreement (IIA) concluded between that host State and the investor’s State of origin (“home State”).

The first negative reaction came after Canada and the United States became respondents in cases brought by foreign investors under Chapter 11 of the North American Free Trade Agreement (NAFTA),<sup>15</sup> and this attitude has persisted in the recent negotiations of the Comprehensive Economic and Trade Agreement (CETA),<sup>16</sup> between the EU and Canada.

Today we are observing a similar debate in Europe with respect to the TTIP as some groups, including civil society organizations, academia and certain government officials, view the proposed inclusion of ISDS in that treaty as a menace.<sup>17</sup> Their concerns are not unfounded given the increasing number of

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October 2013); and Ignacio García Bercero, DG Trade, European Commission (EU Chief Negotiator for TTIP), ‘The Regulatory Part Of TTIP’ (14 October 2013).

<sup>9</sup> European Commission, ‘EU Publishes Initial TTIP Position Papers’ (16 July 2013) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=943>> accessed 4 September 2014

<sup>10</sup> European Commission, ‘Investment Protection and Investor-To-State Dispute Settlement in EU Agreements’ (November 2013).

<sup>11</sup> European Commission, ‘EU-US Transatlantic Trade and Investment Partnership: Trade Cross-Cutting Disciplines and Institutional Provisions (Initial EU Position Paper)’ (July 2013).

<sup>12</sup> ‘EU-US Transatlantic Trade and Investment Partnership: Raw Materials and Energy. Initial EU Position Paper’ (July 2013).

<sup>13</sup> European Commission, ‘EU-US Transatlantic Trade and Investment Partnership: Trade and Sustainable Development Initial EU Position Paper’ (n 1).

<sup>14</sup> T. Cottier et al. (2012), Analysis of the EFTA Model Chapter on Trade and Sustainable Development, Legal opinion prepared for the Swiss Federal Office for the Environment.

<sup>15</sup> See among others: Guillermo Aguilar Alvarez and William W. Park, ‘The New Face of Investment Arbitration: NAFTA Chapter 11’ (2003) 28 *Yale J Int’l L* 365, 368–69; and Nicola Ranieri, ‘Investor’s Rights, Legal Concepts, And Public Policy in the NAFTA Context’ in Leon Trakman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press 2013) 405.

<sup>16</sup> See among others: European Commission, ‘Investment Provisions In The EU-Canada Free Trade Agreement (CETA)’ (3 December 2013); and Nathalie Bernasconi-Osterwalder and Howard Mann, ‘A Response To The European Commission’s December 2013 Document “Investment Provisions In The EU-Canada Free Trade Agreement (CETA)” (International Institute for Sustainable Development (IISD) February 2014).

<sup>17</sup> In the case of the TTIP, due to the substantial interest generated by this specific proposed feature of the agreement, the European Commission held an online public consultation process, receiving a total of 149,399 contributions, mostly from the United Kingdom, followed by Austria, Germany, France, Belgium, Netherlands and Spain. European Commission, ‘Online Public Consultation on Investment Protection and Investor-To-State Dispute Settlement (ISDS) In the Transatlantic Trade and Investment Partnership Agreement (TTIP)’

proceedings that have been brought against developed countries, in particular Member States of the EU.<sup>18</sup>

#### A. TTIP is not introducing ISDS, the system is already in place

As we have already mentioned, one of the main concerns regarding TTIP comes from the assumption that it is introducing ISDS as a “new system of arbitration” between the EU and the United States, which could lead to cases challenging domestic environmental policies. This view, however, is not accurate.

In fact, European countries were the first to promote bilateral investment treaties (BITs) together with ISDS.<sup>19</sup> There are currently nine BITs between EU Member States and the United States that include not only substantive investment protection but also provide for investor-State arbitration. They have been signed exclusively with “accession states”, that is EU Member States from Eastern Europe, i.e. Poland, Slovakia, Czech Republic, Romania, Estonia, Bulgaria, Latvia, Croatia and Lithuania.<sup>20</sup> Although they predate the countries’ accession to the EU, these treaties are all still in force.<sup>21</sup>

They closely follow the “Dutch gold standard model BIT”, in that they are short treaties with broad definitions for investors and investment, unqualified most-favoured nation (MFN) clauses, national treatment (NT), fair and equitable treatment (FET), broad “umbrella clauses” that elevate a contract claim to the level of a treaty claim, free transfer of funds in connection with an investment, no exceptions for special sectors, investor-State arbitration with no filter mechanisms and full compensation for direct and indirect expropriation.<sup>22</sup>

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(July 2014). A group of 121 academic experts has spoken out against the inclusion of ISA in the TTIP. ‘Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) In The Transatlantic Trade And Investment Partnership (TTIP) -’ (*Kent Law School - University of Kent*, July 2014) <[https://www.kent.ac.uk/law/isds\\_treaty\\_consultation.html](https://www.kent.ac.uk/law/isds_treaty_consultation.html)> accessed 4 August 2014.

<sup>18</sup> UNCTAD reported that in 2013, and for the first time, there were more ISDS cases brought against developed economies than against developing countries. United States figures prominently as the main home State of investors that have brought ISDS claims (127 cases, 22% of the known cases). EU Members were among last year’s most frequent respondents in ISDS: the first one was the Czech Republic, followed by Egypt and Spain. See in particular United Nations Conference on Trade and Development (UNCTAD), ‘Recent Developments in Investor-State Dispute Settlement (ISDS)’ [2014] (1) IIA Issues Note, 2, 8.

<sup>19</sup> The first BIT was signed between Germany and Pakistan in 1959; the first BIT that expressly incorporated ISDS, although with some restrictions, is the Indonesia-Netherlands BIT (1968); and the first BIT providing for investor-State arbitration (ISA) without unqualified State consent seems to be the Chad-Italy BIT (1969). See Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 42, 44–45.

<sup>20</sup> A BIT between United States and Poland was signed on 21 March 1990 and entered into force on 6 August 1994 (Poland is a EU member since 1 May 2004); a BIT with Slovakia was signed on 22 October 1991 and is in force since 19 December 1992 (Slovakia is a EU member since 1 May 2004); a BIT with the Czech Republic was signed on 22 October 1991 and is in force since 19 December 1992 (Czech Republic is a EU Member since 1 May 2004); a BIT with Romania was signed on 28 May 1992 and is in force since 15 January 1994 (Romania is a EU member since 1 January 2007); a BIT with Estonia was signed on 19 April 1994 and is in force since 16 February 1997 (Estonia is a EU member since 1 May 2004); a BIT with Bulgaria was signed on 23 September 1992 and is in force since 2 June 1994 (Bulgaria is a EU member since 1 January 2007); a BIT with Latvia was signed on 13 January 1995 and is in force since 26 December 1996 (Latvia is a EU member since 1 May 2004); a BIT with Croatia was signed on 13 July 1996 and is in force since 20 June 2001 (Croatia is a EU member since 1 July 2013); and a BIT with Lithuania was signed on 14 January 1998 and is in force since 13 June 2004 (Lithuania is a EU member since 1 May 2004).

<sup>21</sup> Under Article 351 of the Treaty on the Functioning of the European Union (TFEU), Member States are allowed to give priority to their international obligations over their EU law obligations-at least temporarily.

<sup>22</sup> Nikos Lavranos, ‘The New EU Investment Treaties: Convergence Towards The NAFTA Model As The New Plurilateral Model BIT Text?’ (SSRN Scholarly Paper, 29 March 2013) 1.

All EU Member States – except Ireland – have BITs.<sup>23</sup> In addition, both the EU and its Member States are parties to the Energy Charter Treaty (ECT), one of the few multilateral treaties that provides for ISDS with respect to investments in the energy sector. Investors from the EU are the most frequent claimants in the ISDS system.<sup>24</sup>

To conclude, even if TTIP does not include investor–State arbitration, EU Member States are and will continue to be exposed to ISDS. They are in fact one of the main drivers of the system, and as a group represent the biggest share of home States of foreign investors that use ISDS. With respect to claims coming from US investors, it is important to highlight that not only the “new” EU members that currently have BITs with the US are “unprotected”, but this applies to all Member States. American investors can indeed have recourse to “treaty shopping” or “nationality planning”, a technique which allows foreign investors to benefit from an investment treaty of a third country by routing their investment through that country.<sup>25</sup> As a result, American investors can take advantage of intra-EU BITs to file claims against countries with which the United States does not have an investment treaty.<sup>26</sup>

The system in place has served recently to challenge modifications of national environmental policies of EU Member States: Last year, investors from Germany, the United Kingdom, the Netherlands, Luxembourg and Cyprus brought a law suit against the Czech Republic using ISDS contesting the 2011 amendments that imposed a levy on electricity generated from solar power plants, arguing that the levies undercut the viability of the investments and modified the incentive regime put in place to stimulate the use of renewable energy. In 2013, investors from the Netherlands, Luxembourg and the United Kingdom also brought a law suit against Spain, challenging a 7% tax imposed on the revenues of power generators and a reduction of subsidies for renewable energy producers.<sup>27</sup> From the environmental point of view, these claims are not negative, as they challenge regulatory changes that decreased the incentives provided for renewable energies.

ISDS can, however, also be used to challenge environmental policies as is evidenced by cases in the context of NAFTA. Two disputes against Canada initiated in 2013 by American investors illustrate this point. The first, a claim by Lone Pine Resources, arose out of Quebec’s moratorium on hydraulic fracturing (“*fracking*”) that led to the revocation of the company’s gas exploration permits. In the second, the claimant Windstream Energy LLC, contended that Ontario’s moratorium on offshore wind farms (pending research on their health and environmental effects), breached its contract for the electricity supply, which it had concluded with the Ontario Power Authority for a 20-year period.<sup>28</sup> Overall, it

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<sup>23</sup> Germany (ranked first with 126 BITs and 49 other IIAs in force), United Kingdom (ranked fourth with 95 BITs and 49 other IIAs in force), France (ranked fifth with 92 BITs and 49 other IIAs in force), Netherlands (ranked seventh with 90 BITs and 49 other IIAs in force), Belgium (ranked eighth with 66 BITs and 48 other IIAs in force), Luxembourg (ranked ninth with 66 BITs and 49 other IIAs in force) and Italy (ranked tenth with 73 BITs and 49 other IIAs in force). United Nations Conference on Trade and Development (UNCTAD), ‘International Investment Agreements by Economy’ <<http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>> accessed 15 August 2014.

<sup>24</sup> Ibid 28.

<sup>25</sup> See Matthew Skinner et al., ‘Access and Advantage in Investor–State Arbitration: The Law and Practice of Treaty Shopping’ (2010) 3 J World Energy Law Bus 260, 260–61.

<sup>26</sup> Although some IIAs includes limitations to treaty shopping, reserving the right to deny the advantages of the treaty to a company with no substantial business activities in the host State, that is not a common provision in BITs following the “Dutch” model. For example, an American company investing in Netherlands, through another company incorporated in Croatia, could benefit of the investment protection of the Croatia-Netherlands BIT (1998). According to Article 1 of the Croatia-Netherlands BIT, the term “national” includes legal persons constituted under the law of a Contracting Party, and legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons or legal persons of a Contracting Party. The term “investments” means every kind of asset.

<sup>27</sup> United Nations Conference on Trade and Development (UNCTAD), ‘Recent Developments in Investor–State Dispute Settlement (ISDS)’ (n 18) 5, 26–27.

<sup>28</sup> Ibid 28.

should be noted, however, that Canada, while being a respondent State in 22 ISDS claims has lost only three cases so far.

In conclusion, the introduction by TTIP of ISDS would not create a new system of arbitration allowing the challenge of environmental policies in the EU. That system is already in place through a network of treaties containing ISDS. As evidence of this, on 28 August 2014, the EU published a Regulation on financial responsibility under investor–State disputes, which define who is deemed to be best placed to defend the EU’s and Member States’ interests in the event of any challenge under ISDS in EU agreements and the Energy Charter Treaty.<sup>29</sup> However, TTIP would extend the use of investor–State arbitration to all EU Member States and the EU to prevent the need for recourse to “treaty shopping” or “nationality planning”. Also, we should keep in mind that ISDS is a double-edged sword from an environmental perspective: although it can be used to contest environmental policies, it may also be used to defend policies that reduce the level of environmental protection, as is evidenced by the cases that were brought against Spain and the Czech Republic.

## **B. TTIP can provide more policy space and improve ISDS**

A common concern with respect to ISDS is that IIAs contain certain broadly framed clauses, i.e. clauses on “fair and equal treatment” (FET) of foreign investors, a prohibition on “(indirect) expropriation”, and the so-called “umbrella” clause, which may have the effect of reducing States’ rights to regulate and are potential causes of “regulatory chill”.<sup>30</sup> This effect is increased by the fact the case law interpreting these clauses is not coherent and is sometimes unpredictable. Although certain authors have come to the conclusion that there is no decisive empirical evidence for “regulatory chill” due to the existence of ISDS, as arbitral tribunals usually stress the importance of “policy space, this does not mean that there is no room for improvement.<sup>31</sup>

From a procedural point of view, there is a commonly held opinion that judges would be better suited to settle disputes with foreign investors than arbitrators. Domestic courts would, moreover, be a more fitting forum for this process, as judicial decision-making in Europe and America offer better guarantees of transparency, accountability, and independence.<sup>32</sup>

The European Commission is professedly working to address these concerns within the TTIP, clarifying investment protection rules and improving the way in which investor–State arbitration operates.<sup>33</sup>

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<sup>29</sup> As a general rule, Member States will defend any challenges to their own measures and the EU will defend measures taken at EU level. The rules also establish the principles for allocating any eventual costs or compensation. As a general rule, the EU shall bear the financial responsibility arising from treatment afforded by the institutions, bodies, offices or agencies of the Union, and the Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State, unless such treatment was required by Union law, in which case the EU shall bear the financial responsibility arising from such treatment. See European Union, ‘Regulation (EU) No 912/2014 Of The European Parliament And Of The Council Of 23 July 2014 Establishing A Framework For Managing Financial Responsibility Linked To Investor-To-State Dispute Settlement Tribunals Established By International Agreements To Which The European Union Is Party’ (Official Journal of the European Union 28 August 2014).

<sup>30</sup> United Nations Conference on Trade and Development (UNCTAD), ‘Reform of Investor-State Dispute Settlement: In Search of A Roadmap’ (n 3) 3.

<sup>31</sup> Christian Tietje and Freya Baetens, ‘The Impact of Investor-State Dispute Settlement (ISDS) In the TTIP’ (Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, the Netherlands 24 June 2014) 127.

<sup>32</sup> Gus Van Harten, ‘Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA’ (SSRN Scholarly Paper, 3 July 2014).

<sup>33</sup> European Commission, ‘Investment Protection and Investor-to-State Dispute Settlement in EU agreements’ (n 10) 2.

In addition, it suspended the negotiation of the investment chapter so that it could hold a large public consultation on investment protection and ISDS.<sup>34</sup>

In the following sections, we will provide an overview of how the EU envisages improving the system. Our analysis is based mainly on official documents of the EU and the recently consolidated text of the CETA (announced on 5 August 2014), which provides an effective benchmark for future agreements.<sup>35</sup>

### 1. Clarifying investment protection rules:

- a. Right to regulate: the EU wants to reaffirm in TTIP the right of the States to regulate to pursue legitimate public policy objectives.<sup>36</sup> As reflected in Article X.4 of the CETA draft, there is an explicit recognition of the right of each Party “*to set its own environmental priorities, to establish its own domestic levels of environmental protection, and to adopt or modify its relevant laws and policies accordingly in a manner consistent with the multilateral environmental agreements to which they are a party*”. Under that agreement, each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve those laws and policies and their underlying levels of protection.<sup>37</sup>
- b. “Indirect Expropriation”:<sup>38</sup> the EU wants to provide in TTIP a detailed set of provisions giving guidance to arbitrators on how to decide whether or not a government measure constitutes indirect expropriation. In particular, the Union wants to ensure that when the State is acting to protect the public interest in a non-discriminatory way, the right of the State to regulate should prevail over the economic impact of those measures on the foreign investor.<sup>39</sup> Again, in the CETA draft there is a specific provision declaring that except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, “*non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations*”.<sup>40</sup>

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<sup>34</sup> European Commission, ‘Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’ (n 17).

<sup>35</sup> ‘Canada-European Union CETA (Draft)’ (Transnational Dispute Management (TDM) 1 August 2014).

<sup>36</sup> European Commission, ‘Investment Protection and Investor-to-State Dispute Settlement in EU agreements’ (n 10) 2, 7.

<sup>37</sup> ‘Canada-European Union CETA (Draft)’ (n 40), Art. X.4.

<sup>38</sup> Indirect expropriation can be defined as “a total or near-total deprivation of an investment but without a formal transfer of title or outright seizure”. United Nations Conference on Trade and Development, *Expropriation: A Sequel* (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2012) 7.

<sup>39</sup> European Commission, ‘Investment Protection and Investor-to-State Dispute Settlement in EU agreements’ (n 10) 2, 7–8.

<sup>40</sup> ‘Canada-European Union CETA (Draft)’ (n 40), Annex X.11.3.

- c. **“Fair and Equitable Treatment” (FET):**<sup>41</sup> This is a standard very frequently invoked by investors, but not always clearly defined. As a result, tribunals have had significant leeway in interpreting this concept in a manner that has been seen as giving too many or too few rights to investors. In the TTIP negotiations, the EU aims to set out precisely what elements are covered and which actions are not allowed.<sup>42</sup> The CETA draft declares that a party breaches the FET obligation where a measure or series of measures constitutes:<sup>43</sup>
- Denial of justice in criminal, civil or administrative proceedings;
  - Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
  - Manifest arbitrariness;
  - Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
  - Abusive treatment of investors, such as coercion, duress and harassment; or
  - A breach of any further elements of the FET obligation adopted by the Parties.

## 2. Improving how ISDS operates:

- a. **Preventing investors from bringing multiple or frivolous claims:** To avoid this, the EU wants to include in the TTIP a provision that the investor who loses the case will be obliged to pay all litigation costs, including those of the respondent State and to introduce provisions that enable arbitral tribunals to dismiss frivolous or unfounded claims quickly.<sup>44</sup> In the CETA draft there is a provision establishing a “loser pays” presumption to investment arbitration<sup>45</sup> and certain clauses allow host States to file an objection that a claim is manifestly without legal merit or unfounded as a matter of law, and arbitrators shall address and decide it as a preliminary question.<sup>46</sup>
- b. **Making the arbitration system more transparent:** The EU wants to ensure that in TTIP all ISDS documents are available to the public, there is access to hearings, and

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<sup>41</sup> FET is an absolute standard of protection. It applies to investments in a given situation without reference to how other investments are treated by the host State. Therefore host States are unable to resist a claim under FET by saying that the treatment is no different from that experienced by their own nationals or other foreign investors operating in their country. United Nations Conference on Trade and Development, *Fair And Equitable Treatment: A Sequel* (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2012) 6 The precise content of the standard has been highly debated and it has been developed mainly through ISDS litigation, although some investment treaties – like the ones usually negotiated by the US – contain elements that could narrow the interpretation of the standard.

<sup>42</sup> European Commission, ‘Investment Protection and Investor-to-State Dispute Settlement in EU agreements’ (n 10) 2, 7–8.

<sup>43</sup> ‘Canada-European Union CETA (Draft)’ (n 40), Article X.9.

<sup>44</sup> European Commission, ‘Investment Protection and Investor-to-State Dispute Settlement in EU agreements’ (n 10) 2, 7–8.

<sup>45</sup> ‘Canada-European Union CETA (Draft)’ (n 40), Article X.36.5. “A tribunal shall order that the costs of arbitration be borne by the unsuccessful disputing party. In exceptional circumstances, a tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the tribunal determines that such apportionment is unreasonable in the circumstances of the claim. Where only parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims”.

<sup>46</sup> *Ibid*, Article X.29, X.30.

interested parties (including other non-disputing parties and NGOs) are allowed to make submissions.<sup>47</sup> For this purpose, in the CETA draft, there is an explicit application of the UNCITRAL Transparency Rules in Treaty-based investor-State Arbitration,<sup>48</sup> according to which hearings are to be open to the public, submissions by third persons are admissible in ISDS proceedings previous evaluation of the arbitral tribunal, and documents related to the arbitration are public, unless they are classified as protected information.<sup>49</sup>

- c. Dealing with conflicts of interests and consistency of arbitral awards: The EU wants to include in the TTIP a binding code of conduct for arbitrators and aims to create an appellate mechanism to ensure consistency and increase the legitimacy of the system by subjecting awards to review.<sup>50</sup> According to the CETA draft, arbitrators shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted by the parties.<sup>51</sup> However, there is not yet an appellate mechanism, although it could be created under Article X.42.1 of the Agreement to review, on points of law, awards rendered by an arbitral tribunal.
- d. Introducing safeguards for the State Parties: The EU wants to include in the TTIP provisions that will allow States to maintain control over how the investment provisions are being interpreted (including FET).<sup>52</sup> In the CETA draft, the Parties shall regularly, or upon request of a Party, review the content of the obligation to provide FET, and a Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.<sup>53</sup> In a previous draft of CETA (2013) the EU proposed the inclusion of an “umbrella clause” (Canadian investment treaties typically do not contain such clause), which could make it possible for investors to claim a breach of contract or other agreement as a violation of the treaty itself, broadening host State commitments and leaving them more exposed to international arbitration claims.<sup>54</sup> However, the umbrella clause is not found in the CETA draft of 1 August 2014.

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<sup>47</sup> European Commission, ‘Investment Protection and Investor-to-State Dispute Settlement in EU agreements’ (n 10) 2, 8–9.

<sup>48</sup> ‘Canada-European Union CETA (Draft)’ (n 40), Article X.33.

<sup>49</sup> In July 2013, UNCITRAL adopted a package of rules aiming to ensure transparency in investor-State arbitration, ratifying the work done by delegations to UNCITRAL over the course of nearly three years of negotiations. The new rules which officially came into effect on April 1, 2014, are part of the UNCITRAL Arbitration Rules and are also available as a stand-alone instrument for application in disputes governed by other arbitral rules. They provide for a significant degree of openness throughout the arbitral proceedings ensuring transparency from the beginning to the end of treaty-based investor-State arbitrations to which they apply. They contain one article that governs the scope and manner of application of those provisions (Article 1); three articles mandating disclosure and openness (Articles 2, 3, and 6); two governing participation by non-disputing parties (Articles 4 and 5); one setting forth exceptions from the disclosure requirements (Article 7); and one regarding management of disclosure through a specific repository (Article 8).”

<sup>50</sup> European Commission, ‘Investment Protection and Investor-to-State Dispute Settlement in EU agreements’ (n 10) 2, 8–9.

<sup>51</sup> ‘Canada-European Union CETA (Draft)’ (n 40), Article X.25.6.

<sup>52</sup> European Commission, ‘Investment Protection and Investor-to-State Dispute Settlement in EU agreements’ (n10) 2, 8–9.

<sup>53</sup> ‘Canada-European Union CETA (Draft)’ (n 40), Article X.9.3.

<sup>54</sup> Nathalie Bernasconi-Osterwalder and Howard Mann (n 16) 4.

In contrast to CETA, the current investment treaties concluded by Member States of the EU generally do not include this type of clause. For instance, none of the BITs currently in force between the United States and EU Member States have provisions explicitly recognizing the right to regulate in environmental matters, neither do they provide a clear definition of FET and indirect expropriation. They also do not contain obligations on transparency of investment arbitration nor include codes of conduct for arbitrators or filters for frivolous or multiple claims. Finally, eight BITs between EU Members and the United States include an “umbrella clause” – the Croatia-United States BIT being the exception.<sup>55</sup>

To conclude, if the negotiations fulfil the objectives purported by the EU, the TTIP could provide an important opportunity to improve the ISDS regime for EU countries, including provisions that assure more policy space and an upgraded dispute settlement process. This, however, presupposes that current European BITs with the US will be terminated. If that does not happen, TTIP will only create an extra layer of investment regulation, while retaining all the substantive and procedural problems previously discussed.<sup>56</sup> Progress, however, cannot be taken for granted. Civil society needs to closely monitor the negotiations, as it did for CETA.<sup>57</sup> For example, the repeated critique about the inclusion of an “umbrella clause” seemingly convinced the European Commission to scrap it.<sup>58</sup>

Finally, it should be emphasized that the inclusion of investment protection and ISDS in the TTIP could serve as a catalyst for the improvement of the overall regime of foreign investment. Given the importance of both the EU and the US in overall trade, the TTIP may serve as a template for future bilateral negotiations and could even lay the groundwork for a multilateral investment agreement.<sup>59</sup> On the other hand, if the EU were to promote domestic courts as a sole forum to deal with foreign investment disputes, and were to scrap ISDS in TTIP, this might open the door to the abandonment of the ISDS by developing countries with potentially far-reaching consequences.

## II. Non-Tariff Measures, Regulatory Coherence and TBTs

As tariffs between the US and the EU are already low, a key aim of TTIP is to reduce or eliminate non-tariff measures (NTMs)<sup>60</sup>, in particular unjustified technical barriers to trade (TBTs)<sup>61</sup>, aligning rules and regulations on both sides of the Atlantic in order to achieve “regulatory coherence”.<sup>62</sup> The elimination, reduction and prevention of unnecessary regulatory barriers are expected to provide the greatest

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<sup>55</sup> United Nations Conference on Trade and Development (UNCTAD), ‘International Investment Agreements by Economy’ (n 23).

<sup>56</sup> Some commentators have highlighted that if a BIT is terminated on the basis of mutual agreement, States parties also have the power to override so-called ‘survival’ or ‘sunset’ clauses commonly found in IIAs, thereby excluding all future rights, obligations and claims under the treaty. *See*: Tania S. Voon and others, ‘Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties’ (SSRN Scholarly Paper, 10 December 2013).

<sup>57</sup> Nathalie Bernasconi-Osterwalder (n 2) 28.

<sup>58</sup> See Marc Maes, ‘Investment Protection In The EU - Canada Comprehensive Economic And Trade Agreement (CETA)’ (Seattle to Brussels Network 5 March 2014) 1, 5; Nathalie Bernasconi-Osterwalder and Howard Mann (n 16) 4.

<sup>59</sup> Christian Tietje and Freya Baetens (n 36) 127.

<sup>60</sup> Non-tariff measures are generally defined as “policy measures other than ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both”. United Nations Conference on Trade and Development (UNCTAD), *Classification of Non-Tariff Measures* (UNCTAD/DITC/TAB/2012/2, 2012) 1, 4.

<sup>61</sup> TBTs are one type of NTMs, which refers to measures such as labelling, standards on technical specifications and quality requirements, and other measures protecting the environment. United Nations Conference on Trade and Development (UNCTAD), *Classification of Non-Tariff Measures* (UNCTAD/DITC/TAB/2012/2, 2012) 1, 4.

<sup>62</sup> BEUC - The European Consumer Organisation (n 4) 5. Daniel S. Hamilton, ‘TTIP, Implicaciones Para Las Potencias Emergentes y El Orden Internacional’ (2014) 15 Puentes 8, 8.

benefit of the TTIP.<sup>63</sup> The goal is to help the EU and the US to avoid, to the extent possible, unnecessary divergences when developing new regulations or revising existing ones, as well as when developing international standards.<sup>64</sup>

Although there are clear benefits of reducing and eliminating NTMs, concerns have been raised that the general levels of environmental protection will be lowered. Whether this will happen will largely depend on how the objectives are implemented both at the level of the general principle of “regulatory coherence” and the concrete modalities regarding the reduction or elimination of NTMs.

### A. Regulatory Coherence

Whereas under CETA, the EU agreed with Canada merely a chapter on “regulatory co-operation”,<sup>65</sup> it has been reported that the TTIP will include a new cross-cutting “horizontal chapter” on regulatory coherence. This chapter would apply to all goods and services sectors providing a general discipline for policymakers when monitoring existing regulations and adopting new ones. The goal of this chapter is to promote regulatory coherence through the adoption of a suite of procedural requirements, such as transparency, public consultation, regulatory impact assessment (RIA), early warnings, and ex post analysis of existing regulations, which build upon existing procedures under the relevant WTO Agreements (such as TBTs).<sup>66</sup> It is not yet known whether the chapter on regulatory coherence will merely consist of further procedural requirements or of substantive additions to disciplines covered in other chapters. It is also not clear whether it will include a “body with decision-making power” and a dispute settlement mechanism.<sup>67</sup>

For both the EU and the US, this new chapter offers a unique chance to develop and implement international regulations and standards (multilateral or plurilateral), reduce the risk of unilateral and purely national solutions leading to regulatory segmentation that can have an adverse effect on international trade and investment. It may also serve as a positive example for third-country markets around the world, while maintaining high levels of environmental protection.<sup>68</sup>

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<sup>63</sup> In principle, regulations will be defined in a broad sense, covering all measures of general application, including environmental regulation, and considering both legislation and implementing acts, regardless of the level at which they are adopted and of the body which adopts them. See European Commission, ‘EU-US Transatlantic Trade and Investment Partnership: Trade Cross-Cutting Disciplines and Institutional Provisions (Initial EU Position Paper)’ (n 11) 1; Business Europe and U.S. Chamber of Commerce, ‘Transatlantic Trade and Investment Partnership (TTIP)’ (2014); Transatlantic Task Force on Trade and Investment, ‘A New Era for Transatlantic Trade Leadership’ (February 2012).

<sup>64</sup> European Commission, ‘EU-US Transatlantic Trade and Investment Partnership: Trade Cross-Cutting Disciplines and Institutional Provisions (Initial EU Position Paper)’ (n 11) 2.

<sup>65</sup> This includes activities of information sharing and bilateral discussions, mainly through a Regulatory Cooperation Forum (“the RCF”) with a view to enhancing convergence and compatibility between regulatory measures of the parties. However, both countries can adopt differing measures or pursuing differing approaches for reasons including different institutional and legislative approaches, or circumstances, values or priorities particular to that Party. In that context, to foster regulatory convergence, special emphasis is given to MRAs in special issues such as conformity assessment and pharmaceutical products. ‘Canada-European Union CETA (Draft)’ (n 40), Chapters 26-28.

<sup>66</sup> Alberto Alemanno, ‘The Transatlantic Trade And Investment Partnership (TTIP) And Parliamentary Regulatory Cooperation’ [2014] European Parliament Policy Report, Brussels, 43–44.

<sup>67</sup> Alberto Alemanno, ‘TTIP: Where Do We Stand?’ (9 February 2014) <<http://www.albertoalemanno.eu/articles/438188>> accessed 2 September 2014.

<sup>68</sup> European Commission, ‘EU-US Transatlantic Trade and Investment Partnership: Trade Cross-Cutting Disciplines and Institutional Provisions (Initial EU Position Paper)’ (n 11) 1–2; and Office of the United States Trade Representative, ‘U.S. Objectives, U.S. Benefits In The Transatlantic Trade And Investment Partnership: A Detailed View’ (March 2014) <<http://www.ustr.gov/about-us/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View>> accessed 2 September 2014.

Although there is no public (or leaked) text on the regulatory coherence provisions of the TTIP, the EC has mentioned three fundamental points as negotiating objectives that are related to environmental protection:<sup>69</sup>

- a) **Regulatory coherence could not mean lowering of present levels of protection for the environment.** By way of example, the EU approaches to regulations on chemicals, hormones, and genetically modified organisms (GMOs) are different to those applicable in the US. The EC holds that the levels of protection reflected in the EU laws and regulations on these issues are not to be changed because of TTIP.
- b) **Maintaining the right to regulate to reach the high level of protection that each party considers appropriate.** Disciplines on future environmental regulations or determinations of equivalency for existing ones should not be to the detriment of such right. The EU should not be prevented from regulating to respond to new phenomena or to react to new scientific evidence if necessary – even in areas in which the Union has agreed with the US to recognise each other’s regulations as equivalent.
- c) **The tools used to achieve the regulatory objectives of TTIP will depend on the issues and the specificities of each sector:** Sectorial annexes would contain commitments for specific goods and services sectors. The EC’s declared purpose is not only to achieve greater regulatory compatibility with the US but also to be able to jointly promote global regulations and standards in specific sectors, as the EU and the US already do in the area of technical regulations and safety standards for electric vehicles.

From the US point of view, the horizontal chapter on regulatory coherence offers an opportunity to develop cross-cutting disciplines on regulatory practices, to achieve market integration, and to remove “behind the border” trade barriers. These objectives should be achieved through the promotion of greater transparency, participation and accountability in the development of regulations. This includes evidence-based analysis and decision-making, a “whole-of-government approach”<sup>70</sup> to regulatory management, and giving stakeholders (public and private, foreign and domestic) adequate opportunity to comment on proposed regulations, ensuring that regulatory processes not only respect democratic principles, but also provide regulators with input from a wide range of stakeholders.<sup>71</sup> For the US, transparent regulatory processes ensure better quality regulations that can achieve important objectives, such as protecting the environment whereas a lack of transparency and accountability in regulatory and standards processes can lead to unnecessary, costly, or duplicated rules that reduce competitiveness and act as discriminatory barriers.<sup>72</sup>

Seemingly, a different emphasis is placed by the two Parties on how regulatory coherence should be achieved. While the European approach is more focused on the substance, the American approach is more procedural, highlighting the importance of how regulations are adopted. Both Parties intend, however, to achieve and maintain high environmental standards.

Some civil society groups and green parties have articulated the fear that the US is seeking to adopt a “science-based” approach to addressing environmental issues that would dilute the EU’s “precautionary principle” which guides the regulatory risk assessments of the EU.<sup>73</sup> Other commentators, however, point out that differences between the regulatory standards of the EU and the US are often not

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<sup>69</sup> Ignacio García Bercero, DG Trade, European Commission (EU Chief Negotiator for TTIP) (n 8) 1.

<sup>70</sup> This means that public agencies should work across sectorial boundaries to achieve a shared goal and an integrated response to particular issue.

<sup>71</sup> Office of the United States Trade Representative (n 72).

<sup>72</sup> Ibid.

<sup>73</sup> European Green Party, ‘Position Paper “TTIP – Too Many Untrustworthy Promises and Real Risks”’ (n 5).

grounded in science, but rather are based on subjective, idiosyncratic, political preferences, and cultural values often applied under the guise of differences in “level of protection”.<sup>74</sup>

## B. Reduction and elimination of NTMs, in particular TBTs

There are two ways of reducing the trade-inhibiting impact of TBTs and regulatory measures: harmonizing national standards, so there is only one set of norms in the first place (*harmonization*) or recognizing multiple norms, so that goods are only required to meet one set of norms to allow them to be sold in all markets (*mutual recognition*).<sup>75</sup> To achieve harmonization, a common definition of both the policy objective and the technical requirements is required. Mutual recognition, by contrast, refers to the reciprocal acceptance of the measures applied in the two countries.

Harmonization of regulation is a double-edged sword. On the one hand, it reduces transaction costs and removes barriers to transatlantic trade, increasing welfare within the TTIP negotiating partner countries. At the same time, it gives third country enterprises security and enables them to concentrate on meeting a single standard, so long as the standard is not prohibitive. On the other hand, *ex-ante* harmonization reduces the benefits of regulatory competition for the best solution. Once a standard is agreed upon, it will be rather difficult to change it even when it becomes obvious that it is not achieving its objective.<sup>76</sup>

Negotiating harmonization is also difficult for political reasons, as all firms prefer a single set of norms, but they all want the norms chosen to be theirs. It is also time-consuming to determine whether each of the proposed regulatory modifications permits an equal level of regulatory protection in each country.<sup>77</sup> Complete harmonization has proved to be impracticable, even inside the EU, as is evidenced by the failure of the “Old Approach” that prevailed from 1969 to 1984. In the “New Approach” of 1985, legislative harmonization is limited to the adoption of the essential safety or general interest requirements, with which products put on the market must conform, and therefore enjoy free movement throughout the EU.<sup>78</sup>

The EU has stated that the reduction or elimination of NTMs could be achieved for future regulations through early consultation and closer cooperation among the regulators of the EU and the US bilaterally and in international fora. Compatibility between existing regulations is sought by way of mutual recognition agreements (MRAs), and/or exchange of data and information.<sup>79</sup> This “regulatory cooperation” would be built on principles and disciplines of the WTO Agreement on Technical Barriers to Trade (TBT) establishing on-going mechanisms for improved dialogue and cooperation on TBT issues.<sup>80</sup>

For the EU, TTIP should recognize that the systems of the US and the EU have different levels of protection, none of which should be imposed on the other party.

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<sup>74</sup> Lucas Bergkamp and Lawrence A. Kogan, ‘Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership’ (2013) 4 *European Journal of Risk Regulation*, 506.

<sup>75</sup> Richard Baldwin, ‘The Impact of Mega-Regionals: The Systemic Impact’ in World Economic Forum (ed), *Mega-regional Trade Agreements: Game-Changers or Costly Distractions for the World Trading System?* (2014) 26.

<sup>76</sup> *Ibid.*

<sup>77</sup> Richard Baldwin (n 79) 27.

<sup>78</sup> National public authorities keep intact their responsibility for the protection of safety (or other requirements envisaged) on their territory as “voluntary standards”, but at the same time they are obliged to recognize products manufactured in conformity with the essential EU requirements, although producers have the obligation to prove that their products conform to EU Directives if they depart from domestic standards. See European Communities, ‘Council Resolution of 7 May 1985 On A New Approach To Technical Harmonization And Standards (85/C 136/01)’ (Official Journal of the European Communities 4 June 1985).

<sup>79</sup> Ignacio García Bercero, DG Trade, European Commission (EU Chief Negotiator for TTIP) (n 8) 2.

<sup>80</sup> European Commission, ‘EU-US Transatlantic Trade and Investment Partnership: Technical Barriers to Trade (Initial EU Position Paper)’ (July 2013) 1–2.

In addition, the reduction of TBTs should not be more trade-restrictive than necessary to achieve the public interest objective, or result in new barriers to the countries' trade with the rest of the world, or compromise existing voluntary instruments of transatlantic co-operation.<sup>81</sup> This approach has been followed by the EU in CETA, where the EU has strengthened its cooperation with Canada in the areas of technical regulations, standards, metrology, conformity assessment procedures, market surveillance and monitoring and enforcement activities, following the general scheme of the Chapter on Regulatory Co-operation and giving special emphasis to MRAs.<sup>82</sup>

The EU has further proposed to establish a "Regulatory Cooperation Council" (RCC), an entity with high-level participation of regulators from the EU and the US to oversee the development of regulatory processes on both sides, with the goal of avoiding or minimizing regulatory differences. This Council would have subsidiary bodies responsible for specific sectors (e.g. a Chemical Sectors Joint Cooperation Committee).<sup>83</sup> A possible model could be the Regulatory Cooperation Forum (RCF) that has been established under CETA with a view to enhancing convergence and compatibility between regulatory measures.<sup>84</sup>

It seems, however, that the US has not adhered to this proposal. American negotiators are focusing on improvements of the regulatory process and expect the EU to adopt a "notice and comment" process, as followed in the United States to adopt rules.<sup>85</sup> The creation of the RCC has been criticised based on the argument that it undermines the democratic process on both sides of the Atlantic and because it would slow down the development and implementation of legislation.<sup>86</sup> This clash of views has raised doubts that anything meaningful with regard to TBTs and regulatory coherence in general can actually be accomplished within the TTIP.<sup>87</sup>

To conclude, the benefits and risks deriving from regulatory coherence and reduction or elimination of TBTs are difficult to identify precisely in advance but may become clearer as talks progress and become more concrete. Finding an appropriate balance between trade rules that promote liberalized trade and maintaining policy space for governments to respond to environmental concerns will in any case remain a big challenge.<sup>88</sup>

When the status of negotiation of TTIP is clearer, careful consideration should be given to the use of MRAs or harmonization procedures. To prevent regulatory coherence from leading to an erosion of environmental standards, one possibility would be to identify those regulations that are absolutely fundamental and may not be compromised by TTIP negotiations. This should be done by policy mak-

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<sup>81</sup> Ibid 2.

<sup>82</sup> It should be noted that there are special provisions to advance in the future harmonisation in the field of Motor Vehicle Regulations. See Canada-European Union CETA (Draft)' (n 40), Chapter 6.

<sup>83</sup> This idea had already been articulated in 2007 with the Transatlantic Economic Council (TEC) to create a political space for the US and the EU to "oversee and accelerate government-to-government cooperation in order to further economic integration". See *Framework for Advancing Transatlantic Economic Integration Between the European Union and the United States Of America, signed 30 April 2007* <[http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc\\_134654.pdf](http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134654.pdf)> (emphasis added).

<sup>84</sup> 'Canada-European Union CETA (Draft)' (n 40), Chapters 26-28.

<sup>85</sup> In the US, an agency that is in the preliminary stages of rulemaking may publish an "Advance Notice of Proposed Rulemaking" in the Federal Register to get more information. Any individual or groups interested may submit comments aimed at developing and improving the draft proposal or by recommending against issuing a rule. Office of the Federal Register, 'A Guide To The Rulemaking Process' (2009) <[https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf)> accessed 2 September 2014.

<sup>86</sup> Center for International Environmental Law (CIEL) and Client Earth, 'Toxic Partnership. A Critique of the ACC-CEFIC Proposal for The Trans-Atlantic Cooperation On Chemicals' (March 2014) 9.

<sup>87</sup> Simon Lester, 'TTIP: ¿se Esfumó El Impulso Luego De Un Año De Negociaciones?' (2014) 15 Puentes 4, 6.

<sup>88</sup> Joshua P. Meltzer, 'The Trans-Pacific Partnership Agreement, The Environment and Climate Change' in Tania Voon (ed), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar Pub 2014) 208.

ers on the basis of sound engagement with civil society, including the scientific community. Furthermore, MRAs would have to be handled with extreme care to avoid an agreed “equivalence” becoming a *de facto* deregulation or a “race to the bottom”. This could be done, for instance, by determining areas where mutual recognition cannot be used. For instance, it has been suggested that regulations on food, chemicals and financial services should not be considered appropriate for MRAs.<sup>89</sup> A similar approach could be adopted for regulations on climate change. This still leaves the possibility for making progress by resorting to harmonization (if it is possible to develop an ambitious common standard).

### III. A chapter on trade and sustainable development

There has been no information so far as to whether the TTIP parties have discussed the inclusion in the agreement of provisions specifically related to climate change. Yet, in its initial position paper on trade and sustainable development, which is available to the public, the EU proposes to include in the TTIP an integrated chapter devoted to aspects of sustainable development including climate change, and to consider how trade liberalization or trade-related regulatory cooperation can contribute to achieving climate change objectives. More generally, this leads to the question of how TTIP can ensure increased production of renewable energy, contribute to higher levels of energy efficiency and be implemented in a sustainable manner. In addition, according to the paper, the TTIP should include the adherence to core MEAs and other environment-related bodies as internationally recognized instruments to deal with global and trans-boundary environmental challenges, including the fight against climate change.<sup>90</sup>

The inclusion of chapters related to sustainable development and environmental protection is a common practice under EU and US PTAs. All recent EU PTAs contain chapters on trade and sustainable development.<sup>91</sup> The US is directly mandated by Congress under the Trade Act of 2002 to include in all its PTAs environmental chapters with some legally binding commitments.<sup>92</sup> Moreover, NAFTA and some US PTAs concluded with third countries contain comprehensive side agreements on environmental protection.

In terms of the content, environmental provisions contained in environmental and sustainability chapters of EU and US PTAs can be divided into three groups.<sup>93</sup> The first group of provisions seeks to prevent the relaxation of environmental laws for trade and investment purposes. The second group embraces provisions supporting cooperation on green technologies. The third group includes provisions aimed to facilitate the information exchange. These provisions could particularly serve the purposes of climate change policy, as they could develop public awareness of climate change and generate support of the society for climate actions.<sup>94</sup> The proposed TTIP chapter on trade and sustainable development will most likely incorporate the standard environment-related provisions contained in existing EU and US PTAs. Yet, it might also be expanded to include provisions specifically related to climate change, particularly on the parties’ cooperation under a post-Kyoto international climate agreement.<sup>95</sup>

An important condition for the regulatory effectiveness of the TTIP chapter on sustainable development is legal bindingness of its provisions. It should be noted that the PTAs of the EU and the US

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<sup>89</sup> BEUC - The European Consumer Organisation (n 4) 6.

<sup>90</sup> European Commission, ‘EU-US Transatlantic Trade and Investment Partnership: Trade and Sustainable Development Initial EU Position Paper’ (n 1).

<sup>91</sup> See e.g. Chapter 13 on Trade and Sustainable Development of the EU-Republic of Korea FTA (2011), available at <[http://www.amchamkorea.org/publications/information\\_detail.php?id=213](http://www.amchamkorea.org/publications/information_detail.php?id=213)> accessed 24 August 2014.

<sup>92</sup> Ibid 45.

<sup>93</sup> According to the results of an OECD study on regionalism reported in D Kernohan and E De Cian, ‘Trade, the environment and climate change: multilateral versus regional agreements’, in C Carraro and C Egenhofer (eds), *Climate and Trade Policy: Bottom-Up Approaches Towards Global Agreement* (Edward Elgar 2007), 78-80.

<sup>94</sup> K. Holzer, *Carbon-related border adjustment and WTO law* (Edward Elgar, 2014), 271.

<sup>95</sup> Ibid.

differ significantly with respect to the legal enforcement of environmental provisions.<sup>96</sup> Environmental commitments under FTAs and EPAs concluded by the EU have a mainly declarative character. They usually do not provide a dispute settlement mechanism for environmental matters. The EU usually excludes environmental chapters of FTAs and EPAs from the dispute settlement mechanism, which is normally foreseen in these agreements for disputes arising under trade and investment provisions. Instead, environmental disputes in EU PTAs can be settled through consultations at special PTA committees on trade and sustainable development or by decisions of panels comprising environmental experts. By contrast, environmental commitments under US PTAs have binding status, supported by the possibility of arbitration.<sup>97</sup> So far, however, there has been no case of a formal dispute settlement. Some US PTAs<sup>98</sup> provide furthermore for public submission mechanisms, which allow individuals to complain about the failure of a party to a PTA to enforce its environmental laws.<sup>99</sup>

#### IV. A chapter on energy and raw materials

Trade in energy is a prominent topic of the TTIP negotiations. Seeking to fill the gap in international rules on energy trade, the EU strives to include in the TTIP a separate chapter with legally binding obligations for trade and investment in energy and raw materials.<sup>100</sup> In the view of the EU, transparent and non-discriminatory rules for trade and investment in raw materials and energy, if agreed between the EU and the US, could be multilateralized through future negotiations with other countries.<sup>101</sup>

In order to increase competition in the energy sector, the EU would like to have rules restricting trade monopolies, prohibiting price discrimination through dual pricing and supporting access to transport facilities for energy products.<sup>102</sup> It would also like to include provisions prohibiting local content requirements in subsidy schemes for renewable energy (e.g. feed-in tariffs).<sup>103</sup> It also proposes rules that give access and national treatment to companies of one party operating on the territory of the other party in all areas related to energy business (e.g. prospecting, exploring, production, sale, purchase, export and import etc.).<sup>104</sup> Measures taken to guarantee the safe operation of energy networks would fall under exceptions, provided that these measures are not implemented in a way that constitutes a means of arbitrary or unjustifiable discrimination.

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<sup>96</sup> OECD (2007), *Environment and Regional Trade Agreements* (Paris, France), 120-129.

<sup>97</sup> Environmental chapters in those cases are normally subject to a separate dispute settlement mechanism (e.g. under NAFTA's North American Agreement on Environmental Cooperation and most of the PTAs with NAFTA countries) preceded by consultation between parties. A dispute settlement panel would usually consist of environmental experts. Besides the traditional suspension of trade concessions (the imposition of higher tariffs), trade remedies upon authorization by a dispute settlement body would include so-called 'smart' penalties – monetary contributions by a party to an environmental fund established in the territory of the party in breach, for environmental initiatives.

<sup>98</sup> E.g. the NAFTA's North American Agreement on Environmental Cooperation, the US-Central American Free Trade Agreement.

<sup>99</sup> Such a complaint can be valid grounds for a body supervising the implementation of an environmental side agreement to produce a factual record documenting the facts of the case, which is assumed to be of sufficient embarrassment for the violating party to influence it to take measures to correct the situation.

<sup>100</sup> This proposal is found in a non-paper on raw materials and energy prepared by the Directorate-General for Trade on 20 September 2013 and leaked by the Huffington Post on 19 May 2014.

<sup>101</sup> 'EU-US Transatlantic Trade and Investment Partnership: Raw Materials and Energy. Initial EU Position Paper' (n 12), p. 2.

<sup>102</sup> See the EU non-paper on the TTIP chapter on energy and raw materials leaked and published by the Huffington Post on 19 May 2014: Zach Carter and Kate Sheppard, 'Read the Secret Trade Memo Calling for More Fracking and Offshore Drilling' (*The Huffington Post*, 19 May 2014) <[http://www.huffingtonpost.com/2014/05/19/trade-fracking\\_n\\_5340420.html](http://www.huffingtonpost.com/2014/05/19/trade-fracking_n_5340420.html)> accessed 5 September 2014.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

The negotiating parties also give a high priority to the promotion of renewable energy and energy efficiency.<sup>105</sup> TTIP negotiators strive to facilitate the achievement of these objectives based on the development of common approaches, policies and the use of international standards where appropriate.<sup>106</sup>

Finally, the EU is interested in the cancellation of US export restrictions on energy products, particularly crude oil and gas, to be able to import them from the US. Exports of energy to the EU would automatically qualify under the requirements for the issuance of export licences in the US.<sup>107</sup>

NGOs and representatives of green parties have already voiced their concerns about the negative impact of the proposed rules on energy in TTIP on protection of the environment and climate.<sup>108</sup> The criticism is particularly strong with respect to the liberalization of energy export regime, which might lead to the prevalence of shale gas on the EU market to the detriment of renewable energy. While the consumption of shale gas is much less carbon-intensive than the consumption of coal, the extraction process and especially transportation of shale gas is associated with greenhouse gas emissions.<sup>109</sup>

The proposed rules on competition in the energy sector are another area of criticism. These rules are viewed as unfavourable for renewable energy as they would leave little policy space for the promotion of renewable energy through various national support schemes.<sup>110</sup> Allowing for “freedom of transit” in the transportation of energy and transmission of electricity might further create obstacles for the environmental regulation.<sup>111</sup>

Concerns about increased competitive disadvantages of renewable energy that might be caused by imports of US shale gas in Europe are really important and should be thoroughly investigated. At the same time, comparison should also be made with the present situation of considerable consumption of coal in Europe and the prospects of its substitution with less carbon-intensive gas.<sup>112</sup> As regards the proposed rules prohibiting the local content requirements in the context of support schemes for renewable energy, such TTIP provisions would not create an additional limit to the policy space available for the promotion of renewables. The outcome of the recent WTO dispute on the Canada-Feed-in Tariff

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<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> See the EU non-paper on the TTIP chapter on energy and raw materials leaked and published by the Huffington Post on 19 May 2014: Zach Carter and Kate Sheppard (n 105).

<sup>108</sup> Earthjustice, ‘Trade in Energy in the Transatlantic Trade and Investment Partnership: An Analysis of the EU “Non-Paper” On Raw Materials and Energy’ (n 6). See also ‘Green Party: TTIP trade deal is a corporate power grab, that must be stopped’, available at <https://www.greenparty.org.uk/news/2014/07/11/green-party-ttip-trade-deal-is-a-corporate-power-grab,-that-must-be-stopped/#sthash.bIQ8lmyz.dpuf>

<sup>109</sup> B. Kavalov et al., “Liquefied Natural Gas for Europe – Some Important Issues for Consideration”, Joint Research Centre of the European Commission Reference Report, 2009, <[http://ec.europa.eu/dgs/jrc/downloads/jrc\\_reference\\_report\\_200907\\_liquefied\\_natural\\_gas.pdf](http://ec.europa.eu/dgs/jrc/downloads/jrc_reference_report_200907_liquefied_natural_gas.pdf)> accessed 5 September 2014.

<sup>110</sup> See the EU non-paper on the TTIP chapter on energy and raw materials leaked and published by the Huffington Post on 19 May 2014: Zach Carter and Kate Sheppard (n 106).

<sup>111</sup> Earthjustice, ‘Trade in Energy in the Transatlantic Trade and Investment Partnership: An Analysis of the EU “Non-Paper” On Raw Materials and Energy’ (n 6).

<sup>112</sup> K. Holzer (2014), ‘Toward Alignment of Carbon Standards under the Transatlantic Trade and Investment Partnership’, NCCR Working Paper no. 2014/08, [http://www.nccr-trade.org/fileadmin/user\\_upload/nccr-trade.ch/wp5/5.1/0Holzer\\_Working\\_paper\\_2014\\_8\\_5\\_July.pdf](http://www.nccr-trade.org/fileadmin/user_upload/nccr-trade.ch/wp5/5.1/0Holzer_Working_paper_2014_8_5_July.pdf).

This assessment should also take into consideration that shale gas, especially at the stage of transportation, causes GHG emissions. See Kavalov et al., “Liquefied Natural Gas for Europe – Some Important Issues for Consideration” (n. 113).

Program has indeed confirmed that feed-in tariff schemes with local content requirements are unlawful under the WTO Agreement to which both the EU and the US are parties.<sup>113</sup>

Moreover, it is uncertain whether all the initiatives proposed by the EU regarding the energy sector would be supported by the US. It is currently not clear to what extent the US would agree to liberalize its export regime for energy goods.<sup>114</sup> In a recent non-paper on energy and raw materials, circulated by the EU on 27 May 2014, it is noted that the US has so far been hesitant to discuss a solution for US export restrictions on crude oil in the TTIP through binding legal commitments.<sup>115</sup> Such reluctance by the US can be explained by its concerns that the increased energy exports would drive the domestic energy prices up, thereby causing competitive disadvantages for its oil refineries, petrochemical and other energy-dependant industries and consumers.<sup>116</sup> The document further reports that the US has shown only limited openness towards considering energy-specific provisions on transport and transit and cooperation provisions on off-shore safety, and that a clear agreement to discuss a comprehensive chapter on energy and raw materials is still lacking. In the recent round of negotiations on energy and raw materials in TTIP, EU and US negotiators discussed offshore risk management and safety.<sup>117</sup>

## V. Conclusions

The inclusion of ISDS in the TTIP would not create a new regime allowing American investors to challenge governmental policies and regulations of EU host States. That regime of investor–State arbitration is already in place with respect to nine “new” EU members through BITs signed previously to their accession to the EU. “Old” EU members are also exposed to ISDS if American investors use “treaty-shopping” or “nationality-planning” to take advantage of intra-EU BITs. However, TTIP would directly extend the use of investor–State arbitration to all EU Member States and the EU as a whole.

TTIP notwithstanding, EU Member States are and will continue to be exposed to ISDS, via a network of international investment agreements, as EU Member States are one of the main drivers of the system, being the group of countries with the largest number of IIAs in force, and the home States with the highest number of foreign investors acting as claimants in ISDS.

From an environmental perspective, ISDS should not necessarily be seen as a regime that goes against the defence of the environment or prevention of climate change. Although it might be used to challenge policies of an EU home State that increase levels of environmental protection, it can also be used to contest changes in an EU home State’s environmental policies that would reduce the protection of the environment, if foreign investment is affected.

The likely impacts of the TTIP on environmental legislation in general, and climate change regulations in particular, can at this stage not be fully ascertained and will depend to a large extent on how the purported objectives are implemented. A race to the bottom in the area of carbon regulations may in particular result from the harmonisation of carbon-related standards, if the alignment of standards is done at the level of the lower standards of the two parties. Another risk for the emissions reduction arises from the possible recognition by the parties of each other’s existing standards.<sup>118</sup> While the mutual recognition of standards has no impact on climate policies and legislation of the parties as such, it can have an impact on their emissions. The recognition of less stringent norms of one party as equiva-

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<sup>113</sup> *Canada-Measures Relating to the Feed-in Tariff Program*, DS426, AB report, 24 May 2013, para. 5.85.

<sup>114</sup> I. Espa and K. Holzer (2015) ‘Negotiating an energy deal under TTIP: Drivers and impediments to US shale exports to Europe’. *Denver Journal of International Law and Policy*, 43(4).

<sup>115</sup> Simon McKeagney, ‘LEAKED: Proposal Reveals EU Pressure on US to Lift Ban on Crude Oil Exports - TTIP’ (no date) <<http://www.ttip2014.eu/blog-detail/blog/WP%20leak%20TTIP%20energy.html>> accessed 18 August 2014.

<sup>116</sup> I. Espa and K. Holzer ‘Negotiating an energy deal under TTIP: Drivers and impediments to US shale exports to Europe’ (n 118).

<sup>117</sup> European Commission, ‘State of Play of TTIP negotiations after the 6th round’ (n 7).

<sup>118</sup> TTIP negotiators are looking for ways of how to increase regulatory compatibility and coherence particularly at five sectors: pharmaceuticals, cosmetics, medical devices, automotive, and chemicals.

lent by the other party can give a competitive advantage to imports not bound by stringent carbon regulations and will eventually lead to carbon leakage.

Notwithstanding the clear risks that the TTIP carries for domestic climate change regulations, it should be highlighted that the process of regulatory convergence and reaching mutual recognition agreements in specific sectors is considered to be extremely complex and time-consuming. Commitments in the area of regulatory convergence under TTIP are likely to be rather general and, in most cases, will not affect specific legal acts of the parties.

While the achievement of a balance between rules that promote trade but maintain policy space for governments to respond to environmental concerns will have to be closely monitored, environmental NGOs should also seize the opportunity to actively support the inclusion of provisions that promote trade in low carbon technologies and stimulate bilateral cooperation on climate change. TTIP negotiations could particularly be used to align carbon regulations and standards at the level of standards, which are stricter.<sup>119</sup> Another measure that could be pursued in the course of TTIP negotiations is the dismantling of trade barriers to environmental goods and services. From the point of view of climate change, the liberalization of environmental services, in particular, would constitute a major breakthrough. Liberalization of trade in certain services can indeed play a very positive role by favouring services and service providers whose impact on the environment is positive. The most obvious target is environmental services per se, as any efficiency gains associated with liberalization would appear to entail more or less immediate environmental benefits. Environmental protection, through the application of such services, becomes cheaper, and hence is more likely to happen. A second target for pro-environmental liberalization could be environmentally produced services of any kind, as opposed to competing (like) services that are not produced in an environmentally friendly manner. A third target could be preferential treatment of service suppliers who meet certain environmentally relevant criteria, such as emission standards, thus providing them with incentives for increased environmental performance and thereby improving the overall environmental outcome.<sup>120</sup>

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<sup>119</sup> K. Holzer, 'Toward Alignment of Carbon Standards under the Transatlantic Trade and Investment Partnership' (n. 116).

<sup>120</sup> Hannes Schloemann, Trade in Services – Introducing pro-environment dynamics in EFTA FTA negotiations, an unpublished paper, April 2013.