

## The Investor-State Dispute Settlement Mechanism Emerging From the Leaked Draft of TTIP: A New Shift of Paradigm?

AYSHA JESSICA BEAVERS

PhD candidate at the Law Faculty of Zhongnan  
University of Economics and Law, Wuhan, China

### **Abstract**

*On May 2016, Greenpeace's leak of the TTIP's Draft lifted the secrecy from the negotiations, exposing the positions of the parties. After a brief survey on ISDS, this article focuses on the Draft's ISDS Chapter and compares the parties' models. One oriented towards the institutional arbitration facilitating model (USA), the other promoting an institutional judicial-like model (EU), which defines a new paradigm of ISDS, but raises further doubts on its compatibility with the democratic principles, public interests, and regulatory power.*

**Summary:** *Introduction - Section I – On the Investor-State Dispute Settlement (ISDS). - I.1 Brief Survey On The International Investment Law and Private-State Dispute Settlement. - I.2 The ICSID Convention. - I.3 The North-American Free Trade Agreement (NAFTA). - I.4 The Bilateral Investment Treaties (BITs) And The International Investment Treaties (IIT). - Section II – The Transatlantic Trade And Investment Partnership (TTIP): EU And USA Free Trade Agreement And The Idea Of An Independent Dispute Settlement Institute. - II.1 TTIP: The EU Model Of Dispute Resolution. - II.2 TTIP: The USA Model Of Dispute Resolution. - Conclusion – List of Abbreviations – Bibliography*

## INTRODUCTION

In May 2016, Greenpeace leaked and published the results of the negotiation of the XII round of the Transatlantic Trade and Investment Partnership [*hereinafter*, TTIP]<sup>1</sup>. The leaked documents refer to different negotiation periods; the round of June 2015 concerns the dispute resolution chapter, while other chapters of the TTIP's Draft refer to March 2016. At the time of the leakage, this represented an important moment for the Non-Governmental Organizations [*hereinafter*, NGOs], the social and workers unions and the associations that were asking the European Union Commission to lift the secrecy from the text and from the negotiations with the USA. In addition, parliamentarians of both national Member States and European Union [*hereinafter*, EU] supported and voiced the critics, fostering the peak of the protests against the TTIP to the point they could no longer be ignored, and, thus, leading the EU political institutions to interrupt the negotiations<sup>2</sup>.

Based on the leak published on May 2016, this paper focuses on the TTIP's Chapter on dispute settlement. It deals with the contracting states' elaboration of a system of rules, of a dispute resolution mechanism for investor's protection and trade issues and compliance and implementation. This Chapter is the core for the understanding of the different objectives the parties pursue: their ideological perspective, the values and principles that ground their action, the dispute settlement model they support and the underlying motives. The questions, emerging from the underlying ideological point of view, require to consider the evolution of the investor-State dispute resolution in international economic law; the *status quo* of the different models and their efficiency; the underlying protected

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<sup>1</sup>The XII rounds held during the month of February 2016, Greenpeace, [www.trade-leaks.org](http://www.trade-leaks.org); [www.ttip-leaks.org](http://www.ttip-leaks.org) (site consulted on June 13<sup>th</sup>, 2017) [*hereinafter* TTIP, TTIP Draft or Draft].

<sup>2</sup>Roderick Abbott, Frederick Erixon, Martina Francesca Ferracane, ECIPE, *Demystifying Investor-State Dispute Settlement (ISDS)*, Occasional Paper no. 5/2014, available at [http://www.ecipe.org/app/uploads/2014/12/OCC52014\\_1.pdf](http://www.ecipe.org/app/uploads/2014/12/OCC52014_1.pdf), at 3.

system of values and principles; and, their compatibility with the sovereignty principle and the democratic value system supported by the National, Federal, Supranational and International legal systems involved.

The leaked papers showed that the February 2016 negotiations were focused on the three main pillars of the partnership, *i.e.* market access, regulatory cluster and rules<sup>3</sup>; before that, the regulatory cooperation and rules were based on the EU proposal of November 2015, and were presented as “*a new and reformed approach to investment protection and investment dispute resolution for TTIP, [which is presented to the US in detail during this round for the first time].*”<sup>4</sup> This aspect raised, and raises, much concern for the parties, due to the deeply divergent approaches to State-foreign investor dispute resolution objectives and practices pursued. As evident as it is, the mere observation of the leaked documents on the dispute settlement chapter reveals the intention of the US negotiator to oppose to the creation of an independent body that deals exclusively with the TTIP's investment protection and trade issues, further denying accepting a body composed of irrevocable members. These differences do not exclude the fact that both models are unbalanced towards the protection of the private interests of the foreign investor.

The TTIP has been welcomed differently from the civil society, the academics, the political institutions, the economic institutions and the individuals, depending on the political and economic views and positions. Surely, the USA officials' explicit request for secrecy on the content and on the meetings has contributed in raising doubts on the shady intentions purported unfavorably against the stakeholders excluded from the negotiations. Nonetheless, this negotiation, that started in 2013 and was later suspended in 2016, is considered by the experts

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<sup>3</sup>TTIP Draft, *Note - Tactical State of Play of the TTIP Negotiations – March 2016*, (June 13<sup>th</sup>, 2017), doc. 16. <https://trade-leaks.org/ttip/tactical-state-of-play/>, at 3.

<sup>4</sup>*Id.*, at 3.

an important milestone for the setting of a new standard for the Western economies, particularly referring to the reduction of labor and environmental rights and regulations, a step towards further free trade and deregulated markets, and, potentially, the creation of a new system of trade and investor-state dispute settlement. The legal point of view on the scope, the limits and the advantages of a new dispute settlement mechanism in a Bilateral Investment Treaty, as the TTIP, concerns: 1) the creation and protection of private subjects rights (traders and investors), on the one hand, and the rise of risks linked to choice that favors an institutional dispute resolution mechanism to avoid domestic jurisdiction, on the other; and, 2) a mechanism that puts at the same level the interests of private companies and States' public interests. Advocates consider this institutional dispute resolution mechanism neutral and transparent, due to the characteristics of autonomy, independence, with unmovable arbitrators or panelists that guarantee democratic scrutiny and public access to deposited documentation of the conflicting parties. Nonetheless, its opponents argue that the apparent neutrality and characters of autonomy and independence mirror values and principles that don't find their roots in democratic constitutional principles, nor public interests, but in neo-liberalist oriented economic private interests<sup>5</sup>.

The first Section of the paper will consider the state of art of the investor-State dispute settlement [*hereinafter*, ISDS] system and bodies, focusing on the foreign direct investment. The second Section of this essay will consider the nature and the innovations introduced in the TTIP's ISDS by the negotiating parties. The final part of this paper will analyze the ISDS paradigms and their respective scopes, limits, and advantages. Hence, the two ISDS mechanisms emerging from

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<sup>5</sup>Alessandra Algostino, *ISDS (INVESTOR-STATE Dispute Settlement), Il Cuored di Tenebra della Global Economic Governance, e il Costituzionalismo*, Fasc. No. 1 *Costituzionalismo.it - Tornare ai Fondamentali: La Solidarieta'* 100, (2016), at 100-174.

the TTIP negotiation, if it were to be availed, would introduce different approaches to foreign investors and contracting parties' rights, to the compatibility with the constitutional democratic and public interest, to the underlying ideological system of values. The EU TTIP dispute-settlement model will be compared with the system of the Comprehensive Economic Trade Agreement (CETA)<sup>6</sup> between EU and Canada; and the overview on the reaction to the EU public consultation on the Multilateral Investment Court [*hereinafter* MIC] will allow the emergence of the clashes between the underlying ideological system of values promoted by the new ISDS system and the EU citizens' democratic principles. The USA TTIP model will be compared to the existing North-American Free Trade Agreement [*hereinafter* NAFTA]<sup>7</sup> dispute settlement system, which has given the negotiators much inspiration.

## **Section I – On the Investor-State Dispute Settlement (ISDS).**

### **I.1 Brief Survey on the International Investment Law and Private-State Dispute Settlement**

The International Investment law [*hereinafter*, IIL] is the name that includes norms that are united under the same objective of recognizing the contribution of private international capital flows as a factor for economic and social development. It pursues the objective of providing an adequate protection to foreign investments. IIL is created by a series of international agreements and treaties, most of bilateral and regional nature. It has been proved difficult to write and ratify a multilateral investment treaty, because the interests of the nations are too distant, due to various economic, social and political factors.

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<sup>6</sup>Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, October 28, 2016, 2017 O.J. (L 11) – provisional application September 21, 2017 [*hereinafter* CETA]. The agreement has been ratified by the EU Council, but requires further ratification by each EU Member State.

<sup>7</sup>North-American Free Trade Agreement, U.S.-Can.-Mex., December 17, 1992, 32 I.L.M. 289 (1993).

Nonetheless, the legal sources of IIL have different nature: international norms, national legislation, contracts and agreements between state and foreign investors. These legal sources have in common the protection and guarantee of providing the foreign investor with property rights, an independent and effective judicial system, legal certainty, and well-defined rules for governmental interference and for entrepreneurial activities<sup>8</sup>.

The subjects concerned by the IIL are the sovereign States and foreign investors. Foreign investments can occur in two main different ways in a host state: through direct investment (FDI) or through indirect investment (FII). The differences between the two forms are not clearly defined, although the World Bank provides several non-legally-binding definitions in this domain.

The legal sources dealing with foreign investment have evolved since the '50s of the XX century, moving from international customary law to the development of specific clauses for the investor-State dispute settlement (ISDS), including the draft of Conventions with clear regulations and enforcement provisions. These disputes were considered belonging to the domain of public international law, therefore concerning exclusively state to state disputes. The State-to-State disputes on foreign investment issues implied the evaluation of further elements connected to the conflict with another State. The implications of a claim by the State, if there was any interest at all to pursue one, would have had to look at different factors: above all, the leverage and power of the relation between States involved; the interest in the emergence of political conflict with that State; furthermore, the position of power of the foreign investor in demanding protection on behalf of its State.

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<sup>8</sup>Matthias Herdegen, *PRINCIPLES OF INTERNATIONAL ECONOMIC LAW*, (Oxford University Press, 2013), at 354.

Before the shift of paradigm in the ISDS domain, the international customary law proclaimed the (natural) jurisdiction of domestic remedies<sup>9</sup> or, in conventional ISDS, the necessary exhaustion of domestic remedies before further submitting a claim to international dispute settlement mechanisms. The principles of sovereignty and of equality of the States in the international community were the columns to the construction of the International dispute settlement. The mechanism presented two levels of dispute: 1 – State-to-State disputes; 2 – Foreign investor-State disputes. Among them, the latter had to be pursued through the domestic judicial system.

After World War II, the previous scenario was replaced by a conventional system based on an international investor-State dispute settlement mechanism. A general opening up to the global commerce and trade exchanges and policies contributed to determining the increasing importance of the following characters: 1) the disputing parties: the dispute is between a private and a sovereign state; 2) jurisdiction: domestic law or international law; 3) applicable law or procedural rules; 4) nature of decision or ruling; 5) implementation of decision; 6) enforceability of decision; and, eventually, 7) review of the decision. The Member States were signed and constituted the General Agreement on Trade and Tariffs (GATT), the World Bank, the first Bilateral investment agreements<sup>10</sup> and Friendship Commerce and Navigation Treaties for investment and trade<sup>11</sup> in a world where every State had to take sides during the Cold War period. These first bilateral investment and trade agreements did not provide for clauses vetting ISDS mechanisms. The end of the Cold War inaugurated a flourishing period for the conclusions of BITs and

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<sup>9</sup>United Nations Convention on Trade And Development [*hereinafter* UNCTAD], Dispute Settlement: Investor-State (2003), UNCTAD/ITE/IIT/30, (Issues Paper Series, United Nations Publication, 2003), at 7, 32 – 37. *See also* Abbott, Erixon, Ferracane, *supra*.

<sup>10</sup>UNCTAD, *supra*, at 37. *See also* Abbott, Erixon, Ferracane, *supra*.

<sup>11</sup>Abbott, Erixon, Ferracane, *supra*, at 5 - 6. Between USA and the Western block States of Europe – (Italy, France, *etc.*) still in force today – Friendship Commerce and Navigation Treaties (FNCT).

Regional agreements with the ex-soviet countries of Eastern and Central Europe<sup>12</sup>. The IIAs have therefore increased, and along with it have augmented the opinions that ISDS clauses were an important factor for the choice to invest in a country.

This opinion has been recently confuted by the new trend of receding from these ISDS conventions and agreements, additionally confirmed by the exclusion of such clauses in new BITs; further, the ISDS has been seriously questioned for its impact on state sovereignty, public interest, and public finance. The disputes on IIL are often strictly connected to the following categories<sup>13</sup>: A) Protection from expropriation, B) National treatment, C) Most Favored Nation treatment, D) Fair and equitable treatment. The competence of the dispute settlement mechanisms based on *ratio materiae* doesn't include pre-establishment issues unless otherwise specified by the agreements between the parties.

The existing definitions of *investment* and *investor* in IIA create issues and uncertainty in setting the effective jurisdiction on the claim, due to their vagueness and uncertainty. Further difficulties and technically open definitions of the *nationality* of the investor assume great importance due to their connection to the *ratio personae*, *i.e.* entitlement in submitting investment claims under IIA.

In brief, the ISDS evolved from an international customary law based on State sovereignty to a conventional system of international dispute settlement mechanisms for *ad hoc* (*UN Commission on International Trade Law - UNICTRAL, International commercial court of Arbitration - ICC*) and institutional arbitration tribunals (*International Center of State Investor Disputes - ICSID*<sup>14</sup>, *North American*

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<sup>12</sup>See UNCTAD, *supra*; see also Abbot, Ericson, Ferracane, *supra*, at 7, during this period they increased to a number of 3400 approximately, in 2014.

<sup>13</sup>Abbott, Erixon, Ferracane, *supra*, at 14; see also UNCTAD, at 69 – 77.

<sup>14</sup>Convention on the Settlement of Investment Disputes between States and Nationals of Other State, March 18,1965, 1966, 17 U.S.T. 1270 [*hereinafter*, the Washington Convention, the ICSID Convention or the ICSID]



*Free Trade Agreement* -NAFTA<sup>15</sup>) based on bilateral investment treaties (BITs) and regional investment treaties. The development of the ISDS has been promoted with the support of neo-liberalist oriented institutions such as the World Bank [*hereinafter*, WB], the International Monetary Fund [*hereinafter*, IMF] and the World Trade Organization [*hereinafter*, WTO], therefore providing for a vision of the foundations, of the underlying principles and convictions that support this vision.

## **I.2 The ICSID Convention.**

The International Center of State Investor Disputes [*hereinafter*, ICSID] is one of the five organizations that constitute the World Bank<sup>16</sup>; it was established by a multilateral treaty, signed in 1965 and entered into force in 1966, named the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, commonly called the “ICSID Convention” or the “Washington Convention”<sup>17</sup>. The scope of the ICSID is to provide facilities for the conciliation and arbitration of investment disputes between contracting States and foreign investors, nationals to Members to the convention. ICSID does not itself conciliate or arbitrate such disputes. This is the task of the conciliation commission and arbitral tribunal, which is constituted for each dispute, through an institutionalized procedure of appointment (ICSID Convention, Article 29 for Conciliation Commission, and Article 37 for Arbitral Tribunal). The ICSID Secretariat assists in the initiation and conduct of conciliation and arbitration proceedings, performing a variety of administrative functions in

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<sup>15</sup>North-American Free Trade Agreement, U.S.-Can.-Mex., December 17, 1992, 32 I.L.M. 289 (1993) [*hereinafter*, NAFTA]

<sup>16</sup>The World Bank Group is constituted from: International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).

<sup>17</sup>Michael K. Young, Antonio R. Parra, José Angel Canela, Amelia Porges, *ICSID And New Trends In International Dispute Settlement*, 87 ASIL - Challenges to International Governance 2, (March 31<sup>st</sup> -April 3<sup>rd</sup>, 1993), at 2-3.

this respect (ICSID Convention, Section III). The recourse to conciliation and arbitration under the convention is entirely voluntary. Once the consent to the procedure is given, all Contracting States, whether or not parties to the dispute in question, are required to recognize awards rendered pursuant to the Convention as binding, and to enforce the pecuniary obligations they impose (Article 54 of the Convention). Such awards are not subject to appeal or any other remedy except those which, like the remedy of annulment, are provided for in the convention itself (Section V, Articles 50-52 of the Convention). In 1978, the Center increased its potential judicial competence with the draft of “Additional Facility” rules, under which the ICSID Secretariat is authorized to administer certain proceedings between States and nationals of other States that fall outside the Convention's scope (including: settlement of disputes between parties that are not a contracting State or nationals of a member; where one party is a Member State or has the nationality of a Member State; the fact-finding procedures, including pre-dispute phase on non-investment disputes, *i.e.* not “ordinary commercial” disputes). Lastly, it included the ICSID's undertaking to act as the appointing authority of arbitrators for *ad hoc* (meaning, non-institutional) arbitration; particularly in agreements designed for *ad hoc* proceedings that referred to the UNICITRAL Arbitration Rules. There are different ways to provide the consent to the application of the ICSID Convention, or of the Additional Facility rules, can be provided in different ways: primarily, the signees to the convention can decide to make a reservation on the consent; secondly, the signees can record and deposit their preliminary consent, although it does not imply automatic acceptance of all disputes submitted to the ICSID, actually, on the contrary, it requires further acceptance; thirdly, the consent can be contained in a commercial or investment treaty, clauses or in national legislation, and that is either inferred relying on

these legal sources and agreements, or it is automatically binding for the state called by the foreign investor submitting the claim<sup>18</sup>.

Private arbitration institutions, such as ICC International Court of Arbitration and the Arbitration of the Stockholm Chamber of Commerce, or international bodies such as the Permanent Arbitration at The Hague, referring to the same consent clauses, model and rules just mentioned.

The main character of the ICSID dispute settlement mechanism is the consent of both parties in writing under the ICSID Convention; this could imply the agreements itself, or, a change of the national legislation provisions containing general “offers”, or general consent, to submit disputes with foreign investors to ICSID arbitration. The latest Bilateral Investment Treaties (BITs) include dispute settlement consenting to the ICSID mechanism, other combine the mechanism with the Additional Facilities rules 1978 and the UNICTRAL Rules; BITs can also create a general provision of consent of the contracting State towards the investor that can choose to activate the settlement, based on this right created by the same BIT<sup>19</sup>.

The jurisdiction to the ICSID has different sources: (1) contracts and agreements between state and foreign investor, (2) BITs consents (3) legislative provision consent. Additionally, at the beginning of the XXI century, a new option joined the previous list: a general blanket consent contained in investment contracts, BITs, NAFTA and investment (national) law<sup>20</sup>.

### **I.3 The North-American Free Trade Agreement (NAFTA).**

The dispute settlement system enshrined by NAFTA Chapter 11 section B sets a series of “first times” in the international

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<sup>18</sup>Young, Parra, Canela and Porges, *supra*, at 3.

<sup>19</sup>Young, Parra, Canela and Porges, *supra*, at 4.

<sup>20</sup>Parra Antonio R., *ICSID And The Rise Of Bilateral Investment Treaties: Will ICSID Be The Leading Arbitration Institution In The Early 21 St Century?*, 94 Proceedings of the Annual Meeting (ASIL) 41, (APRIL 5-8, 2000), at 43.

economic law scenario. It sets up, for the first time, an international arbitration mechanism for the settlement of investment disputes between a NAFTA country and an investor of another NAFTA country; further, it represents the first time Mexico entered into an agreement with such a system, in 1993; the first time that members of the OECD<sup>21</sup> (Organization for Economic Co-operation and Development) have agreed to submit investor-State arbitration mechanism. It was the first time that a trade agreement included provisions on international investment law, also providing them with a protection system as part of the treaty itself. The dispute settlement mechanism was considered one of the most advanced at the time of its signature and ratification in 1993.

As mentioned, for the first time an investment treaty is embedded in a trade treaty<sup>22</sup>, containing absolute protection and relative protection for the investor; the former protection in the form of concrete commitments of a host state *vis-à-vis* a foreign investor, in relation for example to expropriation, the appointment of senior management personnel, the elimination of performance requirements and similar; the latter protection consisting in the ones' typical of trade agreements, such as the extension to foreign investors of the principles of national treatment or of the most-favored-nation principle<sup>23</sup>. The private investor is allowed to have recourse to international arbitration when, as a result of the alleged breach of any of these provisions, the investor has suffered damages. Generally, arbitration remedies are in the form of payment of damages, but under NAFTA the arbitration panel can also order the restitution of property.

The mechanism provides that the NAFTA countries consent to the submission of a claim of arbitration in

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<sup>21</sup>Daniel M. Price, *An Overview Of The NAFTA Investment Chapter: Substantive Rules And Investor-State Dispute Settlement*, 27 No. 3 *The International Lawyer* 727 (Fall 1993), at 731.

<sup>22</sup>Young, Parra, Canela and Porges, *supra*, at 7.

<sup>23</sup>Young, Parra, Canela and Porges, *supra*, at 7.

accordance with the treaty procedures. The procedures prescribe that

[A]n investor of a NAFTA country, on its own behalf, or on behalf of an enterprise that the investor owns or controls directly or indirectly, may assert a claim that the investor or the enterprise has incurred loss or damage as a result of a breach by the host country of a provision of the NAFTA<sup>24</sup>.

This point requires contextualization, as per it is prescribed in consequence of an underlying Arbitration case issue that article 1117 of NAFTA tried to solve in consequence of the so-called *Barcelona Traction*<sup>25</sup>, that concerned the investor's permission to assert a claim for injury to its investment even where the investor itself did not suffer loss or damage independent from that of the injury to its investment.

The NAFTA provisions consider that some exceptions may allow that claims may be pursued by Federal, State, and Provincial governments; that certain claims may be pursued by enterprises; and that others may be pursued by certain State-chartered monopolies when the actions are inconsistent with the NAFTA. Cases initiated against a Municipal, Provincial, or Federal government under the investor-State provisions of Chapter 11 are not heard before a Canadian court using Canadian jurisprudence but go to arbitration before an international panel operating by rules established under the aegis of the World Bank or the United Nations for settling international disputes between transnational corporations. Since each of these forums operates according to the norms of international commercial law, Chapter 11 actually transfers adjudication of disputes over government policies from the realm of national law to international commercial law, with several serious implications<sup>26</sup>. There are time pre-conditions,

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<sup>24</sup>Price, *supra*, at 732.

<sup>25</sup>Barcelona Traction Case (Belgium v. Spain), [1970] I.C.J. Rep. 3 (Preliminary Objections).

<sup>26</sup>Michalos, *supra*, at 212.

whereas the claims should be brought within three years of when the investor (or enterprise) first acquired or could have acquired knowledge of the breach and knowledge of loss or damage. At least ninety days before submitting a claim of arbitration, an investor must notify the host country<sup>27</sup>. Further, the NAFTA article 1120 prescribes the applicable rules and the terms for the deposit of the claim, or its expiry, within six months from the knowledge of the breach or the damage. Therefore, a claim to arbitration can be filed under the following: 1) the Convention on the Settlement of Investment Disputes between States and nationals of other States (ICSID Convention); 2) the Additional Facility Rules of the ICSID Convention; or 3) the UNICITRAL Arbitration Rules.

The article 1120 NAFTA prescribes pre-existing requirements and conditions, for example: consenting to arbitration in accordance with the procedures set out in the NAFTA; waiving the right to initiate or continue before any administrative tribunal or court under the law of any NAFTA partner, or other dispute settlement procedures, any proceedings with respect to the measure that is alleged to be a breach of the NAFTA, except for the injunction proceedings, declaratory, or other extraordinary relief not involving the payment of damages. The consent and waiver must be delivered to the host country in writing. Because a tribunal is empowered to award only monetary damages, investors are not required to waive their right to seek other relief in domestic courts<sup>28</sup>.

In addition, article 1135 NAFTA defines the composition of the arbitration tribunal, setting the number of the panel members at 3, part of a designated roster, two nominated by each disputing party and a third one, presiding the tribunal, appointed by the agreement of the disputing parties.

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<sup>27</sup>North-American Free Trade Agreement, U.S.-Can.-Mex., December 17, 1992, 32 I.L.M. 289 (1993) [*hereinafter*, NAFTA], art. 1121.

<sup>28</sup>Michalos, *supra*, at 733

Further, article 1126 NAFTA provides for the consolidation of claims. This former implying that, where there are two or more claims having a question of law or fact in common submitted to arbitration, they may “*in the interests of fair and efficient resolution of the claims*”<sup>29</sup> be consolidated and heard by a tribunal established under the UNICITRAL Arbitration Rules, except as modified by NAFTA<sup>30</sup>.

It must be further specified that NAFTA also prescribes rules for the place of arbitration and the governing law. In the first case, it clearly states, at Article 1130 NAFTA, that the arbitration tribunal will hold the arbitration in the territory of a NAFTA country that is a party to the New York Convention,<sup>31</sup> for the purpose of guaranteeing enforceability under that Convention NAFTA. This Chapter 11 prescribes the role to the NAFTA Parties in the interpretation of the same chapter and the basic procedural rules of the notice of a claim, of copies of the pleadings, of submissions on a question of NAFTA interpretation. The NAFTA interpretation is pursued with the establishment of a three States parties Commission. The Treaty defines the deadlines by which the Commission must abide to submit its interpretation; otherwise, the tribunal shall decide the issue itself. The arbitration tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the tribunal's jurisdiction is effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction (Article 1134 NAFTA).<sup>32</sup> It may award, separately or in combination, only monetary damages, and applicable interest, or it may order restitution of property, in which case the award must provide that the disputing country may pay

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<sup>29</sup>NAFTA, art. 1126 par. 2

<sup>30</sup>Michalos, *supra*, at 733.

<sup>31</sup>Convention on the Settlement of Investment Disputes between States and Nationals of Other State, March 18, 1965, 1966, 17 U.S.T. 1270 [*hereinafter*, the Washington Convention, the ICSID Convention or the ICSID].

<sup>32</sup>Price, *supra*, at 734.

monetary damages and applicable interest *in lieu* of restitution. In addition, it may also award costs in accordance with the applicable arbitration rules.

Section B is drafted so as to permit investors to avail themselves of the enforcement mechanisms provided in the ICSID Convention, the New York Convention and the Inter-American Convention on International Commercial Arbitration<sup>33</sup>. In fact, Article 1122 NAFTA obliges and implies that the consent of the State party, recited in that article together with the submission of a claim by an investor, satisfies the jurisdictional requirements of the three conventions. At the same time, this section disciplines the enforcement action of the State Party whose investor has received an award. Although in practice, the compliance and implementation of NAFTA awards are not legally binding – the decisions and recommendations of panels may have political and/or moral force<sup>34</sup>. In addition, there is no provision that binds the enforcement of damages through an award, like an injunction, or some equivalent order. Some regard this as a significant weakness.

Moreover, the timing for the enforcement of the award depends on the tribunal and rules applied by the tribunal; it is the NAFTA Commission that, upon request of the home country of the investor, must establish an arbitral panel under Chapter 20 of the NAFTA. During the procedure, the Commission may be asked to determine that the failure to abide or to comply is inconsistent with the NAFTA obligations and emit a recommendation that the NAFTA award triggering the State Party's right to suspend NAFTA benefits under Chapter 20.

The system created by the NAFTA has been analyzed from the point of view of its' efficiency, based on the notion put forward by Eklund, which is followed by the majority of the legal doctrine, but this definition is too narrow to be considered

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<sup>33</sup>See Inter-American Convention on International Commercial Arbitration, January 30, 1975, 1976, O.A.S.T.S. No. 42, 14 I.L.M. 336 [*hereinafter* Panama City Convention]. See also NAFTA, art. 1136.

<sup>34</sup>Michalos, *supra*, at 219.



of support for a general argument for the efficiency of the investor-State arbitration mechanism. Further elements must be taken into account to evaluate the efficiency and the conflict of interests that scatter from this international institutional dispute settlement mechanism. In fact, contrarily to the narrow-efficiency-criteria, Michalos advocates for a *robust-sense-efficiency* viewed as and including a “moral consequentialism.”<sup>35</sup> The adoption of the narrow-sense-efficiency determines a lack of unanimity in the legal doctrine withstanding on the foundations of the legitimacy of the dispute settlement system. Notwithstanding this evidence, Eklund shows enthusiasm for the autonomy of the arbitral tribunals and for the NAFTA dispute settlement mechanism<sup>36</sup>. Alvarez<sup>37</sup> advocates for the autonomy of the arbitral tribunal contributes in creating the new foreign investment legal system, although, the same mechanism, simultaneously creates inequality among the national investors and foreign investors, whereas foreign investors complying with certain domestic laws in the United States can use NAFTA Chapter 11 provisions to claim compensation from the U.S. Government on the grounds of “regulatory takings”, although American citizens and companies cannot make such claims<sup>38</sup>. In the opinion of William Greider this particular feature is “*the most disturbing aspect of Chapter 11*”: NAFTA's new investor protections actually mimic a radical revision of constitutional law that the American right-wing has been aggressively pushing for years – redefining public regulation as a government “*taking*” of private property that requires compensation to the owners, just as when government takes private land for a highway or park it has to pay its fair value. Any new regulation is bound to have some economic impact on private assets, this doctrine is a formula to

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<sup>35</sup>*Id.*, at 200.

<sup>36</sup>*Id.*, at 201.

<sup>37</sup>Josè E. Alvarez, *The Emerging Foreign Direct Investment Regime*, 99 Proceedings of the Annual Meeting (ASIL) 94, (March-April 2, 2005), at 94-97.

<sup>38</sup>Michalos, *supra*, at 203.

shrink the reach of modern government and cripple the regulatory state – undermining long-established protections for social welfare and economic justice, environmental values and individual rights. Right-wing advocates frankly and wittingly state this objective – restoring the primacy of property against society's democratic broader claims and interests, using Grieder own words: “*NAFTA checks the excesses of unilateral sovereignty Washington lawyer Daniel Price told a scholarly forum in Cleveland. NAFTA does clearly create some rights for foreign investors that local citizens and companies don't have. But that's the whole purpose of it.*”<sup>39</sup>

It is precisely the illegitimate transformation of issues of broad public interest into issues that allegedly involve only private commercial interests that have mobilized so many people against the Chapter 11 provisions. Clarkson advocated that the Chapter 11: “*created a sinister forum of judicial decision-making in secret...[its] investor-state dispute mechanism is so egregiously offensive to Canada's constitutional norms that its supraconstitutional status could be targeted for defiance.*”<sup>40</sup> These positions provide the other side of the coin of the NAFTA agreement and dispute settlement.

Further elements that exalt the autonomy of this mechanism, compared to the previous IIA, are the innovations introduced by the following: (1) the “*consolidations*” that may occur for the fair and efficient resolution of the claims, decided by a three-member arbitral tribunal operating under the UNICITRAL rules; (2) the “*appointing of the arbitrators*” method, based on a roster established by NAFTA parties, of 45 potential arbitrators, drawn by the Secretary-General of NAFTA<sup>41</sup>; (3) the Chapter 19 NAFTA “*special mechanisms on*

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<sup>39</sup>Michalos, *supra*, at 204.

<sup>40</sup>Michalos, *supra*, at 204.

<sup>41</sup>Young, Parra, Canela and Porges, *supra*, at 6.

*anti-dumping measures and countervailing*” and their implementation and enforcement<sup>42</sup>.

In conclusion to this brief survey, NAFTA introduced innovative instruments for the protection of the investor's interest, the separation of the claims from domestic jurisdiction, the remedy of restitution of property, the autonomy of the institutionalized arbitration body, the enforcement system. At the same time, the new mechanism introduced strong inequalities between the position of private foreign investors and States, that determine the risks to the sovereignty principle and, furthermore, to the constitutional principles, causing the non-ritual alteration of prevailing public interests in favor of private economic interests. The case law of NAFTA has already proved for the prevailing in favor of the foreign investor<sup>43</sup>. These and the other factors considered at the beginning of the section shall be analyzed when evaluating the outcomes and the future limits and advantages of TTIP dispute settlement mechanism<sup>44</sup>.

#### **I.4 The Bilateral Investment Treaties (BITs) and The International Investment Treaties (IIT).**

All the above-mentioned treaties and agreements are bilateral or regional investment treaties that include a section that deals with the investor-State dispute settlement. The new treaties are inspired by these but go a step further towards the creation of a foreign investment system that can be predictable and certain for the parties presenting their claims. Although increasingly controlled by the accrued number of rules and by the new panelists' power of interpretation of predetermined international legal sources, the arbitration settlement system still presents space for legal uncertainty. The future of the

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<sup>42</sup>Young, Parra, Canela and Porges, *supra*, at 8-9.

<sup>43</sup>Pia Eberhardt, Blair Redlin, Cecile Toubeau, *TRADING AWAY DEMOCRACY, HOW CETA'S INVESTOR PROTECTION RULES THREATEN THE PUBLIC GOOD IN CANADA AND THE EU*, (ed. Scott Harris, 2014), available at [http://www.tni.org/files/download/ceta-isds-en\\_0.pdf](http://www.tni.org/files/download/ceta-isds-en_0.pdf)

<sup>44</sup>Young, Parra, Canela and Porges, *supra*, at 2.

foreign investment system, for the advocates of a neo-liberalist economic system, should go in the direction of providing both a set of clear rules and a safe and predictable protection system. The opponents to this ideological approach advocate for instruments strengthening the social responsibility of investors, trading companies, and businesses.

The characters seen above, at paragraph 1.1, are still valid and dealt with new approaches: 1) the evolution of the ISDS has reached a point where private investors can challenge regulation and policies of sovereign states and governments<sup>45</sup>; 2) the IITs have created an independent mandatory system of ISDS that obliges the States that have provided blanket consent to be called in front of the arbitral tribunals; 3) treaties like NAFTA leave to the parties the choice of law, that therefore can be different from the one of the contracting State, just as allowed by the ICSID system; 4) the nature of the decision of the panel, or arbitral tribunal, is characterized by uncertainty, the same connection with the unpredictability of the applicable law and legal principles that the tribunal will use to base its' decision; 5) the implementation of the award is often conditioned by the enforcement system connected to the ICSID convention, the Additional Facilities Rules and the New York Convention on the enforcement of awards; 6) the enforcement system provided for by the latest treaties, is grounded on the previous point 5, and, also, connected to possible retaliation measures, or a further claim against the party for non-compliance with the decision; 7) not all the treaties provide for a review system, in fact, it consists of a minority – for example, NAFTA provides it for special cases, while ICSID provides for annulment in specific procedural cases, that can lead to the re-submission of the claim before the ICSID mechanism between the same disputants.

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<sup>45</sup> NAFTA arbitral tribunal, *Eli Lilly vs. Canada*, ICSID case No. UNCT/14/2.

The new investment treaties have strengthened the position of the foreign investor compared to the position of the sovereign state. This premise is one of the crucial and strong ones for the critics, which has limited and, consequently, lead to the suspension of the negotiations of the Transatlantic Trade and Investment Partnership between EU and USA.

## **Section II – The Transatlantic Trade and Investment Partnership (TTIP): EU and USA Free Trade Agreement and the Idea of an Independent Dispute Settlement Institute.**

The “Transatlantic Trade and Investment Partnership” is, at the moment, considered to be a dead treaty. The negotiations have stopped in May 2016 motivated by the strong and broad will of the EU Member States of suspending the negotiations for reasons including: the uncertainty for the USA elections of November 2016; civil-society and political strong protests; lack of unanimity among the European Union State governments; a rather shy opposition by the European Union Parliament, and other<sup>46</sup>.

After the entry into force of the Lisbon Treaty (2009)<sup>47</sup> including the Treaty on the European Union [*hereinafter*, TEU] and Treaty on the Functioning of the European Union [*hereinafter*, TFEU], the European Union has increased its competence in the domain of internal and international commercial and investment agreements.<sup>48</sup> In fact, the

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<sup>46</sup>Claude Serfati, *The Transatlantic Block Of States And The Political Economy Of The Transatlantic Trade And Investment Partnership (TTIP)*, 9 No.1 Work Organisation, Labour & Globalisation 7, (Pluto Journals, Spring 2015) at 7-37. See also Abbot, Erixon, Ferracane, *supra*, at 2; and Eberhardt, Redlin, Toubeau (2014).

<sup>47</sup>Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, December 13, 2007, 2007 O.J. (C 306) [*hereinafter* Lisbon Treaty]

<sup>48</sup>Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) [*hereinafter* TFEU], art. 3(1) (e), following the procedures of TFUE art. 218. The new competence of the EU have determined the ongoing period of uncertainty for the BITs pending between EU Member States and Third Party States.

legitimacy of the EU Commission to negotiate and sign the TTIP on behalf of all Member States is based on a new set of competences<sup>49</sup>. For example, these new competences provide for the legal basis, that CETA<sup>50</sup> has been signed and, although still undergoing ratification by each EU Member State, it has provisionally entered into force on September 21<sup>st</sup>, 2017. The CETA is a trade and investment agreement between EU and Canada, substituting all pre-existing agreements between the EU Member States and Canada. It includes a section regulating ISDS (Chapter 8). Similarly, the TTIP approval would substitute all the existing BITs and Friendship Commerce Navigation Treaties [*hereinafter*, FCNT] existing between the EU Member States and the USA. It would include a section on ISDS and dispute settlement in general, one of the major concerns of its critics and source of ardor of its advocates. The end of the TTIP negotiations doesn't shade the previous enthusiasm that welcomed the beginning of the negotiations in 2013 by both partners and their institutions:

Perhaps the most developed initiatives on trade, consumer protection, and e-commerce originated outside of the WTO. The current Transatlantic Trade and Investment Partnership (TTIP) negotiations between the United States and the European Union, as well as the Trans-Pacific Partnership (TPP) negotiations between twelve Pacific Rim countries including the United States, also aim to bridge regulatory processes and outcomes with the objective of reducing barriers to trade. Although producers are intended as the primary beneficiaries (as they are in WTO law), consumers could benefit through increased economies of scale for producers of

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<sup>49</sup> TFUE, Title I, “*General Provisions On The Union's External Action*”, art. 188 A.

<sup>50</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, October 28, 2016, 2017 O.J. (L 11) – provisional application 21<sup>st</sup> September, 2017.

harmonized and decreased regulatory compliance requirements.<sup>51</sup>

The partnership enthusiasts considered the benefits for producers (and investors) as central to the TTIP and the TPP, as much as the requirement for a special legal and judicial protection. Therefore, the analysis of the establishment of an autonomous and independent dispute settlement body (abstractly) competent for trade and investment claims arising from the agreement (as the one prospected by the TTIP's Draft) assumes this scope and the underlying structured values related to it that finds its limits in the democratic institutions and principles that inspire the legal systems that should be part of the agreement; this analysis is, in fact, faceted and complex.

As mentioned in the first Section, the trend towards a decrease and an exclusion of clauses concerning ISDS has begun, having its first advocates in developed and developing countries, such as Australia, India, Indonesia and South Africa<sup>52</sup>. This trend is mainly concerned by the threat to public interests, regulatory takings, and state public finance introduced by such clauses in a national legal system. The main elements that define the structure of the ISDS mechanism are relevant in the TTIP dispute settlement as well; particularly relevant are the seven characters listed here: 1) the disputing parties: a private and a sovereign state; 2) jurisdiction: domestic law or international law; 3) applicable law or rules; 4) nature of decision or ruling; 5) implementation of decision; 6) enforceability of decision; and eventually, 7) review of the decision. The different delineation, relevance, and interaction of these characters shape its specificity, additionally, the ISDS

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<sup>51</sup>Sonia E. Rolland, *Atoms Versus Bits: Consumer Protection in the (Cyber) Trade Regime*, 108 Proceedings of the Annual Meeting (ASIL), *The Effectiveness of International Law* 353, (2014), at 356.

<sup>52</sup>Abbott, Erixon, Ferracane, *supra*, at 18-19.

mechanisms are further characterized by the venue chosen, domestic remedies, international *ad hoc* arbitration and international institutional arbitration.

As provided by the Greenpeace leaked documents, the TTIP's ISDS<sup>53</sup> scope at Article 1, states its purpose is “*resolving any dispute between the Parties concern on the interpretation and application of this Agreement with a view to arriving, where possible, at a mutually agreed solution*”<sup>54</sup>. Although the substance of the article is common, the subject of the article remains different: “*The Parties endeavor in*” US negotiators underline an activity that derives from the endeavor, or effort, of the Parties, and not from a pre-existing dispute settlement mechanism. The EU negotiators dwell on “*The objective*” as a title and as a concept implying a pre-existing dispute settlement mechanism that has the common scope mentioned above.

The Article 2 is titled “Scope”. It has a very broad and vague jurisdiction, as stated in paragraph 1, “*the settlement of all disputes between the parties regarding the interpretation or application of this agreement*”<sup>55</sup>. While the EU negotiators are content with this all-including scope, the US negotiators, on the contrary, narrow down the domain affirmed in the first paragraph specifying the relevance of the role of the Party-choice of the parties-, and the *ratio materiae* that can base

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<sup>53</sup>Since the Chapter is not distinguished by a specific number, it will be referred to hereinafter as ISDS Chapter, or the Chapter.

<sup>54</sup>TTIP, Chapter [ ] *Dispute Settlement June 2015*, doc. 15, (consulted on June 13<sup>th</sup>, 2017), <https://trade-leaks.org/ttip/dispute-settlement/> [hereinafter The Chapter, ISDS Chapter or Chapter]: [EU: Section 1 Objective and Scope] Article 1: [EU: Objective] [US: Mechanism to Resolve Disputes] [EU: The objective of] [US: The Parties endeavor in] this Chapter [EU: is] to establish an effective and efficient mechanism for resolving any dispute between the Parties concerning the interpretation and application of this Agreement with a view to arriving, where possible, at a mutually agreed solution.

<sup>55</sup>TTIP Draft, art. 2, Scope: *Except as otherwise provided in this Agreement, this Chapter shall apply to the settlement of all disputes between the Parties regarding the interpretation or application of this Agreement [US: wherever a Party considers that: (a) another Party has otherwise failed to carry out its obligations under this Agreement; or (b) a measure of another Party is inconsistent with the obligations under this Agreement; (c) except as otherwise provided in this Agreement, a benefit the Party could reasonably have expected to accrue to under this Agreement is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement, except that a Party may not invoke this paragraph with respect to a benefit under this Agreement if the measure is subject to an exception under Article [...]] (General exceptions).*



claims: failure to carry out obligations; the adoption of an inconsistent measure by the other Party; and at letter c) “*the benefit the Party could reasonably have expected to accrue to under this Agreement is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement ...*”<sup>56</sup>. The same “reasonably” mentioned in the NAFTA Chapter 11 that gives space to potential injury claims in all subject matters related to trade, investment and connected to modification of state regulatory measures. This last aspect and the potential threats implied when interacting with state sovereignty and democratic values have been discussed in paragraph 1.3 of this paper. Nonetheless, the way the provision is written raises further questions: can the EU's scope include the explicit list of article 2 of the US negotiators? How can an institutionalized ISDS deal with the conflict of law and conflict of legal sources of Constitutional, Supranational and International nature? How can state sovereignty and democratic values be upheld, when an international arbitration mechanism has to support a Partnership that values the producer's and investor's rights more highly than the one of the civil society? How does this deal with the trend of various countries receding from ISDS clauses in IIT? In addition, the evaluation of the consent to the dispute settlement is not mentioned.

On the basis of the leaked document, and of the reaction to the protests against the secrecy of the negotiations between the parties, it seems like sacrificing state sovereignty and democratic values is more than an acceptable risk.

TTIP Article 3<sup>57</sup> prescribes the possibility for the “complaining party” to choose the forum when the subject-

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<sup>56</sup>*Id.*, at art.2

<sup>57</sup>TTIP Draft, art. 3 “Choice of Forum”: 1. Where a dispute regarding any matter arises under this Agreement and under the WTO Agreement [US; or any other agreement to which the Parties are party], the complaining Party may select the forum in which to settle the dispute. 2. Once the complaining Party has requested the establishment of a panel with respect to a matter, it shall not request the establishment of a panel [US; or take an equivalent step] in another forum with respect to the same matter [EU; unless the forum selected first fails for procedural or jurisdictional reasons to make findings on the matter]. 3. For the purpose of this Article, a matter is considered to be the same

matter falls under the competences of the WTO and the TTIP. To avoid the conflict of jurisdictions among the two *forums*, the complaining party that requests the establishment of a panel, may not request the establishment of a panel before a different *forum* on the same subject matter. The differences between the negotiating parties emerge clearly on this point: the US, adding of the formula “*or take an equivalent step*”, advocates the exclusion and limitation of the possibility to present the claim on the same subject matter before any other dispute settlement mechanism (national, transnational or international)<sup>58</sup>; the EU contemplates an exception for the cases in which the “*the forum selected first fails for procedural or jurisdictional reasons to make findings on the matter*”<sup>59</sup>, therefore allowing the complaining party to seek for settlement in a different forum.

The following article, not enumerated, entitled by the EU negotiator “*Relations with the WTO Obligations*”, prevents the conflict between WTO findings and authorized measures, while disposing on the implementation of the suspension of concessions and obligations authorized by the Dispute Settlement Body pursuant the “*Understanding on Rules and*

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*where it concerns the same measure [EU: and a substantially equivalent obligation] under this Agreement and the WTO Agreement [US: or any other agreement to which the Parties are party].*

<sup>58</sup>Similarly, in NAFTA Ch. 11, Sec. B art. 1121 disposes: **Conditions Precedent to Submission of a Claim to Arbitration** 1. A disputing investor may submit a claim under Article 1116 to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party. 2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise: (a) consent to arbitration in accordance with the procedures set out in this Agreement; and (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party. 3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration. 4. Only where a disputing Party has deprived a disputing investor of control of an enterprise: (a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and (b) Annex 1120.1(b) shall not apply.

<sup>59</sup>TTIP Draft, *id.*, art. 3.

*Procedures Governing the Settlement of Disputes contained in Annex 2 of the WTO Agreement*<sup>60</sup>. Further, it is disposed of that the same source of authority cannot be invoked to preclude a Party from suspending obligations under the TTIP. The intention seems to pursue the recognition and the application of reciprocal obligations arising from the different conventions, for the purpose of creating exclusive jurisdictions and to discipline their interaction.

The following article<sup>61</sup>, entitled “*Administration of Dispute settlement*”, concerns the designation of an office that shall be responsible to provide administrative assistance to the panels for the US; while, for the EU, the designated office shall be responsible for the administration of disputes. The different models take shape. The disputing parties are responsible for the operation and the costs connected to it and shall provide written notice to the other Party of the office's location and contact information. The differences reaffirm the distance in the underlying paradigm of the two models of dispute settlement mechanisms portrayed, one underlines the intent for an institutional arbitration facilitating model, while the other promotes an institutional judicial-like model.

The EU defines a Section 2 named “*Consultation and Mediation*”, and, indeed, it is in this section that the different approach to the nature of the dispute settlement mechanism emerges most strongly. The EU’s request to start the amicable settlement of “*Consultation*” must be notified in copy by the party to the “*institutional body to be defined*”, while the US

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<sup>60</sup>TTIP Draft, unnumbered Art. x: [**EU: Relations with WTO Obligations**] 1. *Nothing in this Agreement shall preclude a Party from implementing the suspension of concessions or other obligations authorized by the Dispute Settlement Body pursuant to the Understanding on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 of the WTO Agreement.* 2. [**EU: The WTO Agreement shall not be invoked to preclude a Party from suspending obligations under this Chapter.**”

<sup>61</sup>TTIP Draft, unnumbered article: **Article x: Administration of Dispute Settlement Proceedings.** *Each Party shall: (a) designate an office that shall be responsible for [US: providing administrative assistance to panels established under Article 7] [EU: the administration of disputes under this Chapter]; (b) be responsible for the operation and costs of its designated office; and (c) provide written notice to the other Party of the office's location and contact information.*

negotiators define the “*substantial requirement*” of the request. The article defines strict conditions and terms for the timing of the procedure, the form and the content of the request, the information that shall be provided, the time limit to solve the consultations and the good faith of the parties to solve the matter; further, the article describes the shorter terms for urgent complaints, the type of outcome and, in case of uncertainty, the predefined termination of the consultations between the disputants.

The article on the amicable settlement is named and articulated separately by the negotiators: “*Mediation*” for the EU negotiators, whereas the provision generally allows the parties to enter in a mediation process on any matter affecting trade or investment issues; “*Intervention of Joint Committee*” for the US negotiators, regulating strict conditions and terms for the procedure and in case of failure to solve the case matter. The composition and the appointment of the institutional Joint Committee are not defined, but it is clearly indicated that this body must be notified following predetermined terms upon receipt of the request for consultations. The Joint Committee shall provide the service to “*endeavor to resolve the dispute promptly*”.

The EU negotiators define an additional Section 3 entitled “*Dispute settlement procedures*”, and a Sub-section 1 “*Arbitration Procedure*”, differently from the US negotiators. Both parties name the article “*Panel establishment*”. The article disciplines the notification procedure for the establishment of the panel. The request should be addressed to “*the institutional body to be defined*” for the EU; while, for the US, it should be addressed to the “*other party's office*”, motivating the reasons it failed to carry out its obligations. In both provisions, the request to the panel shall contain the brief summary of the legal basis for the complaint and the identification of the measure at issue. The US alternatively contemplates the

identification of the measure or the description of the failure to comply with the obligations deriving from the measure, which, as previously mentioned for article 2, broadens the potential range of breach and, consequently, the indetermination of the possible injuries claimed. For the EU negotiators, the establishment of the panel is actually a matter of composition, i.e. of identifying the arbitrators; for the US negotiators, the issue is the legitimacy of the panel, therefore the “*establishment and composition*” must be defined upon the request of the complaining party, as follows:

[T]he terms of reference shall be: “To examine, in the light of the relevant provisions of this Agreement, the matter referred to in the notification pursuant to {Article x.x/panel request} [US: to make findings, determinations, and recommendations as provided in Article x.x and to deliver the written reports referred to in Articles x and x] [EU: to rule on the compatibility of the measure in question with the provisions referred to in Article 2 in Chapter XX and to make a ruling in accordance with Articles x and x of Chapter XX].<sup>62</sup>

The differences emerge outstandingly. The EU negotiators would like the outcome to be to a “*rule on the compatibility...make a ruling in accordance with ...*,” while the US tends to pursue the purpose “*to make findings, determinations and, recommendations....and to deliver written reports....*” The use of the technical language further supports

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<sup>62</sup>TTIP Draft, article: **Panel Establishment** 1. *The complaining Party may refer the matter to a dispute settlement panel (“panel”) by notifying the Party complained against.* 2. *The notification shall be made in writing to the Party complained against through its Contact Point [EU: and the institutional body {to be defined}]. The complaining Party shall identify the measure at issue [US: or how the Party complained against has otherwise failed to carry out its obligations under this Agreement] and shall provide a brief summary of the legal basis for the complaint sufficient to present the problem clearly.* 3. *A panel shall be established on delivery of the written notification pursuant to paragraph 2.* 4. *Unless the Parties decide otherwise within {14/5} days from the date of [US: establishment of the panel] [EU: composition of the panel], the terms of reference shall be: “To examine, in the light of the relevant provisions of this Agreement, the matter referred to in the notification pursuant to {Article x.x/panel request} [US:, to make findings, determinations, and recommendations as provided in Article x.x and to deliver the written reports referred to in Articles x and x] [EU: to rule on the compatibility of the measure in question with the provisions referred to in Article 2 in Chapter XX and to make a ruling in accordance with Articles x and x of Chapter XX].*

the evidence of the underlying intentions of the parties, towards different ISDS institutional models.

The panel is made by three individuals. Differences rise on the definition of the roster and of the list of potential arbitrators, and their professional qualifications. Both negotiators agree, though, on the guarantee of the independence and autonomy of the arbitrators from the influence of organizations, or governments, or other; nonetheless, they disagree on the substance of the Code of conduct: an independent predetermined document in Annex II of the TTIP, for the EU negotiators, and a set of rules predefined by the disputing Parties, for the US negotiators.

Furthermore, the Chapter provides for the article “*Rules of Procedure*”<sup>63</sup>, where the US negotiators determine to allow the TTIP's Parties to delineate the procedural rules and the arbitrators' Code of conduct, and other subjects, and they provide the disputants with “*the choice to follow those rules, or adopt additional incompatible procedural rules to the ones' predetermined by the agreement, leaving much space to the choice of law*”. The EU position, on the contrary, limits the choice of the parties and refers to the content of Annex I, as the future container of procedural rules. The second paragraph, agreed upon by both parties, introduces the definitions of: availability to the public of the submission (initial and rebuttal); the written responses and required by the panel; to discipline of the public access of the hearings and of the protection of confidential information.

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<sup>63</sup>TTIP Draft, art. x: **Rules of Procedure**. 1. [US: The Parties shall establish as of the date of entry into force of this Agreement, Rules of Procedure and a Code of Conduct for individuals who have agreed to serve as arbitrators on a panel and, where applicable, for experts, and for assistants and staff of an office designated pursuant to Article x(a). Should the Parties decide otherwise, the panel shall follow the Rules of Procedure and may, after consulting with the Parties, adopt additional rules of procedure not incompatible with the Rules of Procedure.] [EU: Dispute settlement procedures under this Chapter shall be governed by the Rules of Procedure set out in Annex I to this Agreement and by the Code of Conduct set out in Annex II to this Agreement.] 2. The Rules of Procedure shall ensure in particular:(a) that each Party shall make available to the public its initial and rebuttal written submissions, written responses to a question from the panel, and written comments on responses to a question from the panel; (b) at least one hearing before the panel; (c) that any hearing before the panel shall be open to observation by the public; and (d) the protection of confidential information.

The position of the negotiators on the “*Amicus Curiae Submissions*” to the panel differs on the point providing permission to natural or legal persons established in the territory to present submissions. The EU negotiators do not allow submission from non-disputant parties, while the US negotiators require that non-governmental entities located on the territory of a party to the TTIP can request to submit written views on the dispute, and, furthermore, that they may be accounted for by the panel.

The “*Information and technical advice*” article encounters little disagreement between negotiators. If summoned by the parties, the panel may request information or technical advice, although, only for the EU negotiators, the panel may suggest autonomously the advice of an expert's abiding by Code of Conduct and approved by the disputants. Finally, where US negotiators admit advice from “person or bodies”, the EU requires a general “source” subject to the Code of Conduct annexed to the treaty.

Differences rise on the termination or suspension of the procedure. The different titles proposed are “*Suspension and Termination of [US: Proceedings] [EU: Arbitration and Compliance Procedures]*”<sup>64</sup>. For the validity of the request for suspension, the EU requires a joint request to the panel, otherwise ineffective; the US prescribes for the validity of the

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<sup>64</sup>TTIP Draft, art. x: ***Suspension and Termination of [US: Proceedings] [EU: Arbitration and Compliance Procedures]***. [US: 1. The panel may suspend its work at any time at the request of the complaining Party. The complaining Party shall set out in its request its reasons for requesting suspension.] 2. The panel shall suspend its work at any time where the Parties jointly request it to do so [EU: for a period agreed by the Parties not exceeding 12 consecutive months]. The panel shall resume its work [EU: before the end of that period] at the written request of both Parties or [EU: at the end of that period] at the written request of either Party. [EU: The requesting Party shall inform the Chairperson of the {institutional body} and the other Party accordingly.] 3. [EU: If a Party does not request the resumption of the panel's work at the expiry of the agreed suspension period, the procedure shall be terminated.] [US: If the work of the panel has been suspended for more than 12 consecutive months, the establishment of the panel under Article x shall lapse, unless the Parties decide otherwise.] The panel shall terminate its work at any time when the Parties jointly request to do so. 4. In the event of suspension, all deadlines established by the relevant time frames set out in this Chapter, in the Rules of Procedure and in additional rules of procedure that the panel may have adopted shall be extended by the amount of time that the work was suspended.

joint request and of the unilateral request to suspend the panel work at any time on behalf of the complaining party.

Additionally, only the EU prescribes for an article on “*Preliminary Ruling on Urgency*” that permits the parties to request a ruling on the urgency of the case.

The Article titled “*Decisions [EU: and Rulings] of the Panel*” deals with the outcome or the findings of the panel, and their nature. The different perspectives are evident when focusing on the choice of law, the sources that base the decision, the interpretation of legal sources, the conflicting decisions with other institutions, the decision-making model by consensus and the prohibition of creation – or subtraction- of further rights from the rulings. The US negotiators, solely, prescribe for the possibility to choose a different law from the TTIP to base the decision; the panel shall use customary rules of interpretation of public international law reflected in Articles 31-33 of the Vienna Convention of 1969 on the Law of Treaties, and the panelists should try to decide by consensus, but in case of dissenting opinion, the decision will be made by majority and the dissenting panelist shall not be mentioned; lastly, there is no mention of the conflict between decisions from other institutions, nor on the creation of further rights from the decisions. The EU negotiators broadened the sources that the panel can use to base its decision, including relevant interpretations in report panels and the appellate body adopted by the WTO Dispute settlement body, underlying that the rulings of the panel cannot add or diminish the rights and obligations of the parties under this agreement. This choice limits the effects to the disputing parties of the excessive discretion of arbitrators when defining the ruling. The interpretation sources include customary and codified international law; the decision making is by consensus and, in case of dissenting opinion, this shall never be disclosed.



The Institute of the “*Interim Panel Report*”<sup>65</sup> is a decision containing essential terms of the dispute and the measures or recommendations for the resolution of the dispute. This is open to written comment by the disputants to request the panel for justified modifications of the report; the panel is obliged to reply motivating its decision including the comments of the parties. Afterward, the panel issues a “*Final Panel Report*”<sup>66</sup> that includes a discussion of the written comments submitted by the parties during the term of 45 days to 60 days. The final report includes the separate opinions on the matters non-unanimously agreed upon in the interim report for the US; the EU negotiators exclude them from the final report and further discipline urgency cases with a shorter term for the issuance of the report. Both negotiating parties agree on providing for the mandatory publication of the final report, and for the protection of confidential information; they disagree on the unconditional acceptance of the ruling (proposed solely by the EU negotiators) and the creation of derivative rights or obligations for natural or legal persons. This difference is connected to the different nature of the outcome of the two ISDS models.

The section dealing with the compliance or the implementation of the decision (ruling or interim decision, and other) seems one of the most controversial, the definition of the main ISDS elements have been taken and this section expresses the point of view adopted by the two parties. In fact, the negotiating parties decide to present their own separate version, with their own sequence of articles. Separating the two versions and describing them will reaffirm the positions of two different models:

A) EU position – Subsection 2: “*Compliance*”. Article 10-“*Compliance with the Panel Ruling*”; Article 11-“*Reasonable Period of Time for Compliance*”; Article 12-“*Review of Any*

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<sup>65</sup>TTIP Draft, unnumbered article, titled “*Interim Panel Report*”.

<sup>66</sup>TTIP Draft, unnumbered article, titled: “*Final Panel Report*”.

*Measure taken to Comply with the Panel Ruling*"; Article 13-*“Temporary Remedies in case of Non-Compliance”*; Article 14-*“Review of any Measure taken to Comply after the Adaption of Temporary Remedies for Non-Compliance”*. The system of compliance delineated by the EU negotiators obviously starts with the emission of the panel's interim panel report and the final ruling containing the measures the “complained-against-party” shall comply with promptly and in good faith<sup>67</sup>. Where immediate compliance is not possible, the provision provides for the parties' agreement upon a period of time to comply, that must be notified to the complaining party and the “institutional body”<sup>68</sup>. The lack of agreement among the parties allows the complaining party to address the panel on this issue- that the party and the “institutional body”<sup>69</sup> must be notified, within 20 days of the notification of the other party's proposal; thus, the panel will notify its ruling on the “reasonable time to comply” within 20 days from the request. The parties have to co-operate in providing the panel with the information pertaining the progress of the compliance with the ruling, notwithstanding the permission to mutually agree on an extension of the reasonable period<sup>70</sup>. The complained-against-party shall notify a report to the institution one month before the expiry of the reasonable time of compliance. Furthermore, the lack of agreement on the consistent compliance of the ruling or the non-compliance with the ruling within the reasonable time, may lead to a “Review”<sup>71</sup> procedure, consisting of a notification of a request to the party and the institution specifying the inconsistency of the measures adopted by the party and their legal basis. Within 45 days the panel shall notify the parties and the institution with its position. Hence, Article 13 provides for “*Temporary Remedies in Case of Non-Compliance*” in case of non-compliance within the

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<sup>67</sup>TTIP Draft, art. 10.

<sup>68</sup>TTIP Draft, art. 11 par. 1.

<sup>69</sup>TTIP Draft, art. 11 par. 2.

<sup>70</sup>TTIP Draft, art. 11 par. 3 and 4.

<sup>71</sup>TTIP Draft, art. 12.

term agreed upon; the article prescribes a procedure that allows the complaining party to request for temporary compensation. If there is no request of, or no agreement, on the temporary compensation, the complaining party is entitled “*to suspend obligations arising from any provisions referred to in Article 2 at a level of equivalent to the nullification or impairment caused by violation*”<sup>72</sup>, after the notification to the institutional body and to the other party. The other party may request arbitration under Article 13 paragraph 3 and delay the suspension, based on the consideration of the illegitimacy of the complaining party suspension and requests for temporary compensation. The original panel has to decide on the matter and notify its ruling within 30 days from the submission of the complaint. Article 13 paragraph 4 reaffirms the temporary nature of the suspension of the obligations, other than the cases in which the suspension shall not be applicable- *i.e.* when there is- in general- agreement among the parties, or when the panel considers that the inconsistent measures adopted by the complained against party have been withdrawn or amended. One aspect of the Draft that remains obscure is the cross-reference made to certain EU articles – distinguished by the symbol *[EU:....]* – and, vice-versa, to certain US articles – distinguished by the symbol “*[US:....]*”- . This remark makes it more difficult to identify the ISDS model pursued by the negotiators and evidences the fact that the negotiations on this Chapter had only just begun.

B) US position – Article 15- “*Implementation of Final Report*”; Article 16- “*Non-Implementation – Suspension of Benefits*”; Article 17- “*Compliance Review*”. The system of implementation delineated by the US negotiators prospects two scenarios: one of non-conformity with the final report, the second of non-compliance with the final report. In the first case, apparently less severe among the two, the non-conformity

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<sup>72</sup>TTIP Draft, art. 13 par. 3.

between the final report and the *responding* party's measures, or measures recommended by the panel and the equivalent measures causing nullification or impairment under Article 2 (c) applied by the responding party, entitle the parties to seek for a “resolution” based on the panel's determinations and recommendations, for the purpose of eliminating it. In the second case, the non-compliance of the responding party, or the adoption of the measures that causes nullification or impairment under the Article 2 (c), entitles the complaining party to be informed and notified within 30 days from the issuance of the final report of its intent to eliminate the non-conformity. The reference of Article 15 to Article 14 paragraph 2 defines the possibility for a new panel ruling in case of the non-compliance with the final report of the responding party. As mentioned in the previous paragraph, the reference to Article 14 paragraph 2 (article attributed to the EU, and logically) excluded from the USA ones creates doubts and uncertainty on the intentions of the negotiators on the actual intended structure of the ISDS. Article 16, “*Non-implementation – Suspension of Benefits*”, deals with the case of non-implementation and the consequences that arise from the respondent's failure to notify the intentions of eliminating the non-conformity of the issued measures as provided in Article 15 paragraph 2. If the complaining request is notified, a new negotiation between the complaining and the responding parties begins for the definition of a mutually acceptable compensation. Further, Article 16 paragraph 2 delineates the cases in which the complaining party may, at any time after the expiration of the terms, notify the respondent its intention of suspending the application of benefits under this agreement “*of equivalent effect to the nullification and impairment*”, specifying the suspended benefits. The benefits may be suspended after 30 days from the notification; within 7 days from the receipt of the notice, the respondent can notify the complaining party of

the compliance, describing the measures adopted and how they eliminate the non-conformity, or the nullification or impairment. The consequence of this notification determines the panel to reconvene to issue a new interim or final report. Suspensions can't be applied during this time; the respondent part, in case of suspension, may notify the panel with a request to reconvene because “*manifestly excessive*”<sup>73</sup>, providing the panel and the complaining party with the texts of the measures applied and implemented to conform and comply with the report. If the complaining party disagrees, it shall notify it to the responding party within 45 days, whereas the respondent may request to reconvene the panel, which shall decide within 14 days from the notification of the request. The paragraph 7 of Article 16 defines the terms and requirements that parties and panelists should abide by, defining a procedure to be followed when the panel is reconvened (terms, final report minimum requirement, decision-making by consensus or majority, interim report requirements, comments of the parties on the interim report and the final report requirements). Further, the article defines the determinations and the effects of the panel's decision: evaluation of the fairness of the suspension of the benefits, or the immediate suspension of the benefits after the notification of the report. The last Article 17, titled “*Compliance Review*”, contemplates the same case of Article 15 paragraph 1, the case of “*non-conformity or the nullification or the impairment in the sense of Article 2 (c)*”, where the notified respondent may reply with proof of the conformity of the measures and a brief description of the elimination. If the complaining party disagrees, it will notify the party and request to reconvene the panel – within 14 days- that will express its decision within 120 days; if the panel finds the responding party removed the non-conformity than there shall be the termination of the suspension of the benefits. As mentioned in

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<sup>73</sup>TTIP Draft, art. 16 par. 5.

the previous paragraph, the reference to articles written and proposed by the EU negotiators confirms the obscurity and uncertainty of the effective content of the US ISDS Chapter.

The last section of the TTIP ISDS Chapter is named by the EU: Section 4 – General Provisions. It contains one article on “*Time Limits*” and one on the “*Review and Modification of the Chapter*”. The former prescribing that the time limits will be counted in calendar days and that the parties may agree to modify any time limit present in this chapter; and, solely proposed by the EU, the panel may also propose a motivated request to modify time limits. The latter article, promoted by the EU negotiators, allows the institutional body to modify the Chapter and its Annexes – probably considering the future establishment of a Multilateral Investment Court.

## **II.1 TTIP: The EU Model of Dispute Resolution.**

On the basis of the leaked documents, we can observe that the European Union supports the creation of an independent and autonomous body of decision for the investor-state disputes, informing all aspects of the arbitration procedure. The jurisdiction has a broader spectrum of application. The scope of the “*institutional body to define*” covers a jurisdiction concerning all issues of trade and investment either deriving from rights and obligations, interpretation and application of the TTIP. Further, this model prescribes rules and conditions to avoid a conflict of jurisdiction with the WTO dispute settlement system and to avoid the conflict of jurisdiction with national and other international mechanisms. The panelists are selected on the basis of their qualifications and their abidance by the Code of Conduct; their qualifications shall be technical and their expertise in law matters and international law is mandatory; they are inserted in a roster with three lists for a period that the articles don't define explicitly. The procedural rules are fixed and annexed to the Partnership; the access to

the dispute procedure documentation is public, unless covered by secrecy or falls within the confidential information domain. The submissions of third parties to the dispute are discouraged (*Amicus Curiae Submissions*), and the “*information and technical advice*” must be provided by sources that conform to the Code of Conduct. The procedure prescribes clear timing and allows for the disputants and the panel to change all terms provided for; it, also, includes a preferred decision-making option, the one by consensus, and disciplines the decision by majority option. The compliance and implementation refer to neither the ICSID system nor any other existing international arbitration award system (New York Convention, nor Washington Treaty). Furthermore, in the case of non-conformity, or of non-compliance, the disputants are provided with additional procedures and retaliation measures, as the suspension of the TTIP's benefits and the request for non-compliance compensation. It is significant the explicit “*The rulings cannot add or diminish the rights and obligations of the Parties under this Agreement*”<sup>74</sup>- this reference is not made by the US negotiator. One of the reasons may be connected to the will to establish an autonomous and independent institution dealing with the ISDS. Indeed, one of the risks of associating the model to an adjudication structure is connected to the effects of the decision in creating rights and obligations for third parties. The issue does not concern the US model, inspired to an administrative institution ISDS system. The text mentions the costs of the proceedings only once, in the duties of each disputing party “*Administration of Dispute Settlement Proceedings*”, letter (b): “*Each Party shall: [...] (b) responsible for the operation and costs of its designated office*”, although this is an important element, as there are factors that may discourage certain complaints depending on the economic dimension and power of the foreign private investor,

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<sup>74</sup>TTIP Draft, unnumbered article titled “Decisions [EU: and Rulings] of the Panel”.

additionally limit the access to the dispute settlement mechanism for SME. Lastly, the general provisions' section provides the institutional body with additional, indiscriminate and discretionary powers to modify the ISDS Chapter and its' related Annexes.

## **II.2 TTIP: The USA Model of Dispute Resolution**

On the basis of the leaked documents, the USA model focuses on creating an administrative institution that assists the disputants in finding a settlement. The choice of the parties assumes a central role and the disputant parties may choose the applicable rules, the arbitrators, unilaterally complain of the non-implementation of the final report, and suspend the benefits of the agreement and other. A reference to the NAFTA ISDS system is inevitable because, similarly as in this advocated model, the institutions are just meant to provide assistance, to administrate the arbitral procedure, and not to interfere with the settlement.

The disputes must concern the interpretation and application of the TTIP and fall under its object, and the most desired outcome is to reach a mutually agreed solution. The scope advocated by the US model, read in a systematic perspective, feeds the fears of the voices contrary to the partnership, when at Article 2 – on the basis of an all-comprehensive and undetermined jurisdiction – the negotiators support a broad and general range of injuries arising in the following cases: 1) failure to carry out obligations under the TTIP, 2) inconsistency of a measure with the obligations, and 3) *“a benefit the Party could reasonably have expected to accrue to under this Agreement is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement, except that a Party may not invoke this paragraph with respect to a benefit under this Agreement if the measure is subject to an exception under Article ....”*



This last provision can have a direct interference with the national sovereignty principle, the public finance and the policy regulation.

The model avoids conflicts between the dispute settlement systems of other international agreements- WTO and NAFTA (*see intra* Section 1, paragraph 1.3) - by prohibiting the complaining party to request the establishment of different forums on the same subject-matter (Article 3 paragraph 3) and when the complaint is rejected. The model's institutions all have an administrative function, as exalted by the text and by their characteristics. In this regard, the first step of the dispute is defined in the consultations that require the parties to find a mutually agreed solution on the subject matter; where the disputing parties should not reach an agreement, there shall be the intervention of the so-called “*Joint Committee*”; this latter provides the parties with more time to reach a mutually agreed solution with the help of technical advisors or expert groups, and makes recommendations. The establishment of the panel implies that the parties can request the panel for a decision containing suggestions and recommendations. The requirements for the arbitrators listed in the roster are widely at the discretion of the parties; their qualifications are not mandatory: they “should” have an expertise in law and international trade, implying that knowledge expertise is not an asset; further, they “shall” be independent and serve in its individual capacities, they “shall” not take instructions from any organization or government with regard to the matters related to the dispute or be affiliated to the government of any party, in brief, they are autonomous and independent, at a first glance. Using a systematic interpretation, the arbitrators are not immovable, but, well on the contrary, two elements must be highlighted: 1) if selected, they will be listed in a roster for a period of three years; 2) the Parties to the TTIP can remove an arbitrator at any time. The discretion on behalf of the TTIP

members mines the declared autonomy and independence of these subjects, which could be chosen and removed for motives far related to their qualifications. The establishment of the panel is based on the choice of the disputants from the roster; subsequently, the selected arbitrators are invited to serve on the panel and must abide by the Code of Conduct, defined in an appendix (non-legally binding). As far as the proceedings are concerned, the US model welcomes *Amicus Curiae* submissions (admitted as long as the non-governmental entity is located on the territory of an agreement party), technical advice and panel information. The suspension of the proceedings may be requested unilaterally, while the termination may be requested solely by both parties. The interpretative power of the panel is limited to the reference to the Vienna Convention's (1969) provisions, international customary law, TTIP relevant provisions, the parties' submissions and any information or advice obtained. The decision-making is based on consensus, but if taken by majority the dissenting opinions should be provided, although at no time shall the panelists associated with the majority or the minority be disclosed. The first decision is called interim panel report, and it contains facts and findings and determinations, in addition, if the parties have jointly requested them, it must contain recommendations; the basic rationale behind any findings and determinations and recommendations and in case of urgency the panel shall make every effort to accelerate the proceedings the greatest extent possible. The final report shall include a discussion of the written comments submitted by the parties and include all majority and minority opinions if decision-making involved a majority vote, instead of consensus.

The implementation of the final report focuses on two cases (TTIP Draft, Article 15): non-conformity and non-compliance of obligations that cause nullification or impairment in the sense of article 2 (c). In the first case, the resolution

seeks to eliminate the cause through mutual agreement; in the second case, within 30 days the panel presents its final report to the parties under Article 14 paragraph 2, and the responding party has to inform the complaining party of its intent to eliminate the cause of the non-compliance. In the case of non-implementation and in case of non-compliance, the inactivity of the responding party starts a negotiation with the complaining party for a mutually acceptable compensation, upon receipt of the request. If this should also fail, after a notice of the complaining party containing a proposal, the procedure allows suspending the benefits under this agreement of equivalent effect to the nullification and impairment. If the responding party considers it has eliminated the causes of non-conformity to the final report implementation, it can notify the other and ask for the panel to reconvene to re-evaluate the matter. This causes the suspension to be ineffective until the panel has reconvened and issued its final report on the matter, including in cases in which the suspension is considered to be “manifestly excessive”. After the panel is reconvened, it presents an interim report that shall consider the written submissions of the parties; hence, the final report permits the party to suspend the benefits immediately upon receipt of the report.

The US system includes a Compliance review for the cases in which the responding party disagrees with the non-conformity of the measures adopted and, after first notifying the complaining party, if no agreement is reached, he requests the panel to reconvene following the same procedure as depicted at Article 16 for the non-implementation. Further, similarly to the EU model, there is only one reference made to the costs of the operation, which is the responsibility of each party. And the general provisions concern only the terms and the way they will be counted according to the partnership.

## CONCLUSION

The Greenpeace leaked documents have created an important effect on the negotiations of the TTIP. The secrecy that the parties had chosen to proceed with for the Draft of the agreement represented a violation of the European Member States constitutional principles of democracy, human rights and civil rights advocated for, likewise, by the European Union treaties and by the same USA Constitution. Such scenario was further reproduced by the Draft of the partnership itself, expressed in the Dispute Settlement Chapter. This series of events have proved that on both sides of the Atlantic Ocean there are civil societies that are aware and sensitive on the issue involving the infringement of the democratic institutions, the concerns that imply providing political and economic power to entities that are driven by private-financial-interests and pursue objectives orientated towards free market, deregulation, and profit. Whereas, as mentioned in paragraph 2.1 of this article, the TTIP would be an agreement capable of determining limits to the national sovereignty, this has been strongly refuted.

This paper has surveyed the different paradigms that defined the ISDS in the last century. The domestic dispute settlement based on international customary law is the first paradigm on ISDS; it is characterized by main factors concerning: the nature of the position of the foreign investor compared to other subjects, the legal system, and the judicial system. The domestic ISDS paradigm certainly treats the private interest of the foreign investors and the other local investors equally, and, equally, it does not provide remedies in case of expropriation or losses deriving from the investment. As mentioned in the Section I, the “domestic ISDS” procedure required the investor to present the request to its State of origin, so that it could intervene diplomatically with the State

of investment. After the II World War and after the constitution of the international institutions that guided the Western's block economical paradigm, a new ISDS paradigm based on international conventional law and on arbitration gained new ground. This conventional ISDS paradigm is characterized by an attempt to provide the foreign investors with new leverage to increase their disadvantage towards the disputing State; in fact, the constitution of institutions like the ICSID, the New York Convention and the ratification of treaties on the enforcement of the arbitration awards, are symptoms of the lack of legitimization of this type of mechanisms. This paradigm was not backed up by strong and efficient provisions that provided absolute and relative protection to the investor. Nonetheless, the 90's introduced the NAFTA, creating a new paradigm for the ISDS, introducing protections and leverage for the investors in interfering with national sovereignty and national regulatory power, consequently, shifting the balance of the interests at stake in favor of the private economical ones'. The new generation of IIA, as mentioned, does no longer include this paradigm in their dispute clauses, mainly because the economically disadvantageous consequences and the policy interference for signatory States.

The CETA and the TTIP Draft define a new ISDS system the EU explicitly called "Multilateral Investment Court". The MIC is characterized by a focus on providing equal relevance to public interests of a sovereign State and private-for-profit-interests of a foreign investor, and full legitimation to the outcomes of its procedures. The TTIP negotiations had the objective of providing provisions on market access, regulatory cluster and rules that favor the producers, as mentioned earlier in Section I; although, they not only pursue this objective, they also provide them with a supranational dispute settlement mechanism. The complete secrecy of the negotiations and the necessity to read about the Draft through the Greenpeace leak

provides further characteristics of the type of ISDS paradigm the negotiator wanted approved. Additionally, the doubts emerge while the EU Member States are in course of ratifying the provisionally applicable CETA. This agreement, if ratified, would establish an international institutional arbitration system<sup>75</sup>, with a narrower domain of jurisdiction<sup>76</sup> compared to the TTIP, but as dangerous as NAFTA considering the public interests at stake, *i.e.* public interests, State regulatory power, and the so-called chilling effects, which NAFTA's case-law has provided a broad literature on.

In support to the doubts that arise from the political and the civil society, the CETA Chapter 8, section F, Article 8.29 establishes a “*multilateral investment tribunal and appellate mechanism for the resolution of investment disputes*” and prescribes that, when the time will come, the Joint Committee will help to facilitate the transition. In response to the rising expressions contrary to the MIC (often named by the EU negotiators in the TTIP: “*institution to name*”), in 2014 the EU Commission opened a “Public online consultation on investor protection in TTIP”<sup>77</sup> based on a 12 questions scheme<sup>78</sup> focused on the following: 1) the scope of the substantive investment protection provisions, 2) the non-discriminatory treatment for investors, 3) the fair and equitable treatment, 4) the expropriation, 5) the ensuring the right to regulate and investment protection, 6) the transparency in ISDS, 7) the multiple claims and relationship to domestic courts, 8) arbitrator ethics conduct and qualifications, 9) the reduction of

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<sup>75</sup>CETA, Chapter 8, Section F.

<sup>76</sup>CETA, *supra*, Section D on Investment protection, see article 8.9 “Investment and regulatory measures”.

<sup>77</sup>EU Commission, Trade policy, *Public online consultation on investor protection in TTIP*, March, 2014, available at: [http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc\\_152280.pdf](http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf) (consulted Oct. 30, 2017) [*hereinafter* EU Commission consultation (2014)]. Also, EU Commission, Trade Policy, *Public Consultation on Investment Protection*, (2014), available at: [http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc\\_152280.pdf](http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf) (consulted on Oct. 30, 2017)

<sup>78</sup>EU Commission, Trade policy, *Report on the online public consultation on investment protection*, Jan.13, 2015, available at: [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf) (consulted Oct. 30, 2017) [*hereinafter* EU Commission Report (2015)].

the risk of frivolous and unfounded cases, 10) the claims filter, 11) the guidance by the Agreement Parties on the interpretation of the agreement, and, 12) the appellate mechanism and consistency of rulings. The consultation received approximately 149,399 replies from various typologies of subjects and entities of State members. The consultations revealed that the majority of the respondents opposed to the TTIP and its' ISDS<sup>79</sup>. The greatest fears were related to a perceived threat to democracy, to public finance or to public policies, in relation to the so-called "chilling effect" on the right to regulate and to modify State regulation under the potential conflict with foreign investors' lobbyists. Further concerns regarded the independence and impartiality of arbitrators involved in the ISDS, and the possibility for investors to avoid domestic courts, law or regulations. It is necessary likewise to evidence the positive opinion concerning ISDS on behalf of business associations, that strongly support investment protection and, in addition, the critics raised by small and medium-sized companies on the same protection. The EU report assessed all the material received and proposed four further topics emerging from the consultation: a) the protection of the right to regulate; b) the establishment and functioning of arbitral tribunals; c) the relationship between domestic judicial systems and ISDS; d) the review of ISDS decisions through an appellate mechanism.

It becomes clear that the problems perceived by the respondents to the EU Commission consultations, and those foreseen by the academics contrary to the ISDS mechanism, as conceived by the Parties of the TTIP negotiations, are common and grounded on the protection of the democratic instances and the public interests over private profit-oriented interests. The presumed neutrality and the protection of the instances of autonomy and independence of the arbitrators part of the

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<sup>79</sup>EU Commission Report (2015), at 14.

panel, either part of a roster or institutionalized, are insufficient to dissolve the concerns emerged from the EU Commission public consultation. The costs of the operation is a responsibility of the parties in the TTIP; slightly different from the CETA's discipline, because the ISDS section determines the general principle of adjudication that “[T]he tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party” - Article 8.39, paragraph 5 although, aware of its elitist nature, it envisages some precautions and adjustments:

*[T] hird party funding means any funding provided by a natural or legal person who is not a disputing party but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute.*- in Article 8.1 CETA “Definitions”;

the costs for the legal representation and assistance and other reasonable fees are apportioned, unless otherwise decided by the judge; paragraph 6 of the same Article 8.39 unveil the awareness of the parties when mentioning the necessity for the CETA Joint Committee to consider supplemental rules aimed at reducing the financial burden on claimants that are natural persons and SME (small and medium-sized enterprise). The costs of the operation, or of the proceedings, may have an influence on the independence of arbitrators, panelists and advisors (technical or not). Arbitration is a privately funded dispute resolution mechanism. The financial power of one party may be an element that encourages or discourages disputes and complaints.

The steps took by the EU Commission towards the establishment of a Multilateral Investment Court project further surprise. The project aims to establish a court which jurisdiction focuses exclusively on the ISDS, and it will replace the dispute settlement clauses contained in all pending BITs



and FTAs; at the same time the manifesto promotes a system that will comply with the results deriving from the consultation<sup>80</sup>, although it remains a mystery how the EU intends to conjugate the two, considering that the respondents showed strong contrariety to this option. The necessity for this new institution is not clearly explained nor understood, considering that the exclusion of ISDS clauses has been inaugurated; that most of the BITs between EU Member States and third countries do not contain these clauses; that the ISDS element is not the most important factor increasing the foreign investments interest in a country; that the effects of the ISDS claims towards the State create risks for public interests, regulatory State freedom and public finance, as broadly as the NAFTA cases demonstrate to this day.

If advocates of TTIP, on both parts of the Atlantic, praised the economic advantages that both partners would have obtained, then why focus on this “small” part of the partnership that creates turmoil? The way the EU Institutions are behaving on the constitution of MIC is anachronistic (because the new BITs exclude ISDS clauses from IIAs), unproductive, because it stalls the continuation of the negotiations and its acceptance by civil society, and inefficient because it has the objective to create a new supranational court multiplying institutions and costs for EU citizens. The same turmoil that CETA's ratification is meeting in a changed political scenario compared to the one that guaranteed its approval. The way to limit the most feared effects on the democratic foundations of the legal systems concerned from the ISDS mechanism and its disputes is the prescription of binding social responsibilities obligations on businesses and transnational corporations, today existing in the EU, but optional and destined to a narrow spectrum of legal

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<sup>80</sup>See EU Commission, Trade policy, *Accessing markets, Dispute resolution Section.*, available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> (consulted on Oct. 30, 2017).

entities. Additionally, the constitutional principles should not be derogated by ISDS clauses.

The analysis of the two mechanisms proposed in the TTIP by the negotiating parties are evidence of the intention of the USA to confirm the paradigm of the NAFTA, that has proved efficient for private-for-profit-driven foreign investors, and the intention of the EU to create yet another supranational court, that in this case wouldn't require to comply with the various pre-existing (European or national) democratic institutions and value systems, wouldn't have to respect government's policy shift that damage "*the benefit the Party could reasonably have expected to accrue to under this Agreement is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement*". The proclaimed neutrality, autonomy and independence of the arbitrators and of the panel, in fact, reinforce the biases. The new ISDS paradigm the EU is trying to affirm clashes with the US's ISDS paradigm defined in the TTIP Draft and, previously, in the NAFTA. The two paradigms share some common grounds when it comes to considering the interests to favor, the interests that should be protected, the democratic institutions that can be threatened with the help of the secrecy that covers negotiations and signature of the agreement. They both share a common neo-liberalist and elitist conception of legal protection, considering that private arbitration is not accessible to all producers and business of the negotiating parties and that there would be a discrimination between national traders and investors and foreign ones. The paradigms share a common scope of claiming jurisdiction over transnational trade and investment subject-matter, but have different perspectives on the limits of the ISDS mechanism. Whereas the US ISDS mechanisms is inspired to the NAFTA's model, therefore defining a broad possibility to request for damages in spite of pre-existing legal and policy systems, the EU "MIC" ISDS

mechanisms, supported by the EU Commission public statements and the public consultation, seems to push the limits further in terms of compliance with the pre-existing legal systems and democratic institutions, supranational authority and legitimacy, but not in terms of creation of third parties rights from the ruling, or final report.

In conclusion, the evolution of the ISDS paradigm today faces a new potential shift towards adjudication-like-institutionalized arbitration system supported by the new instruments provided by supranational jurisdiction. The TTIP Draft demonstrates that the US confirms its NAFTA inspired ISDS mechanism and that the EU advocates for the shift of paradigm. There is one last choice the parties are not considering, but that civil society advocates for, and that is the elimination of dispute settlement clauses. Only the future new negotiations of TTIP or ratification of CETA could show the choice between the primacy of public interest and public finance and a set of neo-liberalist private anti-democratic interests.

#### List of Abbreviations

BIT	Bilateral Investment Agreement
Can.	Canada
CETA	Comprehensive Economic and Trade Agreement
EU	European Union
FDI	Foreign Direct Investment
FII	Foreign Indirect Investment
FNCT	Friendship, Commerce and Navigation Treaty
FTA	Free Trade Agreement
GATT	General Agreement on Trade and Tariffs
ICC	International Chamber of Commercial
I.C.J.	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreements
IIL	International Investment Law
IIT	International Investment Treaty
ISDS	Investor-State dispute settlement
Mex.	Mexico
MIC	Multilateral Investment Court
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North-American Free Trade Agreement

NGO	Non-Governmental Organization
OECD	Organization for economic Co-operation and Development
SCC	Stockholm Chamber of Commerce
TTIP	Trans-Atlantic Trade and Investment Partnership
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNICTRAL	United Nations Commission on International Trade Law
USA	United States of America
World Bank	International Bank for Reconstruction and Development
WTO	World Trade Organization

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