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## **TTIP and Its Public Criticism: Anti-Globalist Populism versus Valid Dangers**

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*The provisions of the proposed Transatlantic Trade and Investment Partnership (TTIP), the major trade agreement between the EU and the US received serious criticism from the public, some NGOs and even some scholars. Disputes surrounding many of its special provisions got highly emotional, with extreme commentaries in the media. There is a high chance the conclusion of the deal will be blocked because of public opposition. This article tries to analyse four of the most important questions, namely the transparency of negotiations, the issue of investor-state dispute settlement, and the agreement's effects on environment-sustainable development and regulatory issues/consumer standards. Based on the analysis, it concludes that even though TTIP may contain some serious pitfalls, there is a high chance it would not lead to the devastating results as is regularly portrayed, and most of the problematic points could be settled relatively easily.\**

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## 1. Introduction

The EU and the US are some of the major actors in international trade, and have a dynamic and intense relationship with each other. “The two sides account for nearly half of world gross domestic product (GDP), about 30% of global exports, and have investments of more than \$3.7 trillion in each other’s economies.”<sup>1</sup> More than half of the outgoing US foreign direct investment (FDI) is directed to Europe, and European investors represent nearly three-fourths of US FDI inflow.<sup>2</sup> About one-third of EU FDI stems from the US.<sup>3</sup> “In 2013, the share of exports to the United States in total extra EU-28 exports was 18.5 %, the share of imports from the United States in total extra EU-28 imports was, at 11.6 %, somewhat lower than exports.”<sup>4</sup>

Transatlantic cooperation in the field of commerce and trade has a longer history: between 1994 and 1996, the EU and US planned to create a Transatlantic Free Trade Area, but negotiations stopped because of the newly founded WTO. An official framework of transatlantic cooperation was established by the Transatlantic Declaration (TD)<sup>5</sup> in 1990 and five years later with the New Transatlantic Agenda (NTA).<sup>6</sup> After the NTA, many forms of so called “dialogues” had been established between the EU and the US to cooperate. Most of them were in connection with commercial and trade issues.<sup>7</sup> Such dialogues are the Transatlantic Business Dialogue (1995), encouraging trade and cooperation in different industrial sectors, which now includes a Transatlantic Business Council.<sup>8</sup> Dialogues also involve the Transatlantic Consumer Dialogue (1998)<sup>9</sup> and the Transatlantic Economic Partnership (TEP, 1998) in the field of trade and investment, and a Transatlantic Economic Council was also set up in 2007.<sup>10</sup> There exists a Transatlantic Legislators Dialogue (TLD), establishing a formal annual dialogue between the European Parliament and the US

<sup>1</sup> Akhtar et al [2014].

<sup>2</sup> Weiss, Martin A. – Akhtar, Shayerah Ilias – Murrill, Brandon J. – Shedd, Daniel T.: International Investment Agreements (IIAs): “Frequently Asked Questions.” Congressional Research Service 7-5700 www.crs.gov R44015

<sup>3</sup> See: [http://ec.europa.eu/eurostat/statistics-explained/index.php/USA-EU\\_-\\_international\\_trade\\_and\\_investment\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/USA-EU_-_international_trade_and_investment_statistics)

<sup>4</sup> Ibid.

<sup>5</sup> See: [https://eeas.europa.eu/us/docs/trans\\_declaration\\_90\\_en.pdf](https://eeas.europa.eu/us/docs/trans_declaration_90_en.pdf)

<sup>6</sup> See: [https://eeas.europa.eu/us/docs/new\\_transatlantic\\_agenda\\_en.pdf](https://eeas.europa.eu/us/docs/new_transatlantic_agenda_en.pdf)

<sup>7</sup> See: Porsdam [2009], pp. 63–64.

<sup>8</sup> See: Chase–Pelkmans [2015].

<sup>9</sup> Transatlantic Consumer Dialogue. See: [http://tacd.org/?option=com\\_frontpage&Itemid=1](http://tacd.org/?option=com_frontpage&Itemid=1)

<sup>10</sup> Transatlantic Economic Council. See: <http://www.state.gov/p/eur/rt/eu/tec/>

Congress (1999).<sup>11</sup> Several other dialogues can be important as well, like the Transatlantic Environment Dialogue (TAED, 1999), which got suspended in 2000. Later, the EU-US High Level Dialogue on Climate Change, Clean Energy and Sustainable Development was launched in 2006, and several meetings were held in 2006–2008, but no meetings were held after 2009.<sup>12</sup> There also exists a Transatlantic Labour Dialogue (2001), and some other cooperative fora, like the EU-US Working Group on cybersecurity and cybercrimes (2010).<sup>13</sup>

The EU and the US started the negotiations on the conclusion of a Transatlantic Trade and Investment Partnership (TTIP) in 2013. The aim of the TTIP is to connect these two regions, and create an international space by cutting most of the customs, and creating a more investor-friendly environment – partly through making joint efforts in altering regulatory barriers.<sup>14</sup> During the TTIP negotiations, there were protests all over Europe regularly. The biggest anti-TTIP demonstration was held in Berlin, where approximately 150–250,000 people went to the streets to protest against the agreement in August 2015. A European initiative was also started and 3.28 million people signed the petition.<sup>15</sup> In an EU level public consultation 150,000 replies were received in 2014.<sup>16</sup>

Regarding TTIP, a clash between worldviews is taking place. Critics of “neoliberal” “capitalism” got louder; attacks against international cooperation became harsher. The author of this article accepts the opinion that international cooperation is mostly beneficial for the participant countries, but it may also contain some dangers, like a backlash against trade, or social disintegration.<sup>17</sup> A kind of democratic dilemma also emerges: the more interconnected countries are, the less effect people will have on decision making, which becomes less democratic.<sup>18</sup> This is especially true in the EU, which has 28 Member States. As Article 3 of the Treaty on the Functioning of the European Union (TFEU) states, the EU has exclusive competence

<sup>11</sup> See: <http://www.europarl.europa.eu/delegations/en/d-us/publications.html?tab=IPMs>>

<sup>12</sup> Transatlantic Environment Dialogue suspended. See: <http://www.euractiv.com/section/climate-environment/news/transatlantic-environment-dialogue-suspended/>

<sup>13</sup> EU-US cooperation on cyber security and cyberspace. See: [https://eeas.europa.eu/statements/docs/2014/140326\\_01\\_en.pdf](https://eeas.europa.eu/statements/docs/2014/140326_01_en.pdf); “Fact Sheet: U.S.-EU Cyber Cooperation” (White House). See: <https://www.whitehouse.gov/the-press-office/2014/03/26/fact-sheet-us-eu-cyber-cooperation>

<sup>14</sup> See: *Hamilton–Pelkmans* (eds.) [2015].

<sup>15</sup> See: <https://stop-ttip.org/>

<sup>16</sup> Online public consultation on investment protection and invest or-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP). Brussels, 13.1.2015 SWD(2015) 3 final.

<sup>17</sup> See: *Rodrick* [1997], p. 69. et seq.

<sup>18</sup> See: *Rodrick* [2011], p. 120. et seq.

in commercial policy. According to Article 216, it also has the right to conclude such agreements, instead of its Member States (“MSs”). However, in certain countries like Germany TTIP became very unpopular. The fact that the European Commission (“Commission”) has proposed the conclusion of a similar agreement with Canada (EU-Canada Comprehensive Economic and Trade Agreement, “CETA”) as it would fall into shared competency with the MSs instead of exclusive EU competency<sup>19</sup> also shows that this is a democratic dilemma. There is a high chance the Commission will use a similar procedure concerning the TTIP negotiations, which means that MSs will have to ratify the treaty, and some of them will probably hold referendums, which could block the entry into force of the agreement.

Consequently, in a number of countries people will probably decide whether they will give a green light to the agreement, which highlights the importance of the information they receive. In the following, the readers find four of the most debated groups of problems regarding the present text of agreement: the case of transparency of negotiations, the general background of investor-state dispute settlement, and the agreement’s effect on environment-sustainable development and regulatory cooperation/consumer standards. The list is arbitrary: it is based on the points that received the harshest criticism in the European mainstream media or from NGOs/academics. By analysing these problems, the paper tries to show whether mainstream claims regularly raised pro or contra the conclusion of the agreement are valid, partly valid or unfounded.

## **2. Transparency Issues**

In this subchapter, this paper summarises the problems of transparency around TTIP, which has two main sub-problems: transparency during negotiations and transparency of research data about the possible results and benefits of such an agreement.

### *2.1. The Lack of Transparency of Negotiations*

In the first phase of negotiations on TTIP, transatlantic meetings were held behind closed doors from 2013. There were great protests in order to come to know the negotiation mandate. According to the general procedure of such negotiations in

<sup>19</sup> See: [http://europa.eu/rapid/press-release\\_IP-16-2371\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2371_en.htm)

the EU, in the first period the public only came to know its summary. This process is similar to other negotiations on international agreements, but in this case it generated tensions. After the CJEU stressed the importance of transparency during negotiations in a case related to another international agreement and the European Ombudsman pressured the Council to publicise the mandate on TTIP,<sup>20</sup> it was published after a long time with a strong delay in November 2014,<sup>21</sup> and also additional materials got disclosed.<sup>22</sup> The Commission tried to prove its commitment to transparency by regularly publishing materials.<sup>23</sup> On the other hand, even now, the official European website<sup>24</sup> of TTIP still does not give enough, proper and user friendly information for the public.

As a result of the surrounding protests, the public support behind TTIP started to erode in certain countries. As a report of the Pew Research Center signalled, the number of those who are in favour of TTIP in Germany decreased from 55% to 41% between 2014 and mid 2015,<sup>25</sup> while at the end of 2015 it reached a low of 35%, according to other polls,<sup>26</sup> (Eurobarometer poll showed 39%, see below), and some statistics show the support of TTIP sank to 17% in Germany by the middle of 2016.<sup>27</sup> In the US, support remained nearly the same (50-54%). However, Eurobarometer poll results from the beginning of 2016 still show that fifty-eight per cent of EU citizens support the idea of TTIP, while a quarter are against it.<sup>28</sup> In the US, negotiations were put onto a fast track procedure by the Congress.<sup>29</sup> In this case, Congress may not modify the text, but can only accept or reject it, and the president

<sup>20</sup> See: *Horváthy* [2014], p. 19; Case C-350/12 P. Judgment of the Court (First Chamber) of 3 July 2014. Council of the European Union v Sophie in 't Veld. ECLI:EU:C:2014:2039

<sup>21</sup> European Council Document 2014 (OR. En) 11103/13 DCL 1 WTO 139 Services 26 FDI 17 USA 18 - ST 11103/13.

<sup>22</sup> See: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1477>

<sup>23</sup> The Commission publishes further TTIP documents in ongoing transparency commitment. See: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1477>

<sup>24</sup> See: <http://ec.europa.eu/trade/policy/in-focus/ttip/>

<sup>25</sup> PEW: Decreasing Support for TTIP in Germany. See: <http://www.pewglobal.org/2015/05/07/germany-and-the-united-states-reliable-allies/u-s-germany-relations-06/>

<sup>26</sup> Bundesregierung will TTIP-Verhandlungen schon 2016 abschließen. See: <http://bundesdeutsche-zeitung.de/headlines/economy-headlines/bundesregierung-will-ttip-verhandlungen-schon-2016-abschliessen-961156>

<sup>27</sup> Nur wenige Deutsche finden TTIP gut. See: <http://www.faz.net/aktuell/wirtschaft/ttip-und-freihandel/nur-wenige-deutsche-fuer-freihandelsabkommen-ttip-mit-usa-14190518.html>

<sup>28</sup> Eurobarometer: who's for and against TTIP in EU. See: <http://www.borderlex.eu/eurobarometer-whos-ttip-eu/>

<sup>29</sup> *Palmer, Doug*: US trade vote puts TTIP on faster track – President Barack Obama's chief trade official vows to finish the European Union pact by next year. See: <http://www.politico.eu/article/us-trade-vote-ttip-obama/>

may negotiate relatively freely, but only according to the authority Congress has granted to him [trade promotion authority (TPA)]. This procedure is sporadically called unconstitutional, because it deprives Congress (esp. the Senate) of some of its rights.<sup>30</sup> However, according to mainstream US scholars, Congress has the right to delegate some of its powers to the President.<sup>31</sup>

## 2.2. Transparency of Research Data

The Commission estimated that the potential gains for the EU could be as up to €120bn a year and €95bn for the US, which equals 0.5% of EU GDP and 0.4% of US GDP.<sup>32</sup> Wages would also become higher: by 0.5% in the EU and 0.4% in the US. These numbers are based on a report by the London based Centre for Economic Policy Research.<sup>33</sup> The same report also mentions that it would create several million jobs and consumers would enjoy cheaper products and services. It also says that average European households would gain around €500 a year as a consequence of wage increases and price reductions. Several other studies support the view that TTIP would be beneficial, including the analysis of the World Trade Institute.<sup>34</sup> A study of the Bertelsmann Stiftung claims that

*“[a] deep liberalization will create about 181,000 new jobs in Germany, and more than a million in the USA. The total amount shows a growth in employment in all OECD countries of more than 2 million jobs; in the less ambitious tariff scenario, about half a million.”*<sup>35</sup>

Some other studies also contained optimistic prognosis.<sup>36</sup>

<sup>30</sup> Zuesse [2015]; Fein, Bruce–Grayson, Alan: The “Fast Track” Trade Bill Assaults the Constitution. *Huntington Post*. See: [http://www.huffingtonpost.com/rep-alan-grayson/the-fast-track-trade-bill\\_b\\_7643656.htm](http://www.huffingtonpost.com/rep-alan-grayson/the-fast-track-trade-bill_b_7643656.htm)

<sup>31</sup> “So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.” *Wright* [2004], p. 998. See also *Shapiro* [2006], *Shapiro–Brainard* [2001].

<sup>32</sup> Transatlantic Trade and Investment Partnership. The Economic Analysis Explained. September 2013. See: [http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc\\_151787.pdf](http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf)

<sup>33</sup> CEPR [2013].

<sup>34</sup> World Trade Institute: TTIP And The EU Member States. The World Trade Institute, Bern, 2016.01, pp. 9–46. See: [http://www.wti.org/media/filer\\_public/03/b8/03b803d4-e200-4841-9c58-f6612f4a7316/ttip\\_report\\_def.pdf](http://www.wti.org/media/filer_public/03/b8/03b803d4-e200-4841-9c58-f6612f4a7316/ttip_report_def.pdf)

<sup>35</sup> *Felbermayr* et al. [2013], p. 40.

<sup>36</sup> *Berden* et al. [2009].

On the other hand, criticism was also raised. *Joseph Stiglitz* expressed his views that UK could be better off leaving the EU if TTIP passes.<sup>37</sup> He described TTIP as “a massive rewriting of the rules with no public discussion”.

*Jørgen Steen Nielsen* claims that the

*“Transatlantic Treaty on Trade and Investment Partnership between the EU and USA will not increase GDP, exports or employment as claimed by the EU Commission, the Danish government and the Confederation of Danish Industry. On the contrary, the so-called TTIP could lead to losses on all three accounts, especially in Northern European countries like Denmark.”*<sup>38</sup>

*Jeronim Capaldo* claims TTIP could lead to a contraction of GDP, personal incomes, employment, and to European disintegration.<sup>39</sup>

The Austrian Foundation for Development Research claims the methodology of supporting studies are based on unrealistic and flawed assumptions and that TTIP’s social costs could be high and have been completely neglected in the impact assessments.<sup>40</sup>

TTIP could also have serious constitutional implications: as *Anne Meuwese* points it out, it may erode the Commission’s right to initiate legislation. Moreover, it may affect EU MSs rights and their sovereignty.<sup>41</sup>

Between supporters and critical voices a collision of worldviews takes place already mentioned in the introduction of this paper. Some scholars generally support market liberalism, while others reject it and find such rules harmful. Both sides can collect arguments to support their views. At the present time, most of the European public still supports TTIP. However, in order to reach beneficial arrangements, criticism and official data received from diverse sources must be discussed openly, in a democratic way. If some of the criticism is well founded, the text should be modified accordingly. The European website of TTIP is not able to fulfil this purpose, as its architecture and data are too complex and ill-organised, even for scholars. Moreover, the access to texts is also highly problematic, and we need far more analysis presented in a simple manner, also in connection with certain special topics. Based on the above, we can ascertain that we did not have proper public discussion about the potential effects of TTIP, which would highlight different opinions, and the

<sup>37</sup> See: <http://www.independent.co.uk/news/business/news/eu-referendum-joseph-stiglitz-ttip-labour-transatlantic-trade-investment-partnership-a6907806.html>

<sup>38</sup> See: [https://ase.tufts.edu/gdae/Pubs/news/InformationAdverseEffectsTTIP\\_Nov2014.pdf](https://ase.tufts.edu/gdae/Pubs/news/InformationAdverseEffectsTTIP_Nov2014.pdf)

<sup>39</sup> *Capaldo* [2014].

<sup>40</sup> *Raza et al.* [2014]

<sup>41</sup> *Meuwese* [2015], p. 171.

reasons behind them. This could be striking knowing that the interests of countries could differ within the EU. It would be good to receive more official data about each and every country. For example, Hungary's situation is significantly different from other countries like Belgium or the UK.

### 3. Investor-State Dispute Settlement (“ISDS”)

#### 3.1. General remarks

Concluding international treaties including bilateral protection of investors is very common in international relationships. About three thousand international investment agreements exist worldwide; most of them allow investors to bring actions against states. Some claim that such treaties are only useful for developed states.<sup>42</sup> However, this is not true: “intra-South BITs continue to grow and now exceed 1,000”.<sup>43</sup> There are more than a thousand bilateral investor treaties (“BITs”) adopted by EU MSs already existing. After the conclusion of the Lisbon Treaty, the fate of these BITs became uncertain, since international investor protection became an integrated part of EU commercial policy. As a result, the EU even adopted a regulation on their status allowing Member States to maintain them in 2012 (however, EU MSs have also concluded about 170 BITs among themselves earlier, which, at present time, are contrary to EU law<sup>44</sup>). The reason for concluding such treaties is that states try to ensure the rights of related businesses even abroad. As a result of their power, states are always in a position to be able to harm the affiliates of foreign companies or discriminate against them in their territory. The US has concluded such treaties with EU MSs Bulgaria, Croatia, Czech Republic/Slovakia, Estonia, Latvia, Poland and Romania.

One of the cardinal issues regarding TTIP is the investor-state dispute settlement (ISDS) mechanism of the agreement. It seems the text would include a clause that could create a special court for state-investor disputes: a mechanism for disputes

<sup>42</sup> *Kleinheisterkamp* [2014] p. 1.

<sup>43</sup> *Brower–Blanchar* [2014], p. 50.

<sup>44</sup> Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. OJ L 351, 20.12.2012, p. 40-46. ; Commission asks Member States to terminate their intra-EU bilateral investment treaties. [http://europa.eu/rapid/press-release\\_IP-15-5198\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5198_en.htm)



between states and businesses.<sup>45</sup> Using an external court is absolutely common in international commerce, and modern agreements on investor protection “usually contain specific ISDS provisions to provide a forum ensuring host states uphold public treaties with regard to international investments for investors from a home state”.<sup>46</sup> All of the treaties on investor protection concluded by EU states with the US contain such clauses. Even though the German government supports the talks on TTIP, it also expressed its view that the ISDS is not acceptable, and Germany has formed an alliance with France against its implementation into the final text.<sup>47</sup>

The number of investor-state related cases is growing worldwide (in 2012 there were 58 new cases,<sup>48</sup> in 2014 42, while altogether nearly 600 of such cases were reported).<sup>49</sup> However, there are also some sporadic, but still worrying developments:

*“in June 2011, Philip Morris initiated arbitration proceedings against Australia under the Australia – Hong Kong BIT, claiming that Australia’s plain packaging legislation violated investment standards under that agreement and had caused Philip Morris to incur a one billion dollar loss. Philip Morris has a similar claim pending against Uruguay under the Switzerland-Uruguay BIT.”*<sup>50</sup>

However, the claims of Phillip Morris were dismissed based on the lack of jurisdiction (see later).

In another case (see Vattenfall II below), Germany was sued because of its intent to abolish the usage of atomic energy. Some other cases were raised as well (see the next subchapter) and the ISDS was regularly portrayed in the media as a harmful, dangerous system.

<sup>45</sup> Concept Paper: Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court. See: [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF)

<sup>46</sup> *Weaver* [2014], p. 228.

<sup>47</sup> France and Germany to form united front against ISDS. See: <http://www.euractiv.com/section/trade-society/news/france-and-germany-to-form-united-front-against-isds/>

<sup>48</sup> United Nations Conference on Trade and Development (Unctad), IIA Issue Note, “Recent developments in investor-state dispute settlement (ISDS)”. May 2013.

<sup>49</sup> United Nations Conference on Trade and Development (Unctad), IIA Issue Note, “Investor-State Dispute Settlement: Review Of Developments In 2014”. No. 2, 2015.

<sup>50</sup> *Lenk* [2015].

As an answer to the criticism, the Commission made amendments to the draft text on ISDS at the end of 2015. According to the related press release, they would create a new court system, which

*“[i]ncludes major improvements such as:*

- a public Investment Court System composed of a first instance Tribunal and an Appeal Tribunal would be set up;*
- judgements would be made by publicly appointed judges with high qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body;*
- the new Appeal Tribunal would be operating on similar principles to the WTO Appellate Body;*
- the ability of investors to take a case before the Tribunal would be precisely defined and limited to cases such as targeted discrimination on the base of gender, race or religion, or nationality, expropriation without compensation, or denial of justice;*
- governments’ right to regulate would be enshrined and guaranteed in the provisions of the trade and investment agreements.”<sup>51</sup>*

### 3.2. Criticism

Below, we try to collect the most important critique this system received. As a central argument, it is raised that

*“both the US and the EU have highly evolved, efficient rule of law legal systems. There is no evidence that investors have ever lacked appropriate legal protection through these systems. There is no bilateral investment treaty between the US and any of the old EU MSs, and yet US and EU investors already make up for more than half of foreign direct investment in each others’ economies. This demonstrates that investors seem to be satisfied with the rule of law on both sides of the Atlantic.”<sup>52</sup>*

However, the author of the present article is very sceptical regarding this statement. In recent years, the frameworks of the single market got shaky all over

<sup>51</sup> Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations. See: [http://europa.eu/rapid/press-release\\_IP-15-5651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5651_en.htm)

<sup>52</sup> Gerstetter–Meyer-Ohlendorf [2013], p. 4.

Europe.<sup>53</sup> In a number of countries like in Hungary, an institutionalised system was established, which openly discriminates against foreign investors, and the answers by the EU were only part solutions to the problems – in certain instances we could not find proper solutions to issues raised 5-6 years ago.<sup>54</sup> The number of related cases were growing,<sup>55</sup> just like the number of cases related to Hungary (14 procedures recently)<sup>56</sup> before the International Centre for Settlement of Investment Disputes. The US even banned the head of the Hungarian Tax Authority from entering the US, because (according to claims) she was involved in corruption, which had a negative effect on American companies in the local vegetable oil market.<sup>57</sup> If discriminative actions are institutionalised as laws, domestic courts do not apply the international treaty, and would interpret the state's sovereignty to have been infringed by them. As populism rises within the EU, there is a chance several countries could move into this direction.

From a European perspective, it is a key factor whether EU companies could rely on TTIP before courts in the US. The main question is whether courts can enforce an agreement like TTIP without a system of ISDS. The enforcement of international agreements is highly problematic in the US, partly because of the existence of state-federal levels and the hostility against applying them. *Jan Kleinheisterkamp* claims

<sup>53</sup> *Hojnik* [2012].

<sup>54</sup> *Ziegler* [2012]; *Ziegler* [2016].

<sup>55</sup> Perhaps the best example of such actions has been the government openly expressing its desire for foreign banks to leave the country and it also introduced special taxes on banks. The head of the Central Bank (the former minister of finance) also announced that he believes four major banks should leave the country in 15 years. Only to mention a few other cases, see Case C-385/12: Judgment of the Court (Grand Chamber) of 5 February 2014 (request for a preliminary ruling from the Székesfehérvári Törvényszék — Hungary), *Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága*. OJ C 93, 29.3.2014, p. 10; Internal Market: the Commission has brought Hungary before the Court of Justice to contest restrictive conditions on the issue of luncheon vouchers and other benefits in kind. [http://europa.eu/rapid/press-release\\_IP-13-578\\_en.htm](http://europa.eu/rapid/press-release_IP-13-578_en.htm); Commission opens new infringement procedure against Hungary. See: <http://freehungary.hu/index.php/56-hirek/2832-commission-opens-new-infringement-procedure-against-hungary>; State aid: Commission opens two in-depth investigations into Hungary's food chain inspection fee and tax on tobacco sales. IP/15/5375; See: [http://europa.eu/rapid/press-release\\_IP-15-5375\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5375_en.htm); [http://europa.eu/rapid/press-release\\_IP-13-578\\_en.htm?locale=FR](http://europa.eu/rapid/press-release_IP-13-578_en.htm?locale=FR); Commission opens infringement procedure against Hungary on rights of cross-border investors to use agricultural land. [http://europa.eu/rapid/press-release\\_IP-14-1152\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1152_en.htm); [http://europa.eu/rapid/press-release\\_IP-15-4598\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4598_en.htm); [http://europa.eu/rapid/press-release\\_MEMO-14-589\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-589_en.htm); [http://europa.eu/rapid/press-release\\_MEMO-14-293\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-293_en.htm); <http://hungarytoday.hu/cikk/ec-launches-infringement-procedure-hungary-palinka-tax-rules-28300>.

<sup>56</sup> Hungary – as respondent State. <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/94?partyRole=2>

<sup>57</sup> Hungary's top tax auditor in corruption scandal. <https://english.atlatszo.hu/2014/11/25/hungarys-top-tax-auditor-in-corruption-scandal/>

there is no evidence that this would be the case concerning TTIP, even though the Commission cited some recent case law, which proves the opposite.<sup>58</sup> Moreover, it was put in the Medellín case in the US that

*“even when treaties are self-executing in the sense that they create federal law, the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”*<sup>59</sup>

As Saadia M. Pekkanen puts it

*“the territorial-democratic principle comes closer to the nationalist jurisprudence end of the spectrum, not because judges or adjudicators are always so consistently and militantly ideological in their commitments [...]”, but rather because “the real disinclination by judges to invoke, apply, or even just grapple with international law comes from the fact that it is physically external to the national territory and that it is also apparently unaccountable to a transparent democratic processes – twin elements which make international law, whether in trade or otherwise, less palatable to courts that are used to operating in familiar constitutional and electoral settings in the domestic arena.”*<sup>60</sup>

US exceptionalism can also be noticed in the fact that the country uses a great amount of reservations, understandings, and declarations (RUDs) that ensure that the given agreements are not self-executing (i.e. have no direct effect).<sup>61</sup>

Moreover, as *Gráinne de Búrca*<sup>62</sup> puts it, even the Supreme Court supports a highly restrictive stance towards the enforceability of international agreements.<sup>63</sup> The US Supreme Court dealt with international treaties in 15 cases between 2002–

<sup>58</sup> Kleinheisterkamp [2014], Van Harten [2015], p. 29. et seq.

<sup>59</sup> The Medellín judgment (footnote 3) cites 2 Restatement (Third) of Foreign Relations Law of the United States §907, Comment a, p. 395 (1986). It also adds that

*“accordingly, a number of the Courts of Appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary. See, e.g., United States v. Emuegbunam, 268 F. 3d 377, 389 (CA6 2001); United States v. Jimenez Nava, 243 F. 3d 192, 195 (CA5 2001); United States v. Li, 206 F. 3d 56, 60–61 (CA1 2000) (en banc); Goldstar (Panama) S. A. v. United States, 967 F. 2d 965, 968 (CA4 1992); Canadian Transp. Co. v. United States, 663 F. 2d 1081, 1092 (CADC 1980); Mannington Mills, Inc. v. Congoleum Corp., 595 F. 2d 1287, 1298 (CA3 1979).”*

<sup>60</sup> Pekkanen.

<sup>61</sup> Goldsmith [1998], Bradley–Goldsmith [2000]; Bradley [2010], Mark [2009] Ray [2003].

<sup>62</sup> de Búrca [2014].

<sup>63</sup> Ibid, p. 11.

2012.<sup>64</sup> Of these, it addressed the direct enforceability or self-execution of treaties in 2 cases, and it denied the direct enforcement in both of these cases. In the US, NAFTA is also not provided with self-execution (just like the GATT or WTO agreements in Europe).<sup>65</sup> However, investment treaties mostly seem to have a self-executory character.<sup>66</sup> These facts seem to prove the resistance of US domestic courts to applying “foreign” law, and based on the above, ISDS could be a solution to this problem (even if the enforcement of such awards can sometimes be problematic).<sup>67</sup> Consequently, we must admit that the enforceability of TTIP can be seriously questioned by regular courts, and the Supreme Court is not better in this regard.

Opponents of TTIP in Europe also claim that consumers would not be defended against investors, and such a system would create an imbalance in favour of investors. However, consumers could sue investors just like earlier, before national courts. This means that their rights would not be harmed by the procedural issues. It is a different question whether the acceptance of lower consumer standards (i.e. the modification of substantive law) is necessary or not (this could be really harmful) – but this question has less to do with the procedural issues (see later).

It is also regularly claimed that investors mostly win their cases before the investor-state arbitrational courts. However, a very simple search in ICSID’s statistics proves this claim is not true. Around 45% of investor claims were upheld and nearly 30% were found unfounded.<sup>68</sup> Regarding EU MSs,

*“specific data from ICSID ... shows the following figures for disputes against EU MSs:*

- *In 44% of the cases, all claims were dismissed or jurisdiction was declined;*
- *In 36% of the cases, the dispute was settled or otherwise discontinued;*
- *In 20% of the cases, the dispute led to an award upholding claims in part of in full.”<sup>69</sup>*

<sup>64</sup> Ibid, p. 19.

<sup>65</sup> Errico [2011], p. 179. et seq.

<sup>66</sup> Yimer et al. [2011], p. 54.

<sup>67</sup> King & Spalding, Recent Decisions Illustrate Disagreement Among U.S. Courts in Enforcing ICSID Awards. August 19, 2015, See: <http://www.kslaw.com/imageserver/KSPublic/library/publication/ca081915b.pdf>

<sup>68</sup> The ICSID Caseload – Statistics. See: <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Caseload-Statistics.aspx>

<sup>69</sup> Investor-to-State Dispute Settlement (ISDS). Some facts and figures. See: [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153046.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf)

Furthermore, even if this ratio would be different, suggesting that a higher number of successful investor claims must be a consequence of impartial judges<sup>70</sup> seems to be unfounded: what if investors were really not treated properly by the governments? A very similar claim regularly raised in the online media is that only because arbitrators earn well, they could be biased, which is also based on demagoguery, and shows a lack of knowing how international arbitration works. However, allowing judges to proceed as counsels at the same court in different cases would raise serious questions. The present text of TTIP answers this problem. Firstly, it would create a permanent court of BIT disputes. Judges of the court would be delegated: five by the US, five by the EU and five by third countries. The allocation of cases among them would be randomized. Secondly, beside the shady ethical requirements,<sup>71</sup> Article 11(1) of the latest Proposal of the Commission sets up very strict rules on the conflict of interests of judges: it excludes them from acting in any other investor-state dispute, whether as judge or counsel, even before domestic courts.<sup>72</sup> Article 8.30 of CETA also contains a similar rule, without reference to domestic courts.<sup>73</sup>

### 3.3. A “Lighter” Version of ISDS

A solution for a compromise would be to grant States influence in arbitration by allowing regular courts to overrule judgments. The German government proposed a similar solution. However, the author of this article would strongly discourage its usage. As *Brower* and *Blanchard* put it,

*“recent proposals to reform investment arbitration by increasing States’ political control over the arbitral process would undermine the credibility of investment arbitration as a neutral method of resolving a dispute between an alien investor and a host State. Allowing States to interfere with arbitral decision making after a dispute arises would thus weaken the effectiveness of the system of foreign investor protection for stimulating international capital flows and promoting economic development. Moreover, the criticisms of*

<sup>70</sup> Investor-state dispute settlement. The arbitration game. Governments are souring on treaties to protect foreign investor. *The Economist*, See: <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration>

<sup>71</sup> [http://europa.eu/rapid/press-release\\_MEMO-15-5652\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm)

<sup>72</sup> [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)

<sup>73</sup> [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf)

*investment treaties and arbitration that are invoked to justify politicization are based on emotion rather than on facts.*<sup>74</sup>

This solution would force businesses to long-term litigation, which could be used as a tactic by governments to make them leave a country.

### 3.4. Preliminary Findings

When talking about the TTIP's court system, we can have doubts whether the people's trust in their governments is more reliable than trust in independent courts, who decide on professional grounds in hundreds of cases worldwide. If TTIP contains a danger, it cannot be found in the special court system, but in other provisions, like those on environment or consumer law, or on its economic effect on poorer MSs.

However, the creation of ISDS could hurt the independence of the Court of Justice of the European Union ("CJEU"). Regarding the EU's access to the European Convention on Human Rights,<sup>75</sup> the CJEU mentioned that the outsourcing of the judicial powers is against the primary legal sources of the EU. A similar problem can occur regarding TTIP. This could be one reason why there is a need to sign the agreement on shared competency (just like in the case of the United Nations Convention on the Law of the Sea or the WTO agreement): only MSs have the right to select a new court to judge over them, and the EU does not have power in this regard. This problem could be cured by some technical provisions, which gave power to the CJEU to first decide whether the decision falls under MS or EU jurisdiction, like it is done concerning the CETA.<sup>76</sup> We must mention that some commentators have started to write about the unconstitutionality of a pact like TTIP (Trans-Pacific Partnership, "TPP"), based on similar grounds in the US as well.<sup>77</sup>

## 4. Environment and Sustainable Development

As mentioned before, the EU and the US already created a Transatlantic Environment Dialogue ("TAED") in 1999 to discuss environment related issues,

<sup>74</sup> *Brower–Blanchar* [2014], p. 50.

<sup>75</sup> Opinion 2/13 OF THE COURT (Full Court), 18 December 2014. ECLI:EU:C:2014:2454.

<sup>76</sup> See: [https://polcms.secure.europarl.europa.eu/cmsdata/upload/49daf369-5480-40d7-aa8d-df745c4ff98c/SJ-0259-16\\_legal\\_opinion.pdf](https://polcms.secure.europarl.europa.eu/cmsdata/upload/49daf369-5480-40d7-aa8d-df745c4ff98c/SJ-0259-16_legal_opinion.pdf), point 81.

<sup>77</sup> Is the Trans-Pacific Partnership Unconstitutional? See: <http://www.theatlantic.com/politics/archive/2015/06/tpp-isds-constitution/396389/>

which got suspended because the US government failed to supply its share of funding in 2000.<sup>78</sup> Later, the EU-US High Level Dialogue on Climate Change, Clean Energy and Sustainable Development was launched in 2006, and several meetings were held in 2006-2008, but no meetings were held after 2009.

Environmental protection in trade also has background rules in EU primary legal sources. Article 191 TFEU serves as a general basis for environmental protection. It mentions that the EU's environmental policy shall contribute to preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources as well as to promoting measures to deal with regional and worldwide environmental problems. It also claims that Union policy must take into account the diversity of situations in the various regions of the Union. Based on these fundamentals, a great set of legal materials emerged in the last decades.<sup>79</sup>

The EU must maintain its high environmental standards even towards outside actors: in this sense, internal market rules, domestic rules and international agreements interact with each other.<sup>80</sup> Below, we analyse the most important environment related problems regarding TTIP.

#### *4.1. Environment-Friendly Changes in a Legal System Hurting – Foreign – Investors in the Country*

Firstly, according to the general claim in the media, an environment-friendly change in a legal system could force the state to pay a fee to compensate a company for damages caused by new regulations. Critics also bring up several examples of this.<sup>81</sup> For example, in the Vattenfall I and Vattenfall II<sup>82</sup> cases, the liability of Germany came into question. Germany introduced a new law on licensing of a new coal-fired power plant in Hamburg-Moorburg: the Swedish company sued the state, and the case was settled: the German state lowered its standards and agreed to a less stringent license. In Vattenfall II, Germany decided to abolish its nuclear plants by 2022.<sup>83</sup> Vattenfall demanded compensation of €3.7 billion, because the change

<sup>78</sup> Transatlantic Environment Dialogue suspended. See: <http://www.euractiv.com/section/climate-environment/news/transatlantic-environment-dialogue-suspended/>

<sup>79</sup> *Jans-Vedder* [2012].

<sup>80</sup> *Durán-Morgera* [2012], p. 13.

<sup>81</sup> See: *Gerstetter-Meyer-Ohlendorf* [2013], p. 11.; *Bernasconi-Osterwalder-Johnson* [2010].

<sup>82</sup> See: *Bernasconi-Osterwalder-Hoffman* [2012].

<sup>83</sup> See: *Bernasconi-Osterwalder-Brauch* [2014].



could effect the Energy Charter as well as an international agreement on investor protection: the case is still pending. However, existing case law is contradictory. In a number of cases<sup>84</sup> like *Santa Elena v. Costa Rica*<sup>85</sup> states had to pay compensation for their actions. In *Metalclad v. Mexico*<sup>86</sup> the state had to pay because of a local decision to shut down an industrial toxic waste site of a company that was supported by the federal government. Several other cases could be mentioned, in which states were obliged to pay compensation.<sup>87</sup>

In one of the latest cases between Phillip Morris and Australia on tobacco plain packaging, the decision held that

*“the Tribunal found that it had no choice but to conclude the arbitration was an abuse of rights as Claimant’s corporate restructure was undertaken for the principal, if not the sole, purpose of gaining protection [...] when a dispute was not only reasonably foreseeable, but actually foreseen by Claimant.”*<sup>88</sup>

In others cases like *Methanex v. USA*<sup>89</sup> or *Glamis Gold Ltd vs. United States*<sup>90</sup> courts held that compensation is not necessary.

The combination of environmental rules with ISDS is criticised especially harshly. Some claim that the inclusion of rules on ISDS

*“[i]n TTIP would not automatically mean that the US and the EU would be unable to adopt environmental measures in the future or would have to pay compensation to investors whenever doing so; however, the outcome of ISDS proceedings is rather unpredictable – the case law so far is inconsistent. Decisions from some cases have been quite restrictive of governments’ regulatory freedom. These uncertainties result in considerable risks which*

<sup>84</sup> See: *Gerstetter–Meyer-Ohlendorf* [2013], p. 11. et seq.

<sup>85</sup> ICSID Case No. ARB/96/1 *Santa Elena v. Costa Rica. Compañía Del Desarrollo De Santa Elena, S.A. And The Republic Of Costa Rica*. See: [http://www.italaw.com/documents/santaelena\\_award.pdf](http://www.italaw.com/documents/santaelena_award.pdf)

<sup>86</sup> ICSID Case No. ARB(AF)/97/1 *Metalclad Corporation v The United Mexican States*. See: <http://www.italaw.com/documents/MetacladAward-English.pdf>

<sup>87</sup> See: *Gerstetter–Meyer-Ohlendorf* [2013]. See also: <http://www.elstel.org/ISDS.html.en>, or [http://www.foeeurope.org/sites/default/files/foee\\_factsheet\\_isds\\_oct13.pdf](http://www.foeeurope.org/sites/default/files/foee_factsheet_isds_oct13.pdf) (p.7.)

<sup>88</sup> *Kofman–Williams* [2015].

<sup>89</sup> *Methanex Corporation v. USA*. See: <http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf>

<sup>90</sup> ICSID Case No *Glamis Gold Ltd vs. United States*. See: <http://www.state.gov/documents/organization/125798.pdf>; *Obadia* [2009].

*are exacerbated by the fact that investment-related provisions tend to be interpreted broadly in ISDS proceedings.”<sup>91</sup>*

However, we have opposing views about this problem. As *Brower and Blanchar* put it,

*“[m]uch criticism in this vein has focused on the possibility that investor-State arbitration could prevent States from enacting legitimate environmental regulation. However, actual arbitral awards addressing environmental issues demonstrate great deference to environmental policy. Contrary to critics’ claims, BITs do not give investors the right to sue a host State any time an investment is merely “interfered with” or the right to “demand compensation when a government-initiated change lowers the value of their assets.” Instead, a typical investment treaty guarantees that the host State will not discriminate against foreign investors and their investments, will treat them fairly and equitably, will refrain from expropriating without prescribed compensation, and will provide full protection and security. Those guarantees stop far short of promising that the State will not change the law or regulate the environment.”<sup>92</sup>*

They also claim that in most of the cases in which tribunals held a state liable, the environmental rationale was pretextual or against good faith, or government officials clearly violated domestic law.<sup>93</sup>

#### 4.2. The Need for Strong Guarantees

According to the official position paper<sup>94</sup> and a leaked draft on trade and sustainable development,<sup>95</sup> at present it seems the TTIP would include some general provisions on states’ rights to protect environment and modify their laws. Article 3 of the leaked Section I on trade and sustainable development states that

<sup>91</sup> *Obadia* [2009], p. 4.

<sup>92</sup> *Brower–Blanchar* [2014], p. 53. et seq.

<sup>93</sup> “Investment tribunals have found States liable for pretextually environmental measures in only three cases, and in each case the tribunal concluded that based on the evidence the purportedly environmental action was not taken in good faith or in accordance with domestic law.” P. 55 thereof.

<sup>94</sup> Transatlantic Trade and Investment Partnership – Trade in services, investment and e-commerce – Chapter II – Investment. See: [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)

<sup>95</sup> European Commission Brussels, 29 September 2015 Trade 34/2015 Note for the attention of the Trade Policy Committee Subject: TTIP – Draft EU textual proposal for a Chapter on Trade and Sustainable Development. See: <https://www.scribd.com/doc/286658269/EU-SD-Proposal-TTIP>

*“the Parties recognise the right of each Party to determine its sustainable development policies and priorities, to set and regulate its levels of domestic labour and environmental protection, and to adopt or modify relevant policies and laws accordingly. The right to regulate shall be exerted in a manner not inconsistent with the international labour standards and agreements referred to in Article ... [Multilateral labour standards and agreements] and the environmental agreements referred to in Article ... [Multilateral environmental governance and agreements].*

*2. Each Party shall ensure that its domestic policies and laws provide for and encourage high levels of protection in the labour and environmental areas and shall strive to continue to improve those policies and laws and their underlying levels of protection.”*

Several commentators mention<sup>96</sup> that the language of this text is vague, especially, if we compare it to the compensation part, which does not mention any changes in environmental legislation. As it puts it in Art. 18

*“the Parties recognise that it is inappropriate to weaken or reduce the levels of protection afforded in domestic environmental or labour laws in order to encourage, or in a manner affecting, trade or investment.”*

We must agree with those who claim that clearer and more straightforward language would be more useful to maintain the rights of EU states to keep and introduce environmental regulations they wish to protect nature, and ensure that the EU and the US do not weaken environmental protection to attract investment. Otherwise, the agreement can effectively endanger environmental protection in Europe.

#### *4.3. Animal Rights*

Another major claim regarding TTIP was that according to criticism, it would allow foreign companies to test cosmetics on animals, even though it is set out in Article 11 TFEU that environmental protection requirements must be integrated into EU policies and activities. As Article 13 TFEU puts it,

*“in formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and*

<sup>96</sup> See: [https://www.foeeurope.org/sites/default/files/eu-us\\_trade\\_deal/2015/sustainable\\_development\\_proposal\\_analysis\\_261015.pdf](https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2015/sustainable_development_proposal_analysis_261015.pdf)

*space policies, the Union and the MSs shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the MSs relating in particular to religious rites, cultural traditions and regional heritage.”*

Consequently, animal welfare is accepted as a basic principle of EU law. TFEU also says in Article 36 that “MSs may introduce measures on the prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants”, and that such measures are exempt from the prohibition of introducing quantitative restrictions among MSs. Critics claim that TTIP would break through these rules. The Draft on Sanitary and phytosanitary measures (SPS) of TTIP mentions in its Article 17 that “Parties recognise that animals are sentient beings” and that

*“the Parties undertake to exchange information, expertise and experiences in the field of animal welfare with the aim to align regulatory standards related to breeding, holding, handling, transportation and slaughter of farm animals.”<sup>97</sup>*

We agree with those views that claim this text seems weak,<sup>98</sup> since it does not tell us anything about the use of animals for testing, which is a key issue. As *Keith Taylor*, a Green MEP put it regarding the EU directive limiting scientific testing on animals<sup>99</sup> (i.e. replacing, reducing, or refining the use of animals for scientific purposes or experimentation),

*“Directive 2010/63/EU on the protection of animals used for scientific purposes represents the most advanced legislation of its kind in the world, and highlights the need for a review of US legislation in order to ensure that modern standards of animal protection are applied. The EU Directive is wider in scope than the US equivalent, covering all vertebrate and some invertebrate species, whereas in the US birds, fish, rats and mice (which*

<sup>97</sup> See: [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153026.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153026.pdf)

<sup>98</sup> How TTIP undermines food safety and animal welfare. Institute for Agriculture and trade policy, Friends of the Earth Europe. See: [http://www.foeeurope.org/sites/default/files/briefing\\_ttip\\_food\\_safety\\_feb2015.pdf](http://www.foeeurope.org/sites/default/files/briefing_ttip_food_safety_feb2015.pdf)

<sup>99</sup> Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes Text with EEA relevance. OJ L 276, 20.10.2010, p. 33–79.

*are the most frequently used species in scientific studies) are specifically excluded from protection in US legislation.*

*Moreover, EU Regulation 1223/2009 bans animal testing for cosmetics within the EU, as well as the sale within Europe of beauty products subjected to new animal testing for cosmetic purposes after 11th March 2013.*<sup>100</sup>

The Commission published some additional documents regarding this issue.<sup>101</sup> It is said that the EU's goal is to "agree to work on alternative methods to animal testing and to push for the progressive phase-out of animal tests worldwide."<sup>102</sup> It is also set out that the EU's aim is to reduce diverging requirements, which could also be useful because

*"a wider range of cosmetics products would be available to the consumer, testing would be more efficient and international harmonisation of cosmetics regulations and practices would be greater."*

This would be achieved "without compromising the protection of public policy interests such as health or animal welfare".<sup>103</sup> The text also mentions that "both Parties could agree on further fostering the development of alternative methods to replace animal testing."<sup>104</sup>

#### *4.4. Preliminary Findings*

Even though the respectable aims behind the efforts on environment protection can be accepted, they seem to be vaguely worded in order to protect environment properly in both of the above-mentioned cases. It also seems that rules on core issues are missing from the text. Of course, this problem can be cured in the final version of the agreement.

<sup>100</sup> See: <http://www.keithtaylor.mep.org.uk/wp-content/uploads/TTIP-and-the-Use-of-Animals-in-Testing-and-Research-FINAL.pdf>

<sup>101</sup> See: [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153006.4.2%20Cosmetics.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153006.4.2%20Cosmetics.pdf) and [http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152470.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152470.pdf)

<sup>102</sup> See: [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153006.4.2%20Cosmetics.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153006.4.2%20Cosmetics.pdf)

<sup>103</sup> See: [http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152470.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152470.pdf)

<sup>104</sup> See point 2.3. thereof.

## 5. Regulatory Cooperation and Consumer Standards

### 5.1. General background

Consumer protection has a stable background in EU primary legal sources, and a great material was built upon these provisions. Article 114 of TFEU says on the single market that

*“the Commission, in its proposals... concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.”*

Article 169 also stresses that

*“in order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.”*

EU trade policies must be in line with these provisions. Moreover, Article 38 of the EU Charter of Fundamental Rights also says that EU “policies shall ensure a high level of consumer protection”.

The EU and the US started a dialogue regarding consumer issues already in 1998: the Transatlantic Consumer Dialogue (“TACD”),<sup>105</sup> which serves as a hub for consumer organisations to discuss policy issues on both sides of the Atlantic. The TACD regularly issues statements, letters, recommendations and criticism regarding issues it finds important. Such issues cover a wide range of topics like genetically modified organisms (“GMOs”), e-commerce, data privacy, intellectual property, fair trade and medicines. The core topic in this regard is “regulatory cooperation”, i.e. the harmonisation of standards between the US and the EU. Already in 1998, the US and the EU concluded a Mutual Recognition Agreement (“MRA”).<sup>106</sup> Later, a US-EU “Regulatory Cooperation Roadmap” was adopted in 2002, which already implemented sixteen sectors into the cooperation by 2005.<sup>107</sup> In 2007, the

<sup>105</sup> See: [http://tacd.org/?option=com\\_frontpage&Itemid=1](http://tacd.org/?option=com_frontpage&Itemid=1)

<sup>106</sup> Chase–Pelkmans [2015], p. 8; Ahearn [2009].

<sup>107</sup> Roadmap for EU-U.S. Regulatory Cooperation and Transparency. IP/04/816 Brussels, 29 June 2004.

Transatlantic Economic Council (TEC) was founded, aiming to further improve harmonisation. By this time, US Food and Drug Administration (FDA) was having over 1,000 contacts a year with its European counterparts.<sup>108</sup> In 2012, President Obama issued an executive order to reach further development.<sup>109</sup> From the point of view of TTIP, this cooperation means that the US and the EU try to adopt common standards (including consumer goods) to more areas than before. According to the Commission, these standards cause technical barriers to trade, and thus harm trade in sectors like goods and services, automotive or the pharmaceutical industry: if a European company would like to sell goods in the US, differences in standards might cause serious expenses. Such standards can be technical and health-related standards, measures on pre-shipment inspections, but also subsidies, distribution restrictions or rules on procurement.<sup>110</sup> According to a study created by scholars from the LSE,

*“examples of the estimated trade costs/tariff equivalents of such regulatory ‘non-tariff barriers’, suggest a 20% average for all sectors, with motor vehicles being a bit higher than this and food and drink being significantly higher.”*

Other studies also suggest that abolishing differences in regulations “could yield economies of production worth \$150 billion a year in the EU, and \$117 billion a year in the US”.<sup>111</sup>

The EU first published a commentary for regulatory cooperation<sup>112</sup> as well as the concrete draft of the text,<sup>113</sup> and later it amended the draft<sup>114</sup> and the text in 2016.<sup>115</sup> Moreover, special rules on Sanitary and Phytosanitary measures can be found in a related document,<sup>116</sup> and also those on motor vehicles,<sup>117</sup> chemicals,<sup>118</sup> pharmaceutical

<sup>108</sup> Chase–Pelkmans [2015], p. 8.

<sup>109</sup> Executive Order 13609 of May 1, 2012 Promoting International Regulatory Cooperation. Federal Register Vol. 77, No. 87, Friday, May 4, 2012. See: [https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo\\_13609/eo13609\\_05012012.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo_13609/eo13609_05012012.pdf)

<sup>110</sup> Donat et al. [2014]

<sup>111</sup> Alemanno [2015], p. 2; Fung [2014], p. 453 et seq.

<sup>112</sup> See: [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153002.1%20RegCo.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153002.1%20RegCo.pdf)

<sup>113</sup> See: [http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc\\_153120.pdf](http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf)

<sup>114</sup> See: [http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc\\_154378.pdf](http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154378.pdf)

<sup>115</sup> See: [http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc\\_154377.pdf](http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf)

<sup>116</sup> Textual proposal – sanitary and phytosanitary measures (SPS). See: [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153026.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153026.pdf)

<sup>117</sup> See: [http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152467.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152467.pdf)

<sup>118</sup> See: [http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152468.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152468.pdf)

products<sup>119</sup> and medical devices.<sup>120</sup> The parties also introduce an EU-US Annual Regulatory Cooperation Programme,<sup>121</sup> i.e. yearly meetings of representatives from both sides of the Atlantic. They also consult on the Joint Annual Regulatory Cooperation Program with a “domestic Advisory Group composed by businesses including small and medium sized enterprises, trade unions and public interest groups, ensuring a balanced representation of all interests concerned”. Moreover, the EU supports input from industry by allowing “natural and legal persons to present proposals to improve the regulatory environment”.<sup>122</sup> It was also expressed that “TTIP provisions are meant to support compatible outcomes where regulators identify common interests” – this means that in the case of different interests, regulations may remain different.

## 5.2. Criticism

Regulatory cooperation received a lot of criticism from different organisations, mainly from NGOs like Corporate Observatory or Greenpeace.

Firstly, it was said that TTIP may lead to a “race to bottom”,<sup>123</sup> which means that traditionally harsh EU consumer standards could get “watered down”. However, the situation seems to be more difficult. As *Jonathan B. Wiener* and *Alberto Alemanno* put it,

*“fears that agreements such as the Transatlantic Trade and Investment Partnership (TTIP) would require Europe to lower its regulatory standards are based on a premise that European standards are typically more stringent than U.S. standards. But as just noted, the reality is that although some European regulatory standards for some issues are more stringent than U.S. standards, some U.S. standards for other issues are more stringent than European standards.”*<sup>124</sup>

<sup>119</sup> See: [http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152471.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152471.pdf)

<sup>120</sup> See: [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153008.4.5%20Med%20devices.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153008.4.5%20Med%20devices.pdf)

<sup>121</sup> Article X.6. See: [http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc\\_154377.pdf](http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf)

<sup>122</sup> Point 4., See: [http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc\\_154378.pdf](http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154378.pdf)

<sup>123</sup> The TTIP Gap: How a Trans-Atlantic Trade Deal Can Still Be Fixed. See: <http://www.spiegel.de/international/world/how-ttip-and-an-eu-us-free-trade-deal-can-be-fixed-a-1036831.html>

<sup>124</sup> See: *Alemanno–Wiener* [2016], p. 102; *Alemanno* [2014]: Expo/B/Afet/2013/32 Pe 433.847, European Parliament Policy Report, Brussels, April 2014 See: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433847/EXPO-AFET\\_ET\(2014\)433847\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433847/EXPO-AFET_ET(2014)433847_EN.pdf) p. 23 seq.



The EU's answer to the criticism was that they emphasised that the parties do not plan to give up EU standards. According to their claim, regulatory cooperation remains voluntary and is not imposed on the parties. Furthermore, the race to the bottom is not as common as critics claim. As *Peter Chase* and *Jacques Pelkmans* put it, the Transatlantic Business Dialogue

*“was also strongly encouraging great regulatory cooperation in automotive safety. This failed when the US regulator (the National Highway Transport Safety Agency, NHTSA) undertook extensive studies about certain specific auto safety features (e.g., on standards for side door crash resistance) which demonstrated that EU vehicles were less safe than their American counterparts. This experience again underscores some of the lessons learned in the earlier MRAs – that regulators cannot and will not lower safety standards just to promote trade, and that they depend on hard evidence, rather than political good will.”*<sup>125</sup>

In order to decide whether the agreed standards hurt EU consumer standards, we should analyse the concrete, final and detailed text of the agreement, which is not yet available,<sup>126</sup> even if leaked documents are available on the internet.<sup>127</sup> The latest documents on negotiations also seem confusing.<sup>128</sup> On the other hand, the text needs to be clearer to fulfil its purpose and maintain a high level of consumer protection, and all the costs and benefits must be taken into consideration.<sup>129</sup> Based on the official materials, it seems to be impossible to decide whether they are actually beneficial or not, because we neither know details about the negotiations, nor do we have the final and detailed text in hand.

Secondly, there is an on-going dispute on the precautionary principle. According to public opinion (especially in the EU), materials and processes can only be put to market once proven harmless,<sup>130</sup> while in the US they can be banned from the market only after they have been proven harmful. On the other hand, the legal background is by far more complex than that. As *Cass R. Sunstein* puts it,

<sup>125</sup> See: *Chase–Pelkmans* [2015], p. 7.

<sup>126</sup> See: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#regulatory-cooperation>

<sup>127</sup> See: <https://ttip-leaks.org/>

<sup>128</sup> See: The Twelfth Round of Negotiations for the Trans-Atlantic Trade and Investment Partnership (TTIP) Public Report – March 2016. See: [http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc\\_154391.pdf](http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154391.pdf)

<sup>129</sup> *Alemanno–Wiener* [2016], p. 122. et seq.

<sup>130</sup> *Vecchione* [2012–2013].

*“this opposition between Europe and America is false, even illusory. It is simply wrong to say that Europeans are more precautionary than Americans. As an empirical matter, neither is “more precautionary.” Europeans are not more averse to risks than Americans. They are more averse to particular risks, such as the risks associated with global warming; but Americans have their own preoccupations as well.”<sup>131</sup>*

He also writes that “European practice is quite complex”. To take just one example, “Europe has been more precautionary about hormones in beef, while the US has been more precautionary about mad cow disease (“BSE”) in beef and blood donations.”<sup>132</sup> European nations have taken a highly precautionary approach to genetically modified foods, but the United States has been more aggressive in controlling the risks associated with carcinogens in food additives. In the context of occupational risk, American law is far more precautionary than Swedish law.<sup>133</sup> Critics claim, in the future, as a result of TTIP, several materials may be put on the European market which are potentially harmful, e.g. in the cosmetic industry. It is true that the method applied in the US can cause some dangers. On the other hand, there are also opinions, which claim that these problems can be overcome:

*“several studies have demonstrated that, with some possible exceptions, the high standards required by both the EU and US will ensure a high level of consumer, health and environmental protection ... “ and some studies suggest that “differences between precaution and science-based risk assessment have been overplayed and that differences are more due to a selective application of precaution to different risks in different places and times.”<sup>134</sup>*

Furthermore, the precautionary principle is also set out in Article 191(2) TFEU, which expressly states that environmental policy should be based on the precautionary principle. So it cannot be “negotiated away” as simply, as claimed in the media by critics, since MSs would have to amend TFEU to do so.<sup>135</sup>

Third, there is an on-going dispute regarding genetically modified organisms (GMO products). The EU already had international disputes regarding GMO food,

<sup>131</sup> Sunstein [2005], p. 14.

<sup>132</sup> Ibid.

<sup>133</sup> Sunstein [2005], p. 20.

<sup>134</sup> Woolcock et al. [2015].

<sup>135</sup> Leaked TTIP documents confirm major risks for climate, environment and consumer safety.

See: <http://www.greenpeace.org/international/en/press/releases/2016/Leaked-TTIP-documents-confirm-major-risks-for-climate-environment-and-consumer-safety/> P. 21.

when in 2006 WTO dispute settlement found the EU ban of GMO food to be contrary to WTO rules.<sup>136</sup> After that, the EU still maintained that “only GMOs that pose no risk to human and animal health or the environment may be cultivated in the EU”. In 2010, it allowed MSs to ban GMO food (in fact, it transferred power to them),<sup>137</sup> in 2015<sup>138</sup> also moved into a more liberal direction (allowed states to introduce ban more easily) and created an authorisation system.<sup>139</sup> Critics claim GMO food or chlorine chickens could arrive in Europe, because the US uses TTIP negotiations to attack EU laws.<sup>140</sup> However, if the situation remains as it is now, according to official statements, this area will not to be affected by TTIP. Furthermore, as an agreement falling under shared competency, it is up to Member States to adhere to their standards. Hopefully, GMO labelling will also remain as before.<sup>141</sup> This does not preclude that the EU could take an unfortunate step and lower its standards even without the TTIP.<sup>142</sup> Please note that even apart from this problem, different standards in the US meat industry<sup>143</sup> could badly affect European farmers, because of cost efficiency reasons.

Fourthly, critics also claim the TTIP’s rules on regulatory cooperation could harm democracy and transparency. According to the text, the parties would create a body that would include representatives of the US government and EU agencies. Draft legislation on regulatory affairs would have to pass through this regulatory council before being put to a vote in the EU, or by MSs’ Parliaments.<sup>144</sup> Critics claim such a solution may harm democracy and bind governments’ hands. Forty-five organisations including Corporate Europe Observatory have protested against

<sup>136</sup> *Cheyne* [2008]; *Thomison* [2007]; *Kolsky Lewis* [2013–2014]; *Eliason* [2008–2009].

<sup>137</sup> GMOs: Member States to be given full responsibility on cultivation in their territories. See: [http://europa.eu/rapid/press-release\\_IP-10-921\\_en.htm](http://europa.eu/rapid/press-release_IP-10-921_en.htm)

<sup>138</sup> More freedom for MSs to decide on the GMOs use for food and feed. IP/15/4777 Brussels, 22 April 2015; Directive (EU) 2015/412 of the European Parliament and of the Council of 11 March 2015 amending Directive 2001/18/EC as regards the possibility for the MSs to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory Text with EEA relevance. OJ L 68, 13.3.2015, pp. 1–8.

<sup>139</sup> See: [http://ec.europa.eu/food/plant/gmo/authorisation/cultivation/index\\_en.htm](http://ec.europa.eu/food/plant/gmo/authorisation/cultivation/index_en.htm)

<sup>140</sup> US Using TTIP As Vehicle To Attack European Gmo Laws. See: <http://ttip2016.eu/blog/GMOs%20TTIP%20EFSa.htm>

<sup>141</sup> Agriculture Commissioner promises GMO labelling, despite TTIP. See: <http://www.euractiv.com/section/agriculture-food/news/agriculture-commissioner-promises-gmo-labelling-despite-ttip/>

<sup>142</sup> Commission fails to regulate new GMOs after intense US lobbying. See: [http://corporateeurope.org/sites/default/files/20160421\\_br\\_us\\_lobbying\\_on\\_new\\_gmos\\_finall\\_1.pdf](http://corporateeurope.org/sites/default/files/20160421_br_us_lobbying_on_new_gmos_finall_1.pdf)

<sup>143</sup> See: <http://www.spiegel.de/international/world/how-ttip-and-an-eu-us-free-trade-deal-can-be-fixed-a-1036831.html>

<sup>144</sup> *Chase–Pelkmans* [2015], p. 15.

this solution. As they put it, “the proposal makes it possible for the US to exert undue influence at a very early stage of decision-making, before any proposal is considered by elected bodies, namely the Council and the European Parliament.”<sup>145</sup> On the other hand, according to the official reasoning, this method would ensure that such proposals are in conformity with TTIP, and also make a transparent framework for lobbying. Other critics also claimed that the EP’s regulatory sovereignty could be in danger. Other opinions claim

*“that the EP’s regulatory sovereignty – in terms of the legislative, rule-making ability – is unlikely to be affected by the TTIP. The discussion of the Commission’s recently published paper on regulatory cooperation has shown that the provisions are procedural and intended to promote, guide, monitor and help facilitate regulatory cooperation.”*<sup>146</sup>

I believe the truth must lie somewhere in between these positions. Even though it is not true that legislation would be limited in the future (the body would not have the power to overrule or amend legislation), creating such a system seems to be useless and its existence could affect democracy negatively: it is like the outsourcing of certain parts of legislative action. Consequently, even if adopted, its power must be limited, and we need clearly expressed, limited rules on its duties and authority.

### 5.3. Preliminary Findings

In summary, one could agree with the claims that regulatory cooperation contains risks, which must be carefully analysed in order to avoid later damages.<sup>147</sup> However, the concrete details at the present time are not sufficient to make a judgment about its effect on consumer standards.

## 6. Conclusions

If we summarise the above mentioned problems, we can ascertain the following.

Regarding transparency, even though the Commission did not breach EU rules during negotiations, it seems obvious that being more transparent could serve democracy better. Documents created for negotiations are not useful for this purpose,

<sup>145</sup> TTIP: “Regulatory Cooperation” a threat to democracy. See: <http://corporateeurope.org/international-trade/2016/03/ttip-regulatory-cooperation-threat-democracy>

<sup>146</sup> Woolcock et al. [2015], p. 23.

<sup>147</sup> Alemanno [2015], p. 11.

because they represent a highly technocratic thinking, the European public still does not know too much about the strategy behind these documents, and will have fears.<sup>148</sup> The EU should openly express the values it would not give up for commercial gain, and also find those existing provisions in the *acquis* and in MSs' law, which cannot be changed. The same can be said about proper rules on environmental protection. In theory, the right to a healthy environment could be hurt by an agreement, which limits States' rights to amend their related policies, or at least could make them pay compensation. Poor wording could have a detrimental effect on environmental protection. Moreover, the EU rules on GMO should not be watered down, and the agreement should contain provisions, which allow MSs to ban GMOs, in conformity with the present state of EU law. The EU should not give up labelling GMO products, since this is also a typical European value citizens do not want to give up. The ban on animal testing should be openly maintained in the future as well. The text should be explicit on this issue. Most of these problems can be cured relatively easily.

On the other hand, we can also ascertain that a majority of criticism is based on misinformation, fear, prejudice and demagoguery, which can have a detrimental effect on peoples' opinion in Europe, and on the democratic exercise of rights in general.

In summary, TTIP is not the hazardous deal it is portrayed to be in the mass media or by populists, but it contains some risks which must be cured to achieve a cooperation with the US which could work for a longer term.

Moreover, it would be useful to ask for the CJEU's opinion before the conclusion of the agreement, which could analyse the connection of the text and primary legal sources. Moreover, it could also highlight if there is a conflict with secondary sources, or a conflict of legislative competencies between the EU and Member States.

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<sup>148</sup> Sunstein compares the precautionary principle to President George W. Bush's doctrine of preemptive war. See: *Sunstein* [2005], p. 219.

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