CERTAIN CONTROVERSIAL ISSUES OF EU-US TRADE NEGOTIATIONS LEADING TO THE SIGNING OF THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP)

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Summary: In this paper, the authors discuss the main arguments for and against the most controversial individual issues in negotiations over the potential EU-US free trade agreement. The paper takes into account differences between the USA and EU and tackles the most controversial individual issues which threaten to derail the negotiations, and individual issues which seem dubious from the perspective of the general public.

1. Introduction

In the autumn of 2014, the European Union (EU) and United States of America (USA) vigorously negotiated a comprehensive transatlantic free-trade agreement called the Transatlantic Trade and Investment Partnership (TTIP). The agreement between the EU and USA would be unprecedented in terms of its sheer dimension. The EU and USA are the world's major global traders and investors. In fact, the EU is the largest economy in the world, representing 25.1% of world GDP and 17.0% of world trade, while the USA is the second largest economy, accounting for 21.6% of world GDP and 13.4% of world trade.[1] Together, the EU and USA account for almost half of world GDP and one third of total world trade.[2] TTIP would create a free-trade area representing nearly 50% of

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1 European Commission, 'Commission Staff Working Document: Impact Assessment Report on the Future of EU-US Trade Relations Accompanying the Document Recommendation for a Council Decision Authorising the Opening of Negotiations on a Comprehensive Trade and Investment Agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America' [2013] 2.

2 European Commission (n 1).

global economic output, with only 11.8% of the world population.[3] Both the EU and USA hope that the new free trade agreement (FTA) will weaken the influence of emerging markets such as China, Russia, Brazil, India and South Africa.[4]

The first tangible step towards further transatlantic economic integration was taken during the 28 November 2011 summit meeting, when President José Manuel Barroso, President Herman Van Rompuy, and President Barack Obama established the High Level Working Group on Jobs and Growth (HLWG), whose main task was to 'identify and assess options for strengthening the EU-USA economic relationship'.[5] In its final report of 13 February 2013, the HLWG specified the extent to which the parties agreed on the scope and shared ambition of the future partnership, and reached the conclusion that a 'comprehensive agreement ... would provide the most significant mutual benefit'.[6] In accordance with the HLWG recommendations, the leaders of the EU and USA announced the initiation of the internal procedures necessary to launch negotiations,[7] after which the European Commission drafted the negotiation mandate,[8] which the Council of the European Union adopted.[9] In its October 2012 resolution, the European Parliament called for negotiations to be launched in the first half of 2013.[10]

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[3] G Felbermayr and others, 'Dimensions and Effects of a Transatlantic Free Trade Agreement between the EU and USA' (Study) [2013] IFOI 1.

[4] See also M Venhaus, 'The Transatlantic Trade and Investment Partnership as a New Strategy to Marginalize Emerging Powers: A Divided Free Trade Order in the Making?' in D Cardoso, P Mthembu, M Venhaus and M Verde Garrido (eds), *The Transatlantic Colossus* (Berlin Forum on Global Politics in collaboration with the Internet & Society Collaboratory and FutureChallenges.org 2014) 59-62.

[5] Council of the European Union, 'EU-US Summit joint statement' (Press release) [2011] <http://www.whitehouse.gov/the-press-office/2010/11/20/eu-us-summit-joint-statement> accessed 19 December 2013; High Level Working Group on Jobs and Growth, 'Interim Report to Leaders from the Co-Chairs EU-USA High Level Working Group on Jobs and Growth' [2012] 1 <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149557.pdf> accessed 19 December 2013.

[6] High Level Working Group on Jobs and Growth, 'Final Report - High Level Working Group on Jobs and Growth' [2013] 1 <http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf> accessed 19 December 2013.

[7] See also European Commission, 'Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso' (Press Release Memo 13/94) (2013) <http://europa.eu/rapid/press-release_MEMO-13-94_en.pdf> accessed 7 July 2014.

[8] See also K De Gucht, 'A Negotiating Mandate for a Trade and Investment Agreement with the United States' (European Commission Memo/13/212 2013) <http://europa.eu/rapid/press-release_MEMO-13-212_en.pdf> accessed 7 July 2014.

[9] Council of the European Union, 'Council Approves Launch of Trade and Investment Negotiations with the United States' (Press Release 10919/13) [2013] <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137485.pdf> accessed 7 July 2014.

[10] Although the European Parliament does not have a formal role in approving the nego-

The first round of TTIP negotiations was held in the week of 8 July 2013 in Washington, DC, where the main objective was met: a substantive round of talks on the full range of topics intended to be covered in the agreement.[11] The round was accompanied by various stakeholder events, and talks were based on a thorough review of the expressed stakeholder views. A second round was held in the week of 7 October 2013 in Brussels, where the two sides continued where they had left off in July. EU Trade Commissioner Karel De Gucht stated that '[g]ood and steady progress' had been made across a 'broad range of issues'.[12] In Brussels, on 20 December 2013, when the third round was completed, both sides again discussed all the topics they wished to see covered in TTIP along with public consultations.[13] Progress was made on the three core parts of TTIP: market access, regulatory aspects and trade-related rules. These were the focus of the fourth round of talks concluded on 14 March 2014.[14] In the subsequent rounds of negotiations, the EU and US started to discuss the wording of proposals.[15]

Trade policy and FTAs are not just matters for economists and lawyers. Trade policy is much more than the economics of importing and exporting; it has become a major political weapon with great social, environmental and cultural consequences. TTIP would not just have a great effect on the EU and its Member States but also on the everyday lives of its citizens.

This paper will discuss the arguments for and against the most controversial issues in the negotiations on TTIP.

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tiating mandate, it can adopt a resolution; Parliament Resolution (EP) 2012/2149 of 23 October 2012 on trade and economic relations with the United States [2003].

[11] European Commission, 'First Round of TTIP Negotiations Kicks off in Washington DC' (Press release) [2013] <http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151595.pdf> accessed 7 July 2014.

[12] Progress was made in identifying areas of common ground in order to start preparing for text-based discussions in the rounds ahead; K De Gucht, 'EU and US Conclude Second Round of TTIP Negotiations in Brussels' (News archive) [2013] <http://trade.ec.europa.eu/doclib/press/index.cfm?id=988> accessed 22 December 2013.

[13] 'This followed unprecedented efforts by the EU to negotiate as openly as possible and reach out to the widest possible range of interests', European Commission, 'EU Chief Negotiator Says EU-US Trade Deal not about Deregulation, as Third Round of Talks End in Washington' (press release) [2013] <http://europa.eu/rapid/press-release_IP-13-1306_en.pdf> accessed 7 July 2014.

[14] Office of the United States Trade Representative, 'Statement by US Trade Representative Michael Froman at the Close of the Fourth Round Transatlantic Trade and Investment Partnership Negotiations' (press release) [2014] <http://www.ustr.gov/about-us/press-office/press-releases/2014/March/Statement-by-USTR-Froman-at-close-of-fourth-round-TTIP-negotiations> accessed 29 March 2014.

[15] See also European Commission, 'Resources' (press materials) [2014] <http://ec.europa.eu/trade/policy/in-focus/ttip/resources/index_en.htm#_documents> accessed 30 October 2014.

The negotiations and the outlook of TTIP have raised many different issues. However, the authors will limit the discussion to: 1) the most controversial issues of the negotiations; 2) issues identified as separate and individual topics for discussion. The issues that satisfy these two conditions and which will be analysed in this paper are: *exception culturelle*, GMOs, investor state dispute settlement, and intellectual property rights. Of course, TTIP would have other far-reaching and comprehensive effects on the EU and USA and their relations, but these will not be analysed in this paper. One such issue is the environment. However, for the sake of brevity, the authors have decided to limit the scope of this paper to only those individual issues in negotiations which were designated by the negotiators as individual chapters for the negotiations.

To answer the main question of the paper, the authors will firstly use the EU's negotiation mandate (which was adopted by the EU Foreign Affairs Council) to present the topics of the negotiations. This document is officially confidential but has been leaked online. The authors will also use official documents of the EU Commission regarding the EU's position on certain topics of the negotiations and also for information about the stage of the development of the negotiations. By the same token, the documents of the US Chambers of Commerce are used to understand US positions on certain key issues. In addition, the paper will contain references from unofficial documents about TTIP, academic papers, newspaper articles and NGO reports. The authors will approach the literature as a tool for shaping the discussion on TTIP while being analytical and critical.

2. Exception culturelle

The first roadblock for the negotiators on TTIP was the audiovisual sector, in particular the notorious *exception culturelle*. At the very start, Aurélie Filippetti, the French Minister of Culture, forged an alliance with ministers of culture from 14 other EU states to take the audiovisual sector[16] off the negotiating agenda.[17] The EU Parliament underscored these demands in a resolution calling for the 'exclusion of cultural and audiovisual services, including those provided online'.[18] Ultimately, France made its approval of the European Commission's negotiating mandate

[16] The term *audiovisual* refers to cultural products: motion pictures, television, home video, musical recordings, etc.

[17] The French Embassy in London, 'EU-US Free Trade: France not Alone in Upholding Cultural Exception' <http://www.ambafrance-uk.org/France-not-alone-in-upholding> accessed 12 February 2014.

[18] Parliament Motion (EP) 2013/2558 for a Resolution to Wind up the Debate on the Statements by the Council and the Commission on EU Trade and Investment Negotiations with the United States of America [2013].

dependent on the adoption of *l'exception culturelle*[19] and won the day to the plaudits of Germany's cultural sector.[20] The French offensive was a success. The present mandate explicitly excludes audiovisual services from the negotiating mandate[21] and in various places also commits itself to the safeguarding of cultural diversity with direct reference to the UNESCO Convention.[22]

EU Trade Commissioner Karel de Gucht was quick to point out in a press conference that while audiovisual was not in the planned chapter on 'trade in services and establishment' for the time being, it had been agreed that the Commission could come back to the issue to ask for a new mandate on it.[23] Although the EU negotiators described *l'exception culturelle* as a 'not in, not out' formula because of the right of the EU Commission to ask for a new mandate on it, the new mandate would require a unanimous vote and the French Minister of Culture insisted that they would again say 'No'.[24] It could be said that the negotiating team used the formula as a way to satisfy the French and to try to dissuade the USA from retaliation, as the US negotiators could say that if the EU was excluding certain sectors from the very beginning, then the USA could also exclude a certain sector that was valuable to them.

If the provisions on liberalisation of the audiovisual sector end up in TTIP, ie if there is no *exception culturelle*, it would be the first EU trade agreement to contain provisions on the wider liberalisation of the sector,[25] given that the provisions of GATT and other bilateral contracts

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[19] Cultural exception policy includes quotas and subsidies for productions which promote locally and regionally produced content.

[20] 'EU ebnet Weg für Freihandelsgespräche' Zeit Online, (Hamburg 15 June 2013) <http://www.zeit.de/wirtschaft/2013-06/freihandelszone-verhandlungen-usa-eu-mandat> accessed 12 February 2014; A Kämpf, 'Europa eine Seele geben? Eine halbwegs funktionierende europäische Zivilgesellschaft wäre ja auch schon etwas' Politik & Kultur (Berlin September/October 2013) 11 <http://www.kulturrat.de/dokumente/puk/puk2013/puk05-13.pdf> accessed 12 February 2014.

[21] The Mandate was adopted by the EU Foreign Affairs Council. The document is officially confidential but has been leaked online; General Secretariat of the Council, 'Directives for the Negotiation of the Transatlantic Trade and Investment Partnership between the European Union and the United States' 21 (EU negotiation mandate June 2013) <http://www.s2bnetwork.org/fileadmin/dateien/downloads/EU-TTIP-Mandate-from-bfmtv-June17-2013.pdf> accessed 7 July 2014.

[22] General Secretariat of the Council (n 21) 6, 9.

[23] M Ermert, 'Controversial Debate on TTIP Mandate in EU Council of Ministers' <http://www.ip-watch.org/2013/06/14/audiovisual-sector-out-of-eu-mandate-for-ttip/> accessed 12 February 2014.

[24] 'EU Reaches Deal on French "cultural exception"' *France 24* <http://www.france24.com/en/20130615-eu-deal-french-cultural-exception-usa-trade/> accessed 12 February 2014.

[25] The cultural industry, and in particular the audiovisual industry, has never featured in a commercial treaty in the world. It is hardly surprising that the 'cultural exemption' has been around ever since talk of trade liberalisation first began. Article 4 of the very first ver-

already apply in this sector. If that is the case, the provisions of TTIP regarding the trade in services and establishment would cover all sectors and all modes of supply, including the audiovisual sector. The parties would also have to agree to grant treatment no less favourable for the establishment in their territory of audiovisual sector companies, subsidiaries or branches of other parties than that accorded to their own companies, subsidiaries or branches.[26] *L'exception culturelle* is particularly dear to the French, to whom it was granted to maintain quotas and subsidies to protect their cultural markets based on the provisions made during the Uruguay round of international trade talks in 1993 to ensure that culture is treated differently from other commercial products. It notably allowed France to introduce quotas for local music and film on national TV and radio stations and to subsidise its industry.[27] With the acceptance of *l'exception culturelle*, the Member States will continue to be able to support their cultural industries, particularly the audiovisual sector, through broadcasting quotas, subsidies, etc.[28]

From the start, it proved to be a very controversial topic that showed a division in the EU itself.[29] For instance, Manuel Barosso, the Presi-

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sion of GATT in 1948 gave states the possibility of introducing quotas for 'films of national origin' in the audiovisual sector (WTO 1986, 8; M Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law' (2006) JIEL 522). Furthermore, Article 20 sanctions government measures 'necessary to protect public morals' and 'national treasures of artistic, historic or archaeological value' (WTO 1986). Even though GATT has never enshrined any general exemption for cultural products, it is visible that the cultural sector does indeed play a special role in free trade agreements. As an example, one can look at how most states used the provisions of GATT to leave their cultural sectors out of the scope of free trade regulations; For more, see: JM Grant, '"Jurassic" Trade Dispute: The Exclusion of the Audiovisual Sector from the GATT' (1995) ILJ 1334-1365.

[26] European Commission, 'Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America', para 16 <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> accessed 19 October 2014.

[27] European Commission (n 26) 21; See also: EurActiv, 'France Draws Red Lines for EU-USA Free Trade Negotiations' (London 20 March 2013) <http://www.euractiv.com/global-europe/france-draws-red-lines-eu-us-fre-news-518616> accessed 27 June 2014.

[28] EurActiv (n 27).

[29] For more on this topic, see: V Bala and NV Long, 'International Trade and Cultural Diversity with Preference Selection' (2005) EJPE 143-162; C Crook, J Micklethwait, 'Globalisation: Making Sense of an Integrating World' (2002) 56 TES; Deutscher Bundestag, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr Petra Sitte, Ulla Lötzer, Dr Kirsten Tackmann und der Fraktion DIE LINKE: Das geplante Freihandelsabkommen TTIP/TTIP zwischen den USA und der Europäischen Union und seine Auswirkungen auf die Bereiche Kultur, Landwirtschaft, Bildung, Wissenschaft und Datenschutz, Drucksache 17/14734, Berlin, 09/11/2013; G Felbermayr, B Heid, S Lehwald, 'Die Transatlantische Handels und Investitionspartnerschaft. Wem Nutzt Eintransatlantisches Freihandelsabkommen', Teil 1: Makroökonomische Effekte, Bertelsmann Stiftung, Gütersloh, (2011); S Formentini and L Lapadre, 'Cultural Diversity and Regional Trade Agreements: The Case of Audiovisual Services' (2007) UNU-CRIS WP W-2007/4; P Sauvé and K Steinfatt, 'Towards Multilateral Rules in Trade and Culture: Protective Regulation or Efficient Protection?', in:

dent of the European Commission, when referring to the proponents of *l'exception culturelle*, was quoted as saying: 'some say they belong to the left, but in fact they are culturally extremely reactionary and have an anti-global agenda'.[30] Opponents of the exception have repeatedly warned that excluding any economic sector could hand the USA an early bargaining chip in what promise to be tough negotiations. Since the EU audiovisual and cultural market is already relatively open to US companies, while US market access is still very limited for European companies,[31] one could say that the EU would lose economic gains by excluding the audiovisual sector and risk losing further gains from other excluded sectors if the USA retaliated.

Although there are two different opinions regarding the exception, both sides use the same argument: cultural diversity. Opponents argue that the trading of cultural products may be expected to have an influence on the perceptions, values and norms of the importing society.[32] At the same time, trade in cultural products also contributes to cultural diversity within a society, because it increases the range of available cultural products.[33] Additionally, the belief is that trade in cultural products opens horizons and broadens our perspectives, and there is also a sentiment of belonging to the same humanity, which is a very important concept against all forms of narrow nationalism and protectionism.[34]

In contrast, proponents argue that Hollywood's supremacy in the audiovisual sector would harm the cultural diversity and national identity of Member States.[35] They also emphasise that US artists already rep-

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Productivity Commission and the Australian National University (eds*), Achieving Better Regulation of Services* (2002), 323-337; JE Rauch, V Trindade, 'Neckties in the Tropics: A Model of International Trade and Cultural Diversity', (2005) NBER WP No 11890.

[30] A Higgins, 'European Official Takes on the French' *The New York Times* (New York 16 June 2013) <http://www.nytimes.com/2013/06/17/business/global/european-union-divided-before-g-8-meeting.html?_r=0> accessed 12 February 2014.

[31] MA Kirchschlager, 'In between Curious Economics and *l'Exception Culturelle*: Implications of TAFTA | TTIP for the Cultural Sector', 25 February 2014 <http://future-challenges.org/local/in-between-curious-economics-and-lexception-culturelle-implications-of-tafta-ttip-for-the-cultural-sector/> accessed 28 July 2014; See also: AG von Lambsdorff, 'Interview with Alexander Wolkers, TTIP-Verhandlungen: Pro und Contra' *ARTE Journal* (Berlin 31 May 2013) <http://www.arte.tv/de/ttip-verhandlungen-pro-undcontra/7532172,CmC=7532074.html> accessed 13 February 2014.

[32] AC Disdier and others, 'Bilateral Trade of Cultural Goods' (2010) RWE 575-595.

[33] Hahn (n 25) 515, 537.

[34] Higgins (n 30).

[35] MA Kirschschlager, 'In Between Curious Economics and L'Exception Culturelle: Implications of TAFTA/TTIP for the Cultural Sector' in Cardoso, Mthembu, Venhaus and Verde Garrido (eds) (n 4) 80-83; Greek-French movie director Costa Gavras and French actress Berenice Bejo were part of a film-industry delegation that showed up at the European Parliament in Strasbourg in France to say the 'cultural exception' isn't negotiable. 'We risk seeing only American works' Gavras told reporters in the 27-nation European Union assembly. 'It's a cultural invasion. We don't want that', in J Stearns, 'European Film Stars Urge Exclu-

resent around 50% of overall airplay and downloads in pan-European charts.[36] In addition, many EU cultural markets, including the music sector, are based on very specific regulatory frameworks.[37] The EU music sector is also less homogeneous and less concentrated than the US market, especially in the field of digital access and distribution.[38] For these reasons, including the audiovisual sector in the European Commission's mandate would neither contribute to reinforcing European players on the EU market nor result in the growth of exports of European products or services to the USA.

As things stand, the USA already sells the EU more music, movies, and radio and television programmes than it buys from Europe. Its net surplus for the sector averaged 1.5 billion euros a year from 2004 to 2011.[39] Because of the undeniable existence of US cultural products in the EU, and because of their domination, one could say that cultural diversity already exists in the Union. Thus, the opponents of TTIP argue that if we preserve the status quo with more or less the same trade policy as at present and with more or less the same trade outcome between the EU and USA, we will not be depriving ourselves of foreign culture, especially not US cultural products.

Although, 1.5 billion euros a year might seem a large amount, the EU and US already trade goods and services worth 2 billion euros every day. The US surplus of 1.5 billion euros per year in the audiovisual sector is not so big if we take into account the total value of trade per year in all sectors between the two sides. Opponents believe that there is a reasonable fear that the imbalance will only increase under a trade deal, as digital and internet services,[40] already dominated by US technology companies, have become ever more popular. At present, the EU audiovisual sector is worth 17 billion euros and provides jobs for a million people.[41]

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sion of Culture from EU-U.S. Talks' (*Bloomberg*, 12 June 2013) <http://www.bloomberg.com/news/2013-06-11/european-film-stars-urge-exclusion-of-culture-from-eu-u-s-talks.html> accessed 22 November 2014.

36 Austrian Music Export, 'EU/USA Free Trade Agreement: Exclusion of the Audiovisual Sector' <http://www.musicexport.at/euusa-free-trade-agreement-exclusion-of-the-audiovisual-sector/> accessed 12 February 2014.

37 Austrian Music Export (n 36).

38 Austrian Music Export (n 36).

39 P Blenkinsop and R Emmott, 'France backs EU-USA Trade Talks after Culture Clash' Reuters (London 14 June 2013) <http://www.reuters.com/article/2013/06/14/us-eu-us-trade-idUSBRE95D0BE20130614> accessed 13 February 2014.

40 In addition, no one today with the best faith in the world can tell what the future content and media support for audiovisual and cultural policies will be.

41 Blenkinsop and Emmott (n 39), eg France, widely considered to be the birthplace of cinema, has a proud tradition of more than a century of publicly and critically acclaimed movies, and pumps in more public funds to its film industry than any other EU member. Cinema-goers pay a levy on each ticket to help fund the French film industry, which many believe could not survive without such support in the face of Hollywood's dominance.

This could be endangered if US domination increases and has a negative effect on the EU audiovisual sector.

Although the EU would also profit from further liberalisation of the US audiovisual sector, because of Hollywood's dominance, opponents might say that the liberalisation of the audiovisual sector on both sides would bring more costs than gains to the EU. If the EU wants to keep its cultural diversity and the national identity of EU Member States, it will have to preserve an adequate balance. Based on the arguments mentioned above, exclusion of the audiovisual sector from the chapter on trade in services and establishment seems like a more valid option than including it.

3. Genetically modified organisms

Genetically modified organisms (GMOs) are one of the most controversial issues concerning sanitary and phytosanitary (SPS) measures[42] within TTIP negotiations, and are a part of the second section of negotiations: regulatory issues and non-tariff barriers. Although GMOs are not explicitly mentioned in the Commission's directives for the negotiations on TTIP, SPS measures are included, and tacitly the question of allowing GM products to enter the EU arises, and giving an answer to it becomes inevitable.

Allowing GMOs produced in the USA to freely roam the EU market[43] sends a chill down the spines of most Europeans when they first hear that such an option could ever be possible.[44] Such an attitude on the

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French television stations are required to air at least 40 percent home-produced content, with another 20 percent coming from Europe, before American TV soap operas even get a look in; *France 24* (n 24).

[42] Sanitary and phytosanitary measures include 'all relevant laws, decrees, regulations, requirements and procedures' that are 'applied to protect human, animal or plant life or health within the territory of a country from risks arising from plant pests (insects, bacteria, virus), additives, residues (of pesticides or veterinary drugs), contaminants (heavy metals), toxins or disease-causing organisms in foods, beverages or feedstuffs, and diseases carried by animals'; European Commission 'Sanitary and phytosanitary (SPS) issues' [2013] <http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150986.pdf> accessed 29 January 2014.

[43] About 70% of all processed foods sold in US supermarkets contain GMOs. By contrast, almost no GM food is on sale in EU supermarkets, and all food that contains GM ingredients must be labelled as such; See also: J Hillary, 'TTIP: Charter for Deregulation and Attack on Jobs' 18-20 <http://www.bilaterals.org/?ttip-a-charter-for-deregulation-an> accessed 8 March 2014.

[44] S Bonny, 'Why are Most Europeans Opposed to GMOs? Factors Explaining Rejection in France and Europe', (2010) EJB 3; 'Europeans are prickly about American agricultural practices, like the use of genetically modified foods', *Economist*, 'Trade Negotiations Between America and the European Union Will not be Smooth' <http://www.economist.com/news/finance-and-economics/21580512-trade-negotiations-between-america-and-european-union-will-not-be> accessed 7 March 2014.

part of EU citizens is certainly the cause of the difference in regulatory approach,[45] and somewhat differs from the one that US citizens have.[46]

The Commission, however, when giving directions in negotiations about regulatory issues and non-tariff barriers, states that:

> regulatory compatibility shall be without prejudice to the right to regulate in accordance with the level of health, safety, consumer, labour and environmental protection and cultural diversity that each side deems appropriate, or otherwise meeting legitimate regulatory objectives.[47]

With the given nature of such instructions, we can conclude that the Commission wants to have leeway so it can avoid giving GMOs full access to the EU market. When specifically referring to SPS measures, the Commission wants:

> measures based on science and on international standards or scientific risk assessments, while recognising the right for the parties to appraise and manage risk in accordance with the level of protection that each side deems appropriate … applied only to the extent necessary to protect human, animal, or plant life or health.[48]

Moreover, the EU has the intention of uniting with the USA in terms of becoming international standard setters on GMO regulation, and not lowering existing world standards that are currently applied.[49]

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[45] EU law allows GMOs, but only after strict safety assessment by the European Food Safety Authority, and not nearly as much as the USA does, and not to such an extent. Food legislation frameworks in the EU and US often differ considerably in terms of hygiene and control systems, labelling standards, and underlying cultural, ecological and ethical values. European consumers enjoy labelling of genetically modified foods and ingredients, but no similar labelling scheme exists in the US. The issues include the EU bans on genetically modified foods, EU raw milk cheese, hormone-treated beef, anti-microbial resistance, chlorine-washed poultry and food products from cloned animals. The EU lifted the ban on lactic acid before the negotiations, and the USA followed by lifting the ban on EU beef in advance of the second round of trade talks. The first example shows how consumer standards are aggregated in TTIP; K Knoll, M Zinke and J Jaksche, 'Safeguarding Consumer Rights and Protection in TTIP' in Cardoso, Mthembu, Venhaus and Verde Garrido (eds) (n 4) 28-33. The EU has blocked imports of US genetically modified corn and soybeans, poultry treated with chlorine dioxide, beef treated with lactic acid to kill pathogens, and pork produced from hogs fed ractopamine, which promotes lean meat growth.

[46] See: European Commission, 'GMO Evaluation' <http://ec.europa.eu/food/food/biotechnology/evaluation/index_en.htm> accessed 7 March 2014.

[47] European Commission (n 26).

[48] European Commission (n 26).

[49] See: *Economist*, 'A Historic Trade Pact between America and Europe Needs Saving' (2013) <http://www.economist.com/news/united-states/21576704-historic-trade-pact-between-america-and-europe-needs-saving-transatlantic> accessed 7 March 2013.

The Americans are aware that this is going to be one of the most contentious topics that they need to negotiate.[50] Although the USA could benefit from having a provision that allows for the free circulation of GM food, it is still uncertain how they will respond to the EU's defensive stance when it comes to this topic.

The difference in regulatory approaches between the negotiating parties can be seen in the processes which food and other consumer products must undergo in order to enter the market. In the EU, the precautionary principle[51] is applied, which means that 'producers have to demonstrate the safety of GM crops and food products before they can be approved for sale'.[52] Here, in the precautionary principle, an example of the EU's 'better safe than sorry' approach can be seen,[53] as EU regulation will not allow for any food or other consumables to circulate in its market unless it has been proven that they are absolutely healthy. There is not even a little space for taking risks.[54] In contrast to the EU approach, in the USA 'regulators generally see GM foods as substantially equivalent to unmodified products, and give them no additional oversight in the absence of scientific proof that any harm is caused by their sale and consumption'.[55]

If negotiators decide to achieve regulatory compatibility, there are two ways in which they could do so in terms of GMOs as part of the SPS

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[50] This can be seen in the following: '"Food safety as exemplified by GMOs (genetically-modified organisms) has been probably one of the most problematic, controversial areas of the EU-US economic relationship" said Peter Chase, a vice president at the USA Chamber of Commerce', D Palmer and R Emmott, 'USA Trade Deal Could be a Lot for Europe to Swallow' Reuters (Washington 11 December 2012) <http://www.reuters.com/article/2012/12/11/us-usa-eu-trade-idUSBRE8BA05Y20121211?irpc=932> accessed 7 March 2014.

[51] The precautionary principle applies when in a policy or action there is a suspected risk to consumers, animals, or the environment that lacks sufficient scientific evidence to prove its harm. Until scientific proof of the absence of the product having hazards has been provided, the precautionary principle justifies the decision to stop distribution or withdraw from the market certain products. This principle has been ratified by the WTO and has been applied by the EU in the hormone-meat dispute; M vom Endt, 'Is TTIP a Race to the Bottom in Regulatory Standards? The Case of Hormone-treated Beef' in Cardoso, Mthembu, Venhaus and Verde Garrido (eds) (n 4) 99-102.

[52] S Lester, 'Tackling Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership' in Cardoso, Mthembu, Venhaus and Verde Garrido (eds) (n 4) 84-88.

[53] The precautionary principle is seen as 'an antidote to industrialization, globalization and Americanization', vom Endt (n 51).

[54] In the US, for instance, genetically modified foodstuffs can be sold, which is something that European consumers have a rather sceptical view of: 'The majority of European consumers regard gene technology with scepticism', Knoll, Zinke and Jaksche (n 45) 28-33.

[55] Lester (n 52) 84, 86.

measures. One is harmonisation,[56] and the other is mutual recognition.[57] Harmonisation would require a more in-sync mindset and similar mentality between regulation makers and their protection policies, which is not likely to happen in the near future when it comes to the EU and USA. On the other hand, mutual recognition allows each party to have its own system of regulation but at the same time to recognise and approve the regulatory system of the other party, and thus accept products that come from it.

Harmonisation could move in three general directions. One is to adopt regulations similar to those currently in force in the EU. Another direction would be closer to the US approach to GMO legislation, while the third option is to create a *sui generis* legal framework that would comprise elements of both US and EU GMO legislation. It is very unlikely that the USA would ever agree to regulatory harmonisation which would lead to increased standards and stricter regulation when it comes to GMOs. The second variant, the mutual recognition system, is more likely to happen. Under this system, the consumer would be warned which regulatory system the product had undergone, and so could decide for themselves what suits them most. It would not be a surprise if EU food producers got a better deal if mutual recognition were applied. In such a case, it would come down to the responsible and informed consumer to decide on this important issue.[58] One could argue that this would not be so bad after all, since an informed consumer should know what is best for them. If they do not care that much, then how can they at the same time demand to be protected? However, a study has found that over one half of consumers never, rarely or only sometimes read food labels, although the proportion of consumers who always consult food labels has risen to 25% from 8%.[59] Such results should put the responsibility on the state

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[56] Harmonisation implies the alignment of regulations into a single best practice. This could be based on international standards from a standard-setting body, or simply involve co-ordination among nations. Countries would basically agree to converge on a single standard or regulation. This is usually the most difficult way to achieve regulatory co-operation. See Lester (n 52) 84-88.

[57] Lester (n 52) 88: 'Mutual Recognition can be achieved through mutual recognition agreements or the acknowledgement of regulatory equivalence. Mutual recognition agreements approve testing and certification processes of other countries as acceptable for allowing sale in the importing country. This method is especially useful in eliminating duplicative testing and certification processes. Equivalence simply acknowledges that different technical regulations can still achieve the same objectives or outcomes; sometimes there are just different methods of doing the same thing, and they should be treated as equivalent'.

[58] Viviane Reding, European Commission Vice-President and the EU's Justice Commissioner stated: 'Consumers, therefore, must be as much centre stage of EU policies as businesses. We need confident consumers to drive forward the European economy.' Knoll, Zinke and Jaksche (n 45). 2.

[59] Food Safety Authority of Ireland, 'A Research Study into Consumers' Attitudes to Food Labeling' (2009) 23 <www.fsai.ie/workarea/downloadasset.aspx?id=8900> accessed 28 June 2014.

to lower the amount of risk for consumers and to apply stricter health standards (regarding food products in general and GMOs in particular) in order to protect the consumer instead of relying on the artificial concept of a responsible and informed consumer.

There are different regulatory problems for GM foods and for GM crops. For the former, as mentioned above, opponents point out the problem of information asymmetry between the consumer and producer, while for the latter there is the problem of externalities. The two biggest externalities are the potential costs for the health care system and for the ecosystem. These present additional arguments against GMOs. For example, a study was recently released by the Institute for Responsible Technology which uses data from the US Department of Agriculture, the US Environmental Protection Agency, medical journal reviews, and other independent research.[60] A group of scientists put together a comprehensive review of existing data that shows how European regulators have known that Monsanto's glyphosate causes a number of birth malformations since at least the year 2002.[61] Regulators misled the public about glyphosate's safety, and in Germany the Federal Office for Consumer Protection and Food Safety told the European Commission that there was no evidence to suggest that glyphosate causes birth defects.[62]

GM foods also present a danger to the environment. The use of GM crops is causing fewer strains to be planted. In a traditional ecosystem based on 100 varieties of rice, a disease wiping out one strain is not too much of a problem.[63] However, if just two strains are planted (as now occurs) and one is wiped out, the result is catastrophic.[64] In addition, the removing of certain varieties of crops causes organisms which feed on these crops to be wiped out as well, such as the butterfly population decimated by a recent Monsanto field trial.[65] This supports concerns that GM plants or transgenes can escape into the environment, and that there is an impact on rural ecosystems from broad-spectrum herbicides used on herbicide-tolerant GM crops.[66] There are a lot of similar and different

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60 'GMOs Linked to Gluten Disorders Plaguing 18 million Americans' *Russia Today* (Washington 26 November 2013) <http://rt.com/usa/gmo-gluten-sensitivity-trigger-343/> accessed 3 July 2014.

61 M Antoniou, 'Roundup and Birth Defects: Is the Public Being Kept in the Dark?' June 2011 <http://earthopensource.org/files/pdfs/Roundup-and-birth-defects/RoundupandBirthDefectsv5.pdf> accessed 2 June 2014.

62 Antoniou (n 61).

63 D Whitman, 'Genetically Modified Foods: Harmful or Helpful', April 2000 <http://www.csa.com/discoveryguides/gmfood/overview.php> accessed 30 June 2014.

64 Whitman (n 63).

65 Whitman (n 63).

66 WWF Switzerland, 'Genetically Modified Organisms (GMOs): A Danger to Sustainable Development of Agriculture', May 2005, 4 <www.panda.org/downloads/trash/gmosadangertosustainableagriculture.pdf> accessed 30 June 2014.

scientific examples of GMOs' negative effects on the ecosystem, but their full enumeration is not the purpose of this paper.

However, when putting an American hat on, we can point to studies that have shown genetically modified crops as having a net environmental benefit, like a new one demonstrating the success of biotech's banner crop, Bt corn, in reducing the use of pesticides. A new study, out in the Journal of Economic Entomology, looks specifically at the greenness of Bt sweetcorn.[67] The findings here are that crops that produce their own pesticide need less pesticide applied.[68]

The proponents of GMOs argue that if GM products are given broader access to the EU market, the prices of food would generally go down, since GM products can be produced at a lot more cheaply.[69] Thus, not only would cheaper products arrive on the EU market, but existing, regular products would also have to go down in price in order to compete with cheaper GM food from the USA.[70] Secondly, GM food is known to be better looking, and can be tastier if modified to be so, and certain minerals and vitamins from the food can be boosted with the use of genetic modification,[71] making the overall quality of the food higher. This is, of course, if we do not take into account the possible threats from consuming GM products which have not occurred yet in a form that would require their withdrawal from the US market.

On the other hand, opponents use the same argument but turn it the other way round: they think that because GM food has not been proven to be without any serious dangers,[72] there is a still a slight chance that side effects may occur later down the line of product consumption in the decades to come.[73] To prove the point, the argument is invoked that there

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[67] AM Shelton, DL Olmstead, EC Burkness, WD Hutchison, G Dively, C Welty and AN Sparks, 'Multi-State Trials of Bt Sweet Corn Varieties for Control of the Corn Earworm (*Lepidoptera*: *Noctuidae*)' (2014) JEE 2151-2154.

[68] Shelton et al (n 67).

[69] See Brown University, 'Foods from Genetically Modified Crops' <http://brown.edu/ce/adult/arise/resources/docs/GMFoodsBrochure.pdf> accessed 7 March 2014.

[70] Even Neven Mimica, Commissioner for Consumer Protection, thinks that 'consumers would benefit from more product diversity and lower prices due to increased competition in the market', Knoll, Zinke and Jaksche (n 45) 3.

[71] A Norton, 'Genetically Modified Rice a Good Vitamin A Source' Reuters (New York 15 August 2012) <http://www.reuters.com/article/2012/08/15/us-genetically-modified-rice-idUSBRE87E0RO20120815> accessed 8 March 2014; C Sarich, '3 GMO Foods Likely in Your Multi-Vitamins' <http://naturalsociety.com/3-gmo-foods-likely-in-your-multi-vitamins/> accessed 8 March 2014.

[72] Minor threats to human health can already be seen: R Mather, 'The Threats from Genetically Modified Foods' <http://www.motherearthnews.com/homesteading-and-livestock/genetically-modified-foods-zm0z12amzmat.aspx> accessed 7 March 2014.

[73] See: D Oakenfull, 'Genetically Modified Food Risks' <http://www.choice.com.au/reviews-and-tests/food-and-health/food-and-drink/safety/gm-food.aspx> accessed 7 March 2014.

is currently no scientific consensus on GMO safety.[74] Here, the EU applies its strict precautionary principle, as explained before, which would have to change, since there is no way of proving that GM products do not alter the human body over a longer period of consumption.[75] In addition, the aforementioned cheapness of GMOs may ruin European agriculture by lowering food prices and forcing the EU to adopt similar GMO regulations as those in the USA. At the same time, EU food producers may be pressurised into producing GM food or having to drop out of the game. Thus, the whole process could be reduced to a regulatory 'race to the bottom',[76] in which each side reduces as many precautionary measures as it possibly can in order to maintain a stable agricultural sector.

Finally, after reviewing all the benefits and downsides, opponents are still not convinced that taking either the harmonisation or the mutual recognition path of regulatory synchronisation can be beneficial for the EU without there being too much risk, and so would rather not introduce GMOs onto the EU market through TTIP. Bearing in mind all the arguments, it would seem wiser to put a provision in the TTIP chapter on SPS measures with an explicit exception for GMOs. Maybe the answer to this dilemma can be found in the status quo, letting time and science tell whether GMOs are safe to consume, which would satisfy the tough and careful EU legislators.

4. Investor state dispute settlement

Provisions on investor state dispute settlement (ISDS) are provisions in trade treaties and investment agreements that allow investors to bring proceedings against a foreign government that is a party to a treaty.[77] Such proceedings are brought under international law, and if the government is found to be in breach of its treaty obligations, the harmed investor can receive monetary compensation or other forms of redress.[78] ISDS is by far the most controversial part of TTIP negotiations on trade-related

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[74] See: ENSSER, 'Statement: No Scientific Consensus on GMO Safety' <http://www.ensser.org/increasing-public-information/no-scientific-consensus-on-gmo-safety/> accessed 7 March 2014. Different opinions can be found: Occupy for Animals, 'How GMO Foods Alter Organ Functions and Pose a Very Real Health Threat to Humans' <http://www.occupyforanimals.org/how-gmo-foods-alter-organ-function-and-pose-a-very-real-health-threat-to-humans.html> accessed 7 March 2014.

[75] This is not provable in a satisfactory manner for the EU, because GMO products have existed only since the 1970s and there is still no notion about the effects they might have if consumed during an entire lifetime, since no one has consumed them from their birth to death across an average human life span.

[76] See vom Endt (n 51) 99-102.

[77] G Thompson, 'The Transatlantic Trade and Investment Partnership (TTIP)' (House of Commons Library SN/EP/6688) [2014] 6.

[78] Thompson (n 77).

rules. Concerns have been raised among the general public that the ISDS provisions in TTIP will undermine the power of national governments to act in the interest of their citizens.[79] For this controversial part of the TTIP proposal, there are arguments on both sides. Proponents argue that:

- investment protection and ISDS attract foreign direct investment;
- it increases the opportunity to convince other trading partners to have ISDS;
- it fosters certainty, predictability and impartiality.

Those in favour say that investment protection provisions, including ISDS, are important for investment flows. They say that investment leads to economic growth and more jobs.[80] They believe that this is particularly the case in the EU, where the economy is very much based on being open to trade and investment.[81] The belief is that investment is a key element in creating and maintaining businesses and jobs. Through investment, companies build the global value chains that play an increasing role in the modern international economy; they not only create new opportunities for trade but also value-added jobs and income.[82]

Another argument is that these provisions in TTIP will open the door to similar provisions in future FTAs concluded by the USA and EU. This goal could be achieved either via bilateral negotiations with third countries or by influencing the multilateral context, ie through the United Nations Commission on International Trade Law, where the EU has created new rules on transparency that will apply beyond the EU's own investment agreements.[83] These provisions are especially important in

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[79] G Monbiot, 'This Transatlantic Trade Deal is a Full-frontal Assault on Democracy', *Guardian* (London 4 November 2013) <http://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy> accessed 18 January 2014; see also: Seattle to Brussels Network, 'A Transatlantic Corporate Bill of Rights', October 2013 <http://corporateeurope.org/sites/default/files/attachments/transatlantic-corporate-bill-of-rights-oct13.pdf> accessed 18 January 2014; 175 NGOs have signed a letter to EU Commissioner for Trade Karel de Gucht and United States Trade Representative Michael Froman to express their opposition to the inclusion of ISDS in TTIP. 119 of those NGOs come from Europe. Two come from Slovenia and none from Croatia. See <http://www.eeb.org/EEB/?LinkServID=A2B98635-5056-B741-B90148289C557DB&showMeta=0> accessed 7 July 2014.

[80] A-HM. Bashi, 'Foreign Direct Investment and Economic Growth in Some MENA Countries: Theory and Evidence' (1999) TMENAE 5; See also: OS Oladipo and BI Vásquez Galán, 'The Controversy about Foreign Direct Investment as a Source of Growth for the Mexican Economy' (2009) PDRLE 91-112; E Borensztein, J De Gregorio and J-W Lee, 'How Does Foreign Direct Investment Affect Economic Growth' (1995) NBER.

[81] European Commission, 'Investment Protection and Investor-to-State Dispute Settlement in EU Agreements' (fact sheet, November 2013) <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf> accessed 18 January 2014.

[82] European Commission (n 81).

[83] European Commission (n 81).

developing and third world countries which have weaker property rights protection and less efficient domestic court systems.

According to the European Commission, the main reason for having an ISDS mechanism is that in many countries investment agreements are not directly enforceable in domestic courts.[84] Therefore, an investor who finds themselves discriminated against or whose investment is expropriated cannot invoke investment protection rules before the domestic courts to get redress, unless there is consent from the country to solve disputes with certain rules and at certain forums, for example at the International Centre for Settlement of Investment Disputes, which is often provided for by the state in the investment treaty itself.[85] In international investment law,[86] there are two types of procedure to enforce the right to protect investments. The first one is state-to-state arbitration. The investor needs to contact their state and convince it to commence arbitration proceedings against the state that received the investment on the basis of an infringement of rights guaranteed by the investment agreement.[87] The second possibility is that the investor files a protest against the state in which they have invested (investor-to-state arbitration).[88] ISDS allows investors to rely directly on rules that were specifically designed to protect their investments. By creating legal certainty and predictability for companies, investment protection is also a tool for states around the world to attract and maintain foreign direct investment (FDI) to underpin their economy.[89]

An argument invoked by both sides is the neutrality and impartiality of judges. Proponents of ISDS argue that the arbitrators are on average more neutral, independent and impartial than national judges in the domestic court system when there is a case of investment protection

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84 European Commission (n 81).

85 European Commission (n 81).

86 See also: K Sajko, 'Arbitration Under Bilateral Treaties on Promotion and Protection of Investments Concluded Between Croatia and Other States' (1998) (5) CAY, 123-138; K Sajko, 'Settlement of Disputes by Bilateral Investment Treaty: The Croatian Experience' (1998) (2) ULR 657-669; K Sajko, 'Washington Convention on Settlement of Investment Disputes between States and Nationals of Other States' (1999) (6) CAY 129-140; K Sajko, 'Napomene o arbitražnom rješavanju sporova na osnovi ugovora o poticanju i uzajamnoj zaštiti ulaganja između Hrvatske i Italije' (2003) (2) PG 7-17; J Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law' (2007) ICCACS 1, 13; JP Commission, 'Precedent in Investment Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) JIA; C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (3rd edn OUP, Oxford 2007); S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) BYIL 100-104.

87 See also: D Babić, 'Pravičan i pošten tretman ulaganja u međunarodnom investicijskom pravu' (2011) (1) ZPFZG 397, 400.

88 Babić (n 87).

89 European Commission (n 81).

against the state that received the investment.[90] Proponents of the ISDS question national judges' neutrality and impartiality, because a domestic judge is a national of the state against which the complaint is filed, and a servant of the state who receives salaries and promotions from the domestic court system, and is therefore more likely as a result of direct or indirect influences to vote in favour of that state.[91]

In contrast, opponents argue that even if a national judge is biased, it does not mean that he would automatically judge unreasonably against the investor, as the state also has an interest in attracting FDI and not acting in an unreasonable manner towards investors. In addition, opponents also use the arguments of neutrality and impartiality against the arbitrators. ISDS has been accused of having an inherent bias towards investors.[92] Concerns about neutrality also arise from the arbitrator's ability to act as a judge in one case and an advocate in another.[93] Arbitrating panels are not necessarily drawn from a permanent roster of arbitrators, but are generally drawn from what might be called the international commercial arbitration bar.[94] This is especially the case for the third arbitrator selected as president of the panel.[95] As a result, arbitrators can be deciding in one case, and arbitrating on behalf of clients in other cases with similar legal issues. The decisions they make as arbitrators may have an impact on the positions of their own clients or of colleagues in their firms or on other contacts.[96]

The point here is not that the arbitrators lack personal integrity, but simply that the system for the selection of arbitrators permits individuals to argue for broad interpretations of treaty rights on behalf of clients at

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[90] SR Bond, 'Current Issues in International Commercial Arbitration: The International Arbitrator: From the Perspective of the ICC International Court of Arbitration' (1991) (1) NJILB 1, 2.

[91] See also B Manzanares Bastida, 'The Independence and Impartiality of Arbitrators in International Commercial Arbitration' (2007) (1) ME 1.

[92] C Cross, 'The Treatment of Non-Investment Interests in Investor-State Disputes: Challenges for the TTIP Negotiations' (2013) in Cardoso, Mthembu, Venhaus and Verde Garrido (eds) (n 4) 76, 77.

[93] B Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) VJTL 775, 820.

[94] A Cosbey and others, 'Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements' (2004) 6 IISD 1, 6.

[95] Cosbey and others (n 94).

[96] In a recent example of this dynamic, a former President of the International Court of Justice acted as counsel to a multinational water firm alleging violations of BIT provisions on expropriation, 'fair and equitable treatment' and 'protection and full security' at the hands of the Argentine government. In another case, the same individual was given a direct hand, as a party-appointed arbitrator, in interpreting these same treaty commitments in a dispute involving the Czech Republic and a Dutch-registered broadcasting enterprise. In so doing, he enjoyed the opportunity to help influence the direction of substantive treaty interpretation in areas of interest to his clients, Cosbey and others (n 94).

the same time as acting as arbitrators in other treaty claims.[97] Although some authors believe that the most basic legal principle of any legal process, that justice must be blind, is clearly not at play here,[98] it could be said that there is a certain amount of bias, though not because arbitrators want to benefit their clients. It is because they mostly come from the commercial arbitration system, ie they look at the relationship between the investor and the state as a purely commercial relationship. In other words, they primarily take into account the contractual terms between the state and the investor and whether the standard of fair and equitable treatment is respected, and sometimes do not consider the importance of certain state laws regarding the ecology, health, social policy, etc.

We can hardly blame them, because the investment treaties are based on the premise that the relationship between the investor and the state is a purely commercial one. Therefore, if arbitrators' interpretations of bilateral investment treaties (BITs) benefit investors more, it is probably because they think with their commercial law hat on instead of thinking from the broader perspective of an international law lawyer. However, achieving the right balance between commercial law lawyers, international law lawyers and other lawyers is still a problem that needs to be solved within the system of investment arbitration, but is something that is outside the scope of this paper.

ISDS has also been accused of lacking core judicial safeguards of transparency and independence,[99] and of investing immense power in a small core of professional arbitrators who dominate ISDS.[100] One recent report labelled ISDS as the 'world's worst judicial system'.[101] To conclude, neither side can claim the argument on neutrality and impartiality as a clear advantage.

The proponents of ISDS adhere to the logic that 'the end justifies the means'.[102] The goal is economic growth and the means is ISDS, which attracts FDI. However, opponents[103] could argue that:

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97 Cosbey and others (n 94).

98 Cosbey and others (n 94).

99 CN Brower, 'A Crisis of Legitimacy', (2002) NLJ 1, 3.

100 P Eberhardt and C Olivet, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom' (2012) CEO/TI 8.

101 M Khor, 'The World's Worst Judicial System?' (2013) NLJ 1, 3.

102 N Machiavelli, *The Prince* (Bantam Dell, New York 1996) 122.

103 See also: N Bernasconi-Osterwalder and RT Hoffmann, 'The German Nuclear Phase-out Put to the Test in International Investment Arbitration? Background to the New Dispute Vattenfall v Germany (II)' (2012) IISD; M Waibel, A Kaushal and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, Amsterdam 2010); J Brickhill and M Du Plessis, 'Two's Company, Three's a Crowd: Public Interest Intervention in Investor-state Arbitration' (Piero Foresti v South Africa) (2011) 1 SAJHR 152-166; Choudhury (n 93) 775-832; C Cross and C Schliemann Radbruch, 'When Invest-

- the goal will not be achieved to a satisfactory extent;
- the means are not justified;
- there is a better alternative.

Firstly, the argument that the European Commission uses is that:

> companies investing abroad do encounter problems which - for a variety of reasons - cannot always be solved through the domestic legal system. These problems range from the rare, but dramatic, occurrences of expropriations by the host country by force, discrimination, expropriation without proper compensation, revocation of business licences and abuses by the host state such as lack of due process to not being able to make international transfers of capital.[104]

Of course, the described situations frequently happen in the world, but how many of them happen in the EU and USA? Is the domestic court system in these countries so unable and biased that it is holding back investors from investing in the EU or USA? The opponents of ISDS disagree with this notion, and think that the burden of proof is on the proponents to prove otherwise. These problems also happen in the EU and USA, but the system of law, investor rights, and the institutions in the EU and the USA are far superior to the majority of domestic legal systems in the world.

Secondly, opponents believe that the notion that bilateral investment treaties lead to more FDI is taken as an axiom by proponents. However, when you analyse twenty years of bilateral FDI flows from one county to another, you can find little strong evidence that BITs have stimulated additional investment.[105] Recent studies by the World Bank and Yale University have found that BITs on their own do not attract investment.[106] Moreover, according to Jason W Yackee, 'BITs are unlikely to be a significant driver of foreign investment'.[107] Another study concludes by saying

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ment Arbitration Curbs Domestic Regulatory Space: Consistent Solutions through Amicus Curiae Submissions by Regional Organisations' (2013) LDR; L Johnson, 'Case Note: How Chevron v Ecuador is Pushing the Boundaries of Arbitral Authority' (2012) IISD; LE Peterson, 'Analysis: Tribunal's Reading of Amicus Curiae Tests Could Make Life Difficult for Antagonistic Amici - and Those Seeking to Raise Novel Concerns such as Human Rights Law' (2012) IAR; B Simma, 'Foreign Investment Arbitration: A Place For Human Rights?' (2011) ICLQ 573-596.

[104] European Commission (n 81).

[105] M Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract FDI? Only a Bit … and they Could Bite' (2003) World Bank DECRG 22.

[106] KP Gallagher and MBL Birch, 'Do Investment Agreements Attract Investment? Evidence from Latin America' (2006) JWIT 14.

[107] JW Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2010) No 1114 UWLGSRP 1.

that 'BITs impact on the flow of international investments essentially remains unresolved'.[108] The first question opponents could pose is: if BITs' impact on FDI is in doubt, why should the EU sign this BIT? The second question is: if there is no grave breach of investor rights in the EU under the status quo, why would investment go up significantly after signing this BIT?

Thirdly, even if this BIT makes a difference and attracts investment, it is still not safe to say that there will be more economic growth. Although there is a widespread belief among policymakers that FDI generates positive productivity externalities for host countries, and although there are a lot of studies supporting this belief, certain authors claim the empirical evidence fails to confirm it.[109] As one pair of authors put it, 'Theory does point to reasons why external benefits (such as economic growth) might arise, but finding robust empirical evidence to support their existence is more difficult. In fact, supporting evidence is limited.'[110] Other scholars reach similar conclusions, such as 'FDI does not exert any influence on growth'.[111] Moreover, 'an empirical analysis using cross-country data for the period 1981-1999 suggests that the total FDI exerts an ambiguous effect on growth on developed countries'.[112] Similarly to developed countries, 'in the particular case of developing countries, both the micro and macro empirical literatures consistently find either no effect of FDI on the productivity of the host country firms and/or aggregate growth or negative effects'.[113] One could say that the information on developing countries is not relevant, because there is no developing country in the EU, but that it is important to take a look at the positive effects of FDI on growth in general, or the lack of them.

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[108] KP Sauvant and LE Sachs. 'The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows' (2009) 3 EJIL 935, 938.

[109] L Alfaro and others, 'Does Foreign Direct Investment Promote Growth? Exploring the Role of Financial Markets on Linkages' (2009) JDE 27.

[110] H Gorg and D Greenway, 'Much Ado About Nothing? Do Domestic Firms Really Benefit From Foreign Direct Investment?' (2003) 19 WBRO 189.

[111] LK Papanastasiou and V Athanasios, 'Foreign Direct Investment and Economic Growth in Transition Economies' (2008) JDE 38.

[112] L Alfaro, 'Foreign Direct Investment and Growth: Does the Sector Matter?' (2003) JES 1; R Chandra and RJ Sandilands, 'Does Investment Cause Growth? A Test of an Endogenous Demand-Driven Theory of Growth Applied to India 1950-96' (2003) ONGT 244-265.

[113] Papanastasiou and Athanasios (n 111); For similar conclusions, see: BJ Aitken and AE Harrison, 'Do Domestic Firms Benefit from Direct Foreign Investment? Evidence from Venezuela' (1999) 89 AER 605-618; J Haskel, S Pereira and M Slaughter, 'Does Inward Foreign Direct Investment Boost the Productivity of Local Firms?' (2001) 8433 NBER; BS Javorcik, 'Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers Through Backward Linkages' (2004) 94 AER 605-627.

When discussing the impact of FDI on economic growth, we must bear in mind that there are several kinds of FDI: (1) natural-resource-seeking investment; (2) market-seeking investment; (3) efficiency-seeking investment; (4) strategic-asset-seeking investment.[114] Natural-resource-seeking investment involves FDI in the extractive sector, market-seeking FDI is any type of investment that seeks to serve the host market, efficiency-seeking FDI occurs when companies move some of their business to another country to keep costs down, and strategic-asset seeking FDI occurs when companies invest abroad to pick up new techniques and experience.[115] The local impact is likely to be different for each kind. Market-seeking FDI might lead to higher employment, but less trade,[116] while efficiency-seeking FDI might lead to both more employment and more trade.[117] In general, economists seem to agree that manufacturing industries are more wealth-creating than commodities or service industries.[118] Therefore, it is argued that FDI related to manufacturing will have a bigger impact on economic growth than extractive-sector FDI.[119] Research done on economic growth in China seems to underscore this point.[120] By the same token, Laura Alfaro has come to the conclusion that FDI in the primary sector tends to have a negative effect on growth but investment in manufacturing has a positive one, while evidence from the service sector is ambiguous.[121]

We can conclude that the evidence that FDI leads to economic growth is equivocal. Relatively recent research tends to point to evidence that spillover benefits exist but that the effects are not universal.[122] One study concludes that the diverse results are due to differences in the host country: varying levels of indigenous human resources, private-sector sophistication, competition, and host-country policies toward trade and investment.[123] Research has also produced mixed answers to the question of whether FDI actually fosters economic growth in host countries, depending on which country is studied and which methodology is em-

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[114] JH Dunning, 'The Eclectic Paradigm as an Envelope for Economic and Business Theories of MNE Activity' 9 (2000) IBR 163.

[115] UNCTD 'Foreign Direct Investment and Development' (1999) WIR 21.

[116] J Sachs and A Warner, 'Resource Abundance and Economic Growth' 5(1995) NBR Working Paper No 5398 4.

[117] Sachs and Warner (n 116).

[118] Sachs and Warner (n 116).

[119] Sachs and Warner (n 116).

[120] See also: PJ Buckley and others, 'FDI, Regional Differences and Economic Growth: Panel Data Evidence from China' (2002) 11 TC 1-28.

[121] Alfaro (n 112) 244.

[122] TH Moran, EM Graham and M Blomström, *Does Foreign Direct Investment Promote Development?* (Institute for International Economics, Washington 2005) 24.

[123] Moran, Graham and Blomström (n 122) 5.

ployed.[124] According to Theodore H Moran, FDI can have dramatically different impacts, both positive and negative.[125] So far, all the empirical results reveal that there is no unified theoretical explanation for FDI effects, and it seems very unlikely at this point that such a unified theory will emerge.[126]

Taking into account the ambiguous evidence that FDI leads to economic growth, opponents could argue that the means (ISDS) are not justified, because ISDS would constitute a new legal order which would limit the sovereignty of the state by undermining government policies enacted through democratic procedures, while in return there would be only the possibility of economic growth. If the EU or USA limit their sovereignty, they should definitely get something more significant in return than just the possibility of economic growth. Of course, it would be too high a burden to demand a 100% guarantee that there will be economic growth, as most things in life can never be 100% guaranteed. However, there should be a fair balance between the abovementioned costs and the chance of positive returns.

The means are also not justified because ISDS puts an additional cost on the state and risks a 'regulatory chill'. The number of ISDS claims is rising rapidly,[127] and in most cases Member States would have to pay a substantial amount for each ISDS claim.[128] Even when ISDS claims are unsuccessful, there is widespread concern that the enormous cost of defending them may deter states from pursuing future policy goals or taking regulatory measures that may have a potential impact on foreign investors, which is often described as 'regulatory chill'.[129] Investors have made claims of up to USD 114 billion, and 2012 saw the highest ever award for an ISDS claim of USD 1.77 billion.[130]

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[124] Moran, Graham and Blomström (n 122) 49.

[125] Moran, Graham and Blomström (n 122) 375.

[126] V Denisia, 'Foreign Direct Investment Theories: An Overview of the Main FDI Theories' (2010) EJIS 109.

[127] According to the United Nations Conference on Trade and Development, there are over 3,200 IIAs in existence; in 2012, a record 58 ISDS claims were filed and the total number of known treaty-based claims reached 514. This explosion of claims has been driven in part by the wide interpretations given to vague international investment agreement provisions. Investors are protected not just against direct expropriation of their investments by host states. Regulatory and policy measures taken by host states that interfere with or impact on foreign investments can amount to indirect expropriation or breach standards of fair and equitable treatment.

[128] The tabs charged by elite law firms can be USD 1,000 per hour, per lawyer in investment treaty cases, with whole teams handling them. Arbitrators earn daily fees of USD 3,000 or more.

[129] Cross (n 92).

[130] United Nations Conference on Trade and Development, 'Research and Policy Analysis' <http://www.unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Research-and-Policy-Analysis.aspx> accessed 26 January 2014.

In addition, the settlement of ISDS cases can have a negative impact on regulatory standards. Two ISDS case are a good example of this. The first one is *Vattenfall I v Germany*. In 2009, the Swedish energy company Vattenfall started an ISDS procedure against Germany. Vattenfall had engaged in the construction of a coal fired power plant in Hamburg-Moorburg, located on the River Elbe.[131] When Hamburg's environmental authority imposed quality controls on the waste waters released into the river from the power plant, Vattenfall claimed that these standards made the investment project unviable. Using ISDS provisions, the company asked Germany for compensation totalling EUR 1.4 billion. The case was eventually settled when the City of Hamburg agreed to lower the environmental requirements previously set.[132] The second example is *Ethyl vs Canada*. The chemical manufacturer Ethyl sued Canada using ISDS over the introduction of a ban on the toxic chemical MMT. The settlement of the case saw Canada reverse the ban and agree on a USD 13 million payment. Incidentally, the same chemical was banned in the USA.[133]

All in all, opponents believe that ISDS should not be a part of TTIP because it is questionable if ISDS would achieve its goals of attracting FDI and leading to economic growth in a satisfactory manner. Furthermore, after analysing the arguments on both sides, it seems that there are more losses than gains from ISDS in the EU-USA trade deal, and that the means for achieving the goal are not justified. Since both the EU and USA have very strong domestic court systems and property rights protection, one can come to the conclusion that the status quo is a better alternative.

5. Intellectual property rights

Intellectual property rights (IPR) protection is no stranger to EU FTAs. Out of 31 EU FTAs that are currently in force, a big majority, more precisely 23, contain provisions about IP protection. However, the mere fact that the IPR is a usual suspect in FTA negotiations did not stop civil society from declaring it a controversial and a sensitive topic.[134] The

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[131] Friends of the Earth Europe, 'What is the "investor-state dispute settlement"?' <http://www.foeeurope.org/isds/> accessed 23 July 2014.

[132] Friends of the Earth Europe (n 131).

[133] Friends of the Earth Europe (n 131).

[134] Eg The Civil Society Declaration released by 47 European and international organisations to exclude from the upcoming Trans-Atlantic Free Trade Agreement (TTIP) any provisions related to patents, copyright, trademarks, data protection, geographical indications, or other forms of so-called intellectual property, 'IP out of TTIP' 15 March 2013 <http://www.laquadrature.net/en/no-copyright-in-eu-us-trade-agreement> accessed 18 February 2014; B Kilic, 'First SOPA then ACTA, now TTIP: Here We Go Again' 18 March 2013 <http://www.citizenvox.org/2013/03/18/first-sopa-then-acta-now-TTIP-here-we-go-again/> accessed 18 February 2014.

debate concerns whether to include an IP chapter in TTIP or not. The proponents of the idea stress the positive aspects of IP rights. The primary, well-known function of an IP right is to give its holder a competitive advantage in its commercial activities by preventing unauthorised exploitation by others.[135] According to the EU Commission, this is especially important for small and medium-sized entrepreneurs (SMEs) for whom IP rights serve as powerful weapons to compete with much larger companies.[136] There are plenty of benefits of IPR,[137] but the big question is whether it should be included in TTIP.

Proponents offer two main arguments in favour of inclusion. The first one is to reinforce the notion that the chapter on IPR is an integral part of trade agreements. IPR protection in the EU and USA might be at a high level, but the goal is to engage other countries (such as China, India, Brazil or Thailand)[138] to follow their lead and either ramp up the protection of IPR in their domestic systems or to include an IPR chapter in trade agreements.[139] The second main argument is to make the EU and

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[135] European Commission, 'Intellectual Property: Positive Aspects of IP rights' <http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142108.pdf> accessed 19 February 2014.

[136] European Commission (n 135).

[137] Many counterfeit products place citizens' safety or health at risk, for instance where vehicle spare parts or drugs are concerned. Enforcing IP rights in respect of such products guarantees at least that the products' origin is known and that the products are genuine, whereas counterfeit products often do not comply with the applicable safety standards. This is especially true for trademarks, but patent licensing contracts, for instance, may also include quality insurance clauses. Moreover, where a company has protected its products (or processes, etc) with IP rights, it can derive revenues not only from their direct exploitation (by that company) but also from their indirect exploitation by third parties under licensing contracts. These additional indirect revenues sometimes exceed the profits resulting from direct exploitation, especially as they do not require additional internal manufacturing capacities. Such an approach may therefore be particularly relevant for SMEs. It is also important for universities and public research centres, which usually do not have any direct exploitation activities. In addition, while certain procedures required for the registration of IP rights are considered to be expensive, in particular by SMEs, it should be noted that certain IP rights can be enjoyed without any formal procedure and without paying any official fees. This is particularly the case for copyright and unregistered designs. Furthermore, even where a company (or university, etc) does not intend to protect its own inventions, its staff (researchers, etc) can still make use of patent information. Patents are the most prolific and up-to-date source of technological information, and contain detailed technical information which often cannot be found anywhere else. It is estimated that up to 80% of current technical knowledge can only be found in patent documents. Moreover, this information is rapidly available, as most patent applications are published 18 months after their first filing. See: European Commission (n 135).

[138] See also: the International IP Index which ranks the countries on their IP environment, ie their protection of copyrights, patents, etc; USA Chambers of Commerce, 'GIPC International IP Index' <http://www.theglobalipcenter.com/gipcindex/> accessed 20 February 2014.

[139] See also: T Kovziridze, 'Differences in Regulatory Approach between the EU and the US: Transatlantic Trade and Investment Partnership (TTIP) and its Impact on Trade with Third Countries' in Cardoso, Mthembu, Venhaus and Verde Garrido (eds) (n 4) 47-50; V Trigkas,

US IPR systems more compatible and harmonised, and decrease transaction costs by removing non-tariff barriers. For example, in trademark law there are differences between systems. The USA follows the use-based system, whereas the EU has always based trademark protection on registration. If the systems were more compatible, there would be a decrease in transaction costs. Unfortunately, we cannot discuss in detail the possibility of a decrease in transaction costs, because there is still no consensus on what exactly the IPR chapter would look like, and how exactly the IPR chapter would be different in comparison with other EU FTAs. At least, so far it has not been made public what exactly the IPR chapter would look like.

However, opponents might beg to differ on the point of a decrease in transaction costs. Although differences in the systems exist, they are marginal and the transaction costs are minimal.[140] There might be a need to consult a lawyer for advice on the differences, but because of the frequent trade between the EU and USA, they are well known so they do not present a meaningful impediment to trade. Thus, if the differences are small, the benefits will be too. Opponents do not believe that the differences are a strong argument for an IPR chapter in TTIP.

On the other hand, IP protection is already at a high level in both the

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'The Strategic Implications of TTIP: "Will it Engage or Contain China?"' in Cardoso, Mthembu, Venhaus and Verde Garrido (eds) (n 4) 50-54; P Mthembu, 'A Transatlantic Partnership with Ripples Across the Oceans: What Does Africa Stand to Gain or Lose?' in Cardoso, Mthembu, Venhaus and Verde Garrido (eds) (n 4) 54-59; Venhaus (n 4) 59-63.

[140] Examples of differences between the EU and US systems: 'In the patent field, the differences used to be quite substantial. The US had this first-to-invent structure, whereas the EU and most of the rest of the world actually adopted the first-to-file system of patenting, but the US has recently converted to the majority opinion, so that's hardly an argument. Another area of differences ... perhaps is, to a degree, subject matter. The US has been very liberal in protecting subject matter of the more elusive kind, like business models and software, but if you look at recent US court cases, particularly the *Bilski* case, decided by the Supreme Court, the US now seems to be more in line, more restrictive, with European standards. If you look at Europe, Europe actually excludes computer programs per se from patentability but does allow and in practice generously allows hardware implemented software patenting'. Taken from: B Hugenholtz, 'What Should be the Role for Intellectual Property Rights in the TTIP', round table on the topic 21 May 2013 <http://www.youtube.com/watch?v=q9X_fN015yc&noredirect=1> accessed 20 February 2014. In the field of GIs, the most contentious area, 'EU regulations protect geographical indications and product protection is tied to their geographical origin. The US approach is different and oriented towards the protection of trademark rather than geographical origin of the product. For example, whereas the EU only acknowledges the champagne produced in the respective area of France called Champagne and prohibits sale of any products called champagne not produced in this region of France, it is perfectly fine in the US to produce and sell Californian or other sparkling wine called champagne. In this case, not geographical origin but trademark is subject to protection under intellectual property rights regulations', M Venhaus, 'Differences in Regulatory Approach Between the EU and the US: Transatlantic Trade and Investment Partnership (TTIP) and its Impact on Trade with Third Countries' in Cardoso, Mthembu, Venhaus and Verde Garrido (eds) (n 4) 47-49.

EU and USA. Both parties exceed the TRIPS minimum and have a lot of TRIPS-Plus elements.[141] Thus, the argument on strengthening IP protection is not a sound one.

Including IP standards in TTIP necessarily locks in these standards between the EU and USA. Even if these standards comply with what we are used to now, they will restrict us in the future if we want to reform,[142] and this is not a theoretical argument. Reform is very much in the air nowadays, both in the USA and EU, particularly in the field of copyright. There are discussions going on in the United States Congress,[143] the Register of Copyrights of the United States has urged Congress to reform,[144] and there are discussions in the European Parliament about the scope and extent of copyright protection.[145] The same winds of change are blowing across the fields of patents, trademarks, etc. For instance, at the moment, Member States are proceeding with the signing and ratification of the Agreement on a Unified EU Patent Court.[146] If we lock in now, we will regret it because we cannot roll it back easily if in the meantime higher standards are reached. Opponents believe that this is the killer argument

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[141] In recent years, many developing countries have been coming under pressure to enact or implement even tougher or more restrictive conditions in their patent laws than are required by the TRIPS Agreement. These are known as 'TRIPS plus' provisions. Countries are not obliged by international law to do this, but many, such as Brazil, China or Central American states adopt these as part of trade agreements with the United States or the European Union. Common examples of TRIPS plus provisions include extending the term of a patent longer than the twenty-year minimum, or introducing provisions that limit the use of compulsory licences or that restrict generic competition. One of these provisions is known as data exclusivity. This refers to exclusive rights granted over the pharmaceutical test data submitted by companies to drug regulatory authorities to obtain market authorisation. It means that information concerning a drug's safety and efficacy is kept confidential for a period of five or ten years. If a generic manufacturer wants to register a drug in that country, it is not allowed simply to show that their product is therapeutically equivalent to the originator product. Instead, it must either sit out the exclusivity period, or take the route of repeating lengthy clinical trials to demonstrate the safety and efficacy of the drug: trials that have already been undertaken; See: M El-Said, 'The European Union Free Trade Agreements and TRIPS-Plus Challenges and Opportunities for the Ukraine' <http://www.undp.org.ua/images/stories/IPRandAEM_Kyiv/EU TRIPS-Plus Rules Ukraine_ENG.doc> accessed 7 July 2014; F Rossi, 'Free Trade Agreements and TRIPS-plus Measures' (2006) IPM 150-172; M El-Said, 'The Road from TRIPS-Minus, to TRIPS, to TRIPS PLUS' (2005) JWIP 53-65.

[142] Hugenholtz (n 140).

[143] A Robertson, 'Free Speech Doesn't Mean Free Stuff': Congress Begins Copyright Reform with a Plea for Civility' <http://www.theverge.com/2013/5/17/4341038/congress-starts-copyright-hearings-with-a-plea-for-civility> accessed 20 February 2014.

[144] MA Pallante, 'The Next Great Copyright Act' (2013) CJLA 315-344.

[145] Eg Parliament Report (EP) 2012/0180 on the proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market [2012].

[146] European Commission, Patents, 26 May 2014 <http://ec.europa.eu/internal_market/indprop/patent/index_en.htm> accessed 25 July 2014.

against an IPR chapter. However, why would opponents want reform that would actually lower the level of copyright protection? They believe that the purpose of copyright is to benefit the public, and thus the lower the level of protection, the more the public can freely enjoy content that is copyrighted.[147] Secondly, they believe that copyright as it is violates the tenets of free market capitalism. According to them, under the current system of copyright, producers of content are entitled to a guaranteed, government instituted, government subsidised content monopoly.[148] Thirdly, they argue that the current copyright regime does not lead to the greatest level of innovation and productivity. It is a system that picks winners and losers, and the losers are new industries that could generate new wealth and added value. They are of the opinion that we frankly may have no idea how it actually hurts innovation, because we do not know what cannot be produced as a result of our current system.[149]

The next argument comes from the perspective of pragmatism. No matter how many times negotiators have made it clear and stressed that TTIP is different from the highly controversial ACTA,[150] (for example, the ACTA provisions on IPR enforcement in the digital environment in ACTA articles 27(2) to 27(4) will not be part of the TTIP negotiations, and neither will ACTA provisions on criminal sanctions),[151] and no matter how different it really will be, the public still equates the two.[152] If the negotiators wish to minimise the risk of TTIP being rejected as ACTA was, then they should leave the IPR out of TTIP negotiations, just as they did with data protection.[153]

Moreover, as the European Generic Medicines Association points out, 'any attempt to make IPRs stronger would have a negative impact

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147 M Masnick, 'House Republicans: Copyright Law Destroys Markets; It's Time for Real Reform', 16 November 2012 <https://www.techdirt.com/articles/20121116/16481921080/house-republicans-copyright-law-destroys-markets-its-time-real-reform.shtml> accessed 3 July 2014.

148 Masnick (n 147).

149 Masnick (n 147).

150 The Anti-Counterfeiting Trade Agreement (ACTA) was a multinational treaty for the purpose of establishing international standards for intellectual property rights enforcement. The agreement aimed to establish an international legal framework for targeting counterfeit goods, generic medicines and copyright infringement on the internet, and would have created a new governing body outside existing forums, such as the World Trade Organization, the World Intellectual Property Organization, or the United Nations. It was rejected by the European Parliament.

151 European Commission 'How Much Does the TTIP Have in Common with ACTA?' [2013] 1.

152 Civil Society Declaration (n 134).

153 See: V Reding, 'Towards a More Dynamic Transatlantic Area of Growth and Investment' (Speech during a conference organised by the Peterson Institute, SAIS and the EU Delegation in Washington, DC, SPEECH/13/867) <http://europa.eu/rapid/press-release_SPEECH-13-867_en.htm> accessed 20 February 2014.

on the penetration of generic medicines in the markets',[154] as it would reduce competition for cheaper and more effective drugs, and consequently have an impact on patients' access to affordable medicines.[155]

On the other hand, it is maybe for the better, because cheaper generic drugs are less expensive but are rarely better quality or a safer solution. The problem with generic drugs is that they do not have to go through clinical efficacy trials and are not kept at the same standards as brand name drugs.[156] There have been a lot of examples of negative health consequences from generic drugs; one of them is the more seizures resulting from switching from the brand name drug Dilantin to generic drugs.[157] The proponents for the inclusion of the IPR chapter in TTIP can argue that generic drugs are maybe cheaper than brand name drugs but the potential health consequences could be very expensive.

6. Conclusion

If it is to be judged on the basis of the EU negotiation mandate and the current state of negotiations, TTIP will be one of the most comprehensive FTAs ever concluded by the EU, and as a result the next step in the evolution of the EU's foreign trade policy. However, TTIP is not just another FTA. Unlike all the other EU FTAs, this agreement is negotiated with a partner of similar political and economic strength, which makes the negotiations even more challenging and enhances the possibility of an increase in the comprehensiveness and far-reaching impact of the EU-USA trade deal.

It is precisely because of this that there should be a broad debate on its justifiability. TTIP brings a lot of new things to the discussion table, such as liberalisation of the audiovisual sector, inclusion of ISDS and greater access of GMOs to the EU market. No other EU FTA has aroused so much interest and scrutiny from civil society, various NGOs and academics. The majority of them have taken a cautious stance towards the most controversial issues and advised against allowing GMOs greater

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[154] A 'generic medicine' is a medicine that is developed to be the same as a medicine that has already been authorised. Generic medicines are widely used in the EU in cost-effective treatment programmes and are prescribed as effective alternatives to more expensive pharmaceuticals.

[155] K Bizzarri, 'A Brave New Transatlantic Partnership' [2013] S2B, 1, 11 <http://corporateeurope.org/sites/default/files/attachments/brave_new_transatlantic_partnership.pdf> accessed 21 July 2014.

[156] JK Mavromatis, 'Are Generic Drugs as Safe and Effective as Name Brand Drugs?' <http://www.kevinmd.com/blog/2013/02/generic-drugs-safe-effective-brand-drugs.html> accessed 20 February 2014.

[157] RT Burkhardt, IE Leppik, K Blesi, S Scott, SR Gapany and JC Cloyd, 'Lower Phenytoin Serum Levels in Persons Switched from Brand to Generic Phenytoin' (2004) Neurology 1494-1496.

access to the EU market, and also against including ISDS and the chapter on protection of intellectual property rights, but proposed allowing *l'exception culturelle*.

Although the authors understand that it is much easier to cherry-pick in a theoretical discussion than in the real world politics of negotiating the biggest bilateral trade deal in history, they believe that the general public should be informed in greater detail of the pros and cons. It is unquestionable that there will be economic benefits from TTIP, but the question is what will we sacrifice for them and is it worth it? The answer to the last question, the authors will leave to the reader.