

THIRD GENERATION TREATIES: A CALL FOR AN EVOLUTION IN THE INVESTMENT DISPUTE RESOLUTION SYSTEM

By Eddy Jabnounge*

Abstract: The Trump administration has recently stopped the negotiations related to the TTIP, the international investment treaty prepared by the United States and the European Union. Those agreements are indeed increasingly contested. However, the TTIP could potentially create important evolution in the current system of international investment in term of legitimacy, transparency but also dispute resolution. The purpose of this article is to study the difficulties toward this third generation treaty which is not a simple free trade agreement but rather create new regulations for consumer's safety. Indeed, the ratification and negotiation processes are encumbered by the complexity of internal constitutional requirement of both blocs. However, this study will also take into account the impact that the TTIP could have in the international investment dispute resolution system.

Keywords: Third generation treaties, Negotiation and Ratification, TTIP, Free Trade Agreement, Consumer Safety, Investor State Dispute Settlement (ISDS), ICSID.

*Currently a trainee lawyer in the International Arbitration & Litigation Department of a Parisian Law Firm, Eddy Jabnounge has been admitted to the New York Bar with a Paris Bar admission pending. He holds a double Master I degree in International and European Law from Panthéon Assas University and a Master II in International Business Law from Paris Dauphine (France) as well as an LL.M. degree in American Law for Foreign Lawyers from Saint Louis University (SLU) School of Law (USA). He would like to extend thanks to the Dean of SLU School of Law, William P. Johnson, for his guidance related to this article.

I. INTRODUCTION ~ PURPOSE OF STUDY

A. THE TTIP AND THE ICSID

In July 2013 began the first round of the negotiations of what could become the most important international trade treaty of recent decades, a treaty qualified as a “*third generation treaty*”¹: the Transatlantic Trade and

¹ Richard Hiault, “Pascal Lamy : « Le Traité transatlantique est un accord de troisième génération » *LesEchos* (Paris, 20 October 2015) <http://www.lesechos.fr/20/10/2015/lesechos.fr/021418267703_pascal-lamy—le-traite-transatlantique-est-un-accord-de-troisieme-generation-.htm> accessed 19 March 2016

Investment Partnership (TTIP). The treaty is currently being negotiated by two of the most powerful entities among developed economies, the United States of America (U.S.A.) and the European Union (EU). While the potential financial outcome is uncertain in the long term, the two world powers are very likely to remove the remaining import duties and increase the exchange between them. The U.S.A. exports more than \$730 million in goods to the EU every day,² and it is almost certain that this number will grow after the ratification of such a partnership. The volume of U.S.A. exports to the EU will increase as companies will have the opportunity to reach more consumers and lower transaction costs associated with exports. Eventually, they will invest more, ensure growth, and thereby hire more employees. However, this theoretical assumption is sometimes contested: the benefits could be lower than expected and even damaging on a long-term basis. In general, the treaty is highly criticized for health- and employment-related issues. Moreover, the existing framework for Investor State Dispute Settlement (ISDS) poses several problems in terms of democracy or transparency.

As far as negotiation goes, the current system of ISDS for this particular treaty would be the International Center for Settlement of Investment Dispute (ICSID) funded by and part of the World Bank. The ICSID is the international arbitration institution created by the Washington Convention on the settlement of investment disputes between states and nationals of other states. This convention is also named the Washington Convention and was signed on March 18, 1965.³

Today more than 160 countries have signed the Washington Convention to submit their international investment dispute to the ICSID.⁴ The ISDS and the ICSID's goal is to provide a neutral place for dispute

² "Trade in goods" (*Office of the United States Trade Representative*) <<https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-0>> accessed on 20 May 2016 "*The United States ships more than \$730 million in goods to the EU every day. In today's highly competitive global marketplace, even small increases in a product's cost due to tariffs can mean the difference between winning and losing a contract*"

³ The ICSID Convention is a treaty ratified by 150 Contracting States. It entered into force on October 14, 1966, 30 days after ratification by the first 20 States. Article 6 of the ICSID Convention requires the Administrative Council of ICSID to adopt rules of procedure for arbitration and conciliation and for the administrative and financial regulation of the Centre.

<<https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention.aspx>> Accessed on 25 March 2016 The convention is available in the following link : <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf>

⁴ "Database of ICSID Member States"(ICSID) <<https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx>> accessed 20 May 2016

resolution between states and private actors. The idea behind the system is to limit the risk exposure to investors seated abroad and unable to seek the protection of the law of its country of origin and the interest of a state which seeks to attract foreign net-worth private entities with the potential to undertake commercial activity within its borders ultimately increasing its GDP and reducing its unemployment rate. However, the ICSID is becoming increasingly criticized by protestors. The decisions of private arbitrators, considered secret and unreasonable, tend to be contested. These decisions are not necessarily published. Due to this lack of precedent⁵, the reasoning behind their outcome remains ephemeral while the financial stakes skyrocket.

Scholars believe that the TTIP could be the impetus the ICSID ultimately needed to evolve.⁶ Stuck in time, the Washington Convention has not been reformed since its conception. However, after 50 years of existence, it would be beneficial for the institution to make an assessment of its strengths and weaknesses and strive to evolve for the best. If the TTIP could move to a different dispute resolution system, an updated draft of the treaty would be sufficient to modify the current system of arbitration. Indeed, the treaty itself would be the basis used by arbitrators to resolve disputes. Thus, if the signatory parties want the decision to be published or to benefit from a particular appeal mechanism, a specific language of the draft could be enough. It is therefore important for the drafter of the treaty to fully understand its role and its influence on third parties. Even though there is not yet any certainty regarding the future of the TTIP by its member/signatory states, there is a need to understand the weakness of the current system of international dispute resolution and to change it accordingly.

B. BACKGROUND

The expression “third generation treaty” was first used by Pascal Lamy, former General Director of the World Trade Organization (WTO), to distinguish the TTIP from the Trans-Pacific Partnership (TPP), which

⁵ Common-law doctrine under which past decisions of a court are cited as an authority to decide a substantially similar current case.

⁶ see: August Reinisch, Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration, *J Int Economic Law* (2016) 19 (4): 761-786,

<<https://academic.oup.com/jiel/article/19/4/761/2742001/Will-the-EU-s-Proposal-Concerning-an-Investment>> accessed 27 June 2017

would be considered a second generation treaty.⁷

A Free Trade Agreement (FTA) can be defined as an international treaty passed between two or more states to promote international trade, generally by reducing taxes and customs controls and by abolishing national regulations that may impede the importation of goods, services, labor and foreign capital. Until recently, FTA models focused on the removal of tariff barriers⁸ for the purpose of increasing the global welfare, reason why, according to Pascal Lamy, they shall be qualified as “first generation” treaties.⁹ However, the TPP accomplished more than simply removing tariff barriers and establishing a set of minimal environmental or social standards.¹⁰ The TPP also reached a contractual link between those standards and their commercial implementation; it would, therefore, be a second generation treaty.¹¹ Pascal Lamy explains finally that the difference between the TPP and the TTIP is that the latter goes a bit further. Indeed, one of the major difficulties with commercial relations between the EU and the U.S.A. involves consumers. The TTIP does not focus on the producers, but rather on the consumers. The negotiators of the TTIP must find new agreements, mostly in terms of taking precautions for the safety of consumers. The problem lies in the inherent philosophical differences between the two blocs as well as the perspectives on some sensitive topics—such as GMOs, animal testing for cosmetics, and private data protection—may be conflicting. The gap between them is hard to fill. For Pascal Lamy, “*It is a dialogue between EU and US regulators, not a classic commercial negotiation*”.¹² Indeed, the precaution principle is construed differently by both sides.

⁷ Richard Hiault, “Pascal Lamy : « Le Traité transatlantique est un accord de troisième génération »” *Les Echos* (Paris, 20 October 2015) < accessed 19 March 2016 “*Le TPP est un accord de deuxième génération. Jusqu’à une date récente, les accords commerciaux, y compris à l’OMC, portaient essentiellement sur la réduction ou l’élimination d’obstacles au commerce dont l’objet était de protéger les producteurs de la concurrence étrangère comme des droits de douanes, ou des subventions.*”

⁸ Stefano Ross, “The TTIP: A New Generation Treaty” (*The Federalist Debate*, Number 2 July 2015) <<http://www.federalist-debate.org/index.php/current-issue/comments/item/971-the-ttip-a-new-generation-treaty>> accessed 19 March 2016

⁹ Richard Hiault, “Pascal Lamy : « Le Traité transatlantique est un accord de troisième génération »” *Les Echos* (Paris, 20 October 2015) <http://www.lesechos.fr/20/10/2015/lesechos.fr/021418267703_pascal-lamy—le-traite-transatlantique-est-un-accord-de-troisieme-generation-.htm> accessed 19 March 2016

¹⁰ Office of the United States Representative, the trans-pacific partnership: leveling the playing field for American workers and American businesses (*executive office of the president*) <<https://ustr.gov/tpp/>> accessed 21 May 2016

¹¹ Richard Hiault (n 8) “*Avec le TPP, les Etats-Unis sont parvenus à établir un lien contractuel entre un régime commercial et leurs propres standards sociaux, environnementaux et même anti-corruption.*”

¹² Ibid.

They are currently trying to work on mutual recognition of regulations applied in the EU and the U.S.A.¹³

While the negotiations are inherently difficult, their agenda remains very ambitious. The topics involved can be categorized into three pillars: market access (agricultural and industrial goods, services, public procurement); non-tariff barriers (sanitary and phyto-sanitary measures and regulatory convergence); and rules (intellectual property and geographical indications, energy and raw materials, competition, rules of origin, trade facilitation, and sustainable development).¹⁴

As mentioned above, the tariff barriers will most likely be removed, even though they are already low (averaging under 3%¹⁵). In any case, the U.S.A.'s and the EU's regulators will have to harmonize on trickier topics. For instance, there are currently different requirements for the safety tests regarding drugs, cars and soft furniture.¹⁶ These tests are particularly costly for companies that have to pass all of them for their products to be sold in different markets. Furthermore, the regulators will have to draft their agreement with particular attention to the protection of foreign investors clauses; decide whether to use the ICSID or not; and on what terms. While these topics are simultaneously complex and essential, some of them will have to

¹³ Fouad Bahri, "Tafta : l'UE pourrait renoncer au principe de precaution" *Zaman* (France, 2 May 2016) <<https://www.zamanfrance.fr/article/tafta-lue-pourrait-renoncer-principe-precaution-21350.html>> accessed on 29 May 2016

¹⁴ Ministère des affaires étrangères et du développement international, " PTCI: Questions- Reponses" (*France Diplomatie*, 9 October 2015) <<http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/diplomatie-economique-et-commerce-exterieur/negociations-commerciales/focus-sur-le-partenariat-transatlantique-de-commerce-et-d-investissement-ptci/article/ptci-questions-reponses>> accessed 15 May 2016 "Les négociations sont organisées en trois piliers : L'accès au marché regroupe le volet tarifaire (la baisse des droits de douane), l'accès aux marchés publics, la prestation de services ou la liberté et la protection des investissements (partie 1) ;

La convergence réglementaire comporte une dimension horizontale (le traitement des obstacles techniques au commerce), une dimension sectorielle (des annexes spécifiques à dix secteurs comme l'automobile, la pharmacie, les cosmétiques ou la chimie) et, enfin, une dimension institutionnelle (mise en place de structures destinées à assurer la mise en œuvre de l'accord et à favoriser le dialogue réglementaire et la convergence des normes futures (partie 2) ;

Les règles, qui concernent les engagements en matière de concurrence, de propriété intellectuelle, d'indications géographiques etc. (partie 3)."

¹⁵ European Commission, "Countries and regions: United States" (*European Commission*, 29 Apr 2016) <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/>> accessed 19 March 2016

¹⁶ Leala Padmanabhan, "TTIP: The EU-US trade deal explained" (*BBC*, 18 December 2014) <<http://www.bbc.com/news/uk-politics-30493297>> accessed on 21 May 2016 "US and EU regulators have different requirements for testing the safety of cars, drugs and soft furnishings. Going through the different tests is expensive for firms, particularly in developing new medicines. TTIP aims to reduce those costs by bringing in common standards."

be abandoned. This reflects the entities' points of divergence, the treaty's inherent difficulties, and explains process's long road to finalization. Even though the EU has expressed its willingness to include financial services in the negotiations,¹⁷ the U.S.A. has explicitly refused such an agreement,¹⁸ despite the pressure from the insurance industry.¹⁹ These obstacles show the cultural particularities of the two blocs. For instance, the EU has refused to include all audio-visual services from the negotiation,²⁰ invoking the specific protection that this industry enjoys in Europe, due to tough competition with popular American products: "[The] *EU (...) believes such services play a special part in culture and so should be treated differently to other services*".²¹ The fact is that in Europe, because of its specificities, this industrial sector benefits from state financial support to promote their production and consumption.²² In the same way, the TTIP cannot deal with copyrights issues under the Anti-Counterfeiting Trade Agreement (ACTA),²³ which is an international

¹⁷ Irena Asmundson, "What Are Financial Services ? How consumers and businesses acquire financial goods such as loans and insurance" (*Finance & Development*, March 2011) accessed 19 March 2016 "*A financial service is not the financial good itself—say a mortgage loan to buy a house or a car insurance policy—but something that is best described as the process of acquiring the financial good. In other words, it involves the transaction required to obtain the financial good. The financial sector covers many different types of transactions in such areas as real estate, consumer finance, banking, and insurance. It also covers a broad spectrum of investment funding, including securities.*" <<https://www.imf.org/external/pubs/ft/fandd/2011/03/pdf/basics.pdf>> accessed 21 May 2016

¹⁸ James Crisp, "EU-US clash over financial services in TTIP" (*EurActiv.com*, 15 May 2014) <<http://www.euractiv.com/section/euro-finance/news/eu-us-clash-over-financial-services-in-ttip/>> accessed 21 May 2015 "*The dialogue is being continued in various fora. We think the discussion is important and can continue on that basis [...] we don't see the need for financial services to be part of TTIP*"

¹⁹ Jeremy Fleming, "Insurers lead moves to include financial services in TTIP" (*EurActiv.com*, 23 April 2015) <<https://www.euractiv.com/section/trade-society/news/insurers-lead-moves-to-include-financial-services-in-ttip/>> "accessed on 21 May 2016 "*We encourage the EU and US to work towards full market access and national treatment for the insurance sector," the group said in a position paper on TTIP published in December last year. The group strongly welcomed a European Commission proposal to establish a framework for regulatory cooperation in financial services.*"

²⁰ European Commission, "TTIP and Culture" (*European Commission*, 16 June 2014) 1 <http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152670.pdf> accessed 21 May 2016 "*The US has a strong interest in gaining access to markets for services related to films and television – so-called audiovisual services. The EU, however, believes such services play a special part in culture and so should be treated differently to other services. Sometimes, concerns also exist about the potential impact of TTIP in other sectors related to culture.*"

²¹ Ibid 1.

²² Ibid 2.

²³ "Anti-Counterfeiting Trade Agreement - What Is ACTA?" (Electronic Frontier Foundation) <<https://www.eff.org/issues/acta>> accessed on 29 May 2016 "*The Anti-Counterfeiting Trade Agreement (ACTA) is an agreement to create new global intellectual property (IP) enforcement standards that go beyond current international law, shifting the discussion from more democratic multilateral forums, such as the World Trade Organization (WTO)*

treaty creating international standards for international property rights enforcement.

II. SLOW DEVELOPMENT OF THE THIRD GENERATION TREATY AS AN OPPORTUNITY TO TRANSFORM INTERNATIONAL ARBITRATION DUE TO THE INHERENT DIFFICULTY OF THE NEGOTIATION BETWEEN TWO OF THE MOST DEVELOPED ECONOMIES IN THE WORLD.

A. THE INTERNAL ISSUES OF THE TWO ECONOMIES AS AN OBSTACLE FOR THE DRAFTING OF THE AGREEMENT

The EU is facing multiple issues that can mitigate its capacity to find harmonization through a treaty. Among these is what is called “Brexit”,²⁴ the withdrawal of the United Kingdom from the EU. A referendum on the membership of the country was held on June 23, 2016. The referendum was settled under the discretion of the UK Prime Minister, David Cameron. Some of the reasons invoked by the opponents to the UK remaining in the EU were that the UK had been held back by the EU because of business rules and high membership fees.²⁵ More importantly, the country wanted to take back the full control of its borders, while the movement of goods, services and persons, is free between the countries within the EU.²⁶ On the date of the referendum, 52 percent of voters chose to leave the Union. After some legal uncertainty related to the power of the government to trigger article 50 of the Treaty on the Functioning of the European Union (TFEU), the Parliament, in accordance with the UK Supreme Court decision, decided on 13 March 2017 to

and the World Intellectual Property Organization (WIPO), to secret regional negotiations. Through ACTA, the US aims to hand over increased authority to enforcement agencies to act on their own initiative, to seize any goods that are related to infringement activities (including domain names), criminalize circumvention of digital security technologies, and address piracy on digital networks.”

²⁴ “Brexit” stands for the contraction of the words “Britain” and “exit”

²⁵ Brian Wheeler & Alex Hunt, “the UK’s EU referendm: All you need to know” (*BBC*, 17 May 2016) <<http://www.bbc.com/news/uk-politics-32810887>> accessed 21 May 2016 “*This was the big news back in January and February as David Cameron sought an agreement with other European Union leaders to change the terms of Britain's membership. He says the deal, which will take effect immediately if the UK votes to remain in the EU, gives Britain "special" status within the 28 nation club, and will help sort out some of the things British people say they don't like about the EU, such as high levels of immigration and giving up the ability to run our own affairs.*”

²⁶ *Ibid.*

allow the government to start the exit process.²⁷ Currently, Prime Minister Theresa May and EU leaders have commenced the negotiation process settled by Article 50 of the TFEU to discuss the terms of departure.²⁸ This kind of disagreement between EU member countries is a potential obstacle to harmonization between the U.S.A and the EU.

Also, some political issues still arise and weaken the structure of the Union. Previously, Poland faced a difficult issue which uncovered some democratic gaps in the country which is, however, a condition to be a member of the EU. Specifically, at the end of 2015, a new conservative government assumed leadership of the country and started to prepare a controversial legal reform, leading to a transformation of the constitutional tribunal and of the public media of the country. The first law changed the rule of the qualified majority to elect the constitutional court judge, and the second law submits public television and radio under government control.²⁹ While not unconstitutional or against the European regulation, these changes in regulation could constitute signs of a potential future harm to democracy, and Brussels has decided to keep an eye on Poland's situation accordingly.

In the same way, France is currently struggling with a crisis related to social rights and European legislation. EU law is encouraging the country to be more competitive in labor law standards, for instance, simplifying the procedure involved in replacing employees. The "El Khomri" law, strongly encouraged by the EU, has aroused huge protests in the streets.³⁰ It is also weakening the trust of French citizens in their European representatives. While the election of Emmanuel Macron as president of France on 7 May 2017 could mean a return of French trust in the EU, it is worth noting that the rate of abstention was important,

²⁷ Krishnadev Calamur, "Brexit: so what Now? A few frequently asked questions" (*The Atlantic*, 29 March 2017)

<<https://www.theatlantic.com/news/archive/2017/03/brexit-faq/521175/>> accessed 16 June 2017

²⁸ Ibid.

²⁹ Gabriela Baczyńska; Nicolas Delame, "Nouvel avertissement de la Commission européenne à Varsovie" (*L'Obs*, 18 May 2016) < <http://tempsreel.nouvelobs.com/monde/20160518.REU2662/nouvel-avertissement-de-la-commission-europeenne-a-varsovie.html>> accessed 21 May 2016 "Aussi longtemps que le Tribunal constitutionnel est empêché d'effectuer un contrôle constitutionnel, il ne peut y avoir de surveillance réelle de la conformité des actes législatifs avec les droits fondamentaux", a dit la Commission mercredi."

³⁰ France 24, "Loi travail : nouvelle journée de manifestation à travers la France pour le retrait du texte" *France 24* (Paris, 28 April 2016) < <http://www.france24.com/fr/20160428-france-loi-el-khomri-salaries-etudiants-travail-syndicats-manifestation>> accessed on 21 May 2016 "Pour la quatrième fois en moins de deux mois, salariés, étudiants et lycéens s'apprêtent à battre le pavé à travers la France et à cesser le travail, jeudi 28 avril, contre le projet de Loi travail de la ministre Myriam El Khomri, à l'appel de sept syndicats (CGT, FO, FSU, Solidaires, Unef, UNL et Fidl)."

for that election. Indeed, Macron was in reality elected by only 44% of French voters.³¹

These internal difficulties could weaken the TTIP and thus potentially change the ISDS. If the democratic stability of any country is at stake, it would be difficult for its elected representatives to increase the international engagement of that country. Even though the treaty is being negotiated at the European level, any decision will ultimately require unanimity among the 28 countries in order to achieve an entry into force.

B. COMPLEX RATIFICATION OF THIRD GENERATION TREATY POTENTIALLY PARALYZING ITS ENTRY INTO FORCE

1. *The European Union's exclusive competence regarding commercial agreement*

It could be bewildering to learn that the EU is in charge of the negotiations of the TTIP when it has been admitted that members keep their sovereignty despite this institution. In the TFEU³² signed in 2007, which detailed the basis of the EU law by setting out the scope of its authority to legislate and the principles of law in those areas that the EU operates, it is stated that the European institutions have three different kinds of competence³³: exclusive, shared and support.³⁴ When the EU has an exclusive competence, it means that the EU alone can adopt regulations in this area. A shared competence would allow the state to adopt legislation only if the EU has not already regulated that specific area. The supporting competence is limited

³¹ Ilan Caro, "Quatre chiffres qui montrent que l'élection d'Emmanuel Macron n'est pas si écrasante" (France info, 8 May 2017) http://www.francetvinfo.fr/elections/presidentielle/quatre-chiffres-qui-montrent-que-l-election-d-emmanuel-macron-n-est-pas-si-ecrasante_2180067.html accessed on 1 July 2017

³² Formerly known as the EC Treaty, the Treaty of Rome or the Treaty establishing the European Community. The TFEU was given its name and amended by the Lisbon Treaty. The TFEU sets out organizational and functional details of the European Union.

³³ Europa, "Division of competences within European Union" (*Eur-Lex*, 26 January 2016) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Aai0020>> accessed 21 May 2016

³⁴ "Division of competences within the European Union" (*Eur-Lex*, 26 January 2016) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:ai0020>> accessed on 21 May 2016 "The EU has only the competences conferred on it by the Treaties (principle of conferral). Under this principle, the EU may only act within the limits of the competences conferred upon it by the EU countries in the Treaties to attain the objectives provided therein. Competences not conferred upon the EU in the Treaties remain with the EU countries. The Treaty of Lisbon clarifies the division of competences between the EU and EU countries. These competences are divided into 3 main categories: exclusive competences; shared competences; and supporting competences."

to the completion of states' actions.

The common commercial policy belongs to the exclusive competence of the European Union (Article 3 of the TFEU).³⁵ This way, the EU will be the sole competent entity to negotiate and sign the treaty. Since the entry into force of the Treaty of Lisbon in 2007, the European Parliament (EP) is a co-legislator in trade policy (through the ordinary legislative procedure outlined in Articles 206 and 207 of the TFEU³⁶). All trade agreements and investments must gain its approval (goods 207 and 218 of the TFEU³⁷). In accordance with these rules, the European Commission has been authorized by the EP to negotiate, in the name of the Union, the draft of the TTIP.³⁸ Before the Treaty of Lisbon, the EP was, at best, only consulted for issues related to commercial transactions.³⁹

2. The complex constitutional competence for ratification in the European Union and in the United States

a) In the European Union

If the delegation of power gives the EP the ability to establish a trade agreement, the system of ratification of the third generation treaty leads us to believe that the evolution of international arbitration will be delayed, since the ratification process is complicated. As a matter of fact, the ratification of certain kinds of treaties involves a complex process whereby all EU member countries must give their consent through their own

³⁵ Consolidated version of the treaty on the functioning of the European union (2012) OJ C 326/1 Part one Principles TITLE I Categories and areas of union competence - Article 3 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012E003>>

³⁶ Consolidated version of the treaty on the functioning of the European union (2008) OJ C C/115 Part five : External action by the union - TITLE II Common commercial policy - Article 207 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E207:en:HTML>>

³⁷ Consolidated version of the treaty on the functioning of the European union (2012) OJ C C/326 Part five: External action by the union - TITLE IV Restrictive measures - Article 218 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E218:en:HTML>>

³⁸ Ministère des affaires étrangères et du développement international, "Role du parlement francais dans la ratification du traite transatlantique" (*Senat*, 18 September 2014) <<http://www.senat.fr/questions/base/2014/qSEQ140712514.html>> accessed 16 March 2016

³⁹ Parlement European, "Auditions des commissaires europes designes: Cecilia Malmstrom" (*Union Europeenne*, 2014) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/538930/EPRS_BRI%282014%29538930_FR.pdf> accessed 21 May 2016

internal governing bodies. The treaty is not purely solely commercial, but rather is qualified as “mixed”, since some of the matters negotiated are still under the power of the member states and thus are not “exclusive,” according to the definition of the TFEU. Thus, in accordance with the European laws and the member states’ constitutions, at the end of the negotiations, the final text would have to be ratified by all the National Parliaments and be approved by the European Parliament.⁴⁰ For example, the European Court of Justice handed down an opinion on 16 May 2017 clarifying the competency of the Commission regarding the EU-Singapore Free Trade Agreement. The Court declared that “*the free trade agreement with Singapore cannot in its present form, be concluded by the Union alone, because some of the provisions between the Union and the Member States (...). The free trade agreement with Singapore can only be concluded by the Union and the Member States acting in concert.*”⁴¹ This complex procedure has already created difficulties for the CETA (Comprehensive Economic and Trade Agreement – EU Canada Treaty). Indeed, its European ratification was slowed down by Wallonia, a small cultural and historical region in Belgium that was opposed to the CETA.⁴² This region has its own parliament, which has authority for cultural affairs.⁴³ From the beginning, the small region refused to grant the Belgian federal government authority to validate the CETA in the European Council, even though the ratification procedure by the European member states

⁴⁰ Ministère des affaires étrangères et du développement international, “Role du parlement français dans la ratification du traité transatlantique” (*Senat*, 18 September 2014) <<http://www.senat.fr/questions/base/2014/qSEQ140712514.html>> accessed 16 March 2016 “*L'accord final sera bien un accord mixte, comme le sont la quasi-totalité des accords de libre-échange conclus par l'Union européenne. Dès lors, conformément aux traités européens et à la Constitution, à l'issue de la négociation, le texte final devra être ratifié par les parlements nationaux des États membres et obtenir l'approbation du Parlement européen.*”

⁴¹ EUCJ, “L'accord de libre échange avec Singapour ne peut pas, dans sa forme actuelle, être conclu par l'union européenne”, (Curia Europa, 16 May 2017) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170052fr.pdf>> accessed 16 June 2017; full opinion available at <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=707052>> accessed on 16 June 2017

⁴² “L'accord de libre-échange CETA sera officiellement signé dimanche”, (*Le Monde*, 28 october 2016), <http://abonnes.lemonde.fr/europe/article/2016/10/28/le-parlement-de-wallonie-donne-son-accord-a-la-signature-du-ceta_5022179_3214.html> accessed on 16 June 2017

⁴³ Romaric Godin, Ceta : pourquoi la Wallonie a pu dire "non", (*La tribune*, 25 october 2016), <<http://www.latribune.fr/economie/union-europeenne/ceta-pourquoi-la-wallonie-a-pu-dire-non-610883.html>> accessed on 16 June 2017

had not yet begun at that time.⁴⁴ This upstream opposition made sense because following the European ratification, the text provided for a temporary application of the Treaty.⁴⁵ The Wallonia refusal served to prevent this procedure and brought them more certainty about environmental norms and arbitrators' independence.⁴⁶

[Published in September 2014 on the EU's official website, the ratification process is still in progress.⁴⁷ This could suggest the possibility of the TTIP's eventual ratification, yet in the past, national parliaments have not hesitated to block an EU treaty that did not please them.⁴⁸

b) In the United States

Constitutional obstacles are also present in the American point of view. The TTIP is considered as a Congressional Executive Agreement (CEA) (the constitutionality of this class of treaties is frequently challenged by some scholars.) Article II of the U.S Constitution gives the American president the power to negotiate agreements between the U.S.A. and other countries; these must be confirmed “*with the advice and consent*”⁴⁹ of the Senate by a majority of two-thirds. However, even though the U.S. Constitution does not provide any alternative to the procedure, Article I Section 10 makes a distinction between treaties that a state could not negotiate and an agreement that states may enter into with the consent of Congress. But that is not all. Multiple times throughout history, Congress has given the President—via the “*fast track authority*” renamed “Trade Promotion Authority” in 2002⁵⁰ — the power to negotiate international

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Cécile Ducourtieux, « CETA : premier test positif pour la ratification au Parlement européen », (Le Monde, 24 January 2017), < http://www.lemonde.fr/economie/article/2017/01/24/ceta-premier-test-positif-pour-la-ratification-au-parlement-europeen_5068255_3234.html > accessed on 1 July 2017

⁴⁷ Ibid.

⁴⁸ See The Treaty establishing a Constitution for Europe (TCE) and its refusal by French and Dutch.

⁴⁹ Article II Section II (U.S Constitution) “*He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur*”

⁵⁰ J.F. Hornbeck, W. H. Cooper, “Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy”, (Congressional Research Service, 8 February 2011) <https://books.google.fr/books?id=5m3bc4Ly8loC&printsec=frontcover&hl=fr&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false>

agreements that Congress can then approve or deny (but not amend) by a simple majority of the Senate and the House of Representatives. In June 2015, the Obama Administration signed the Trade Promotion Authority, which allowed the American government to continue to negotiate the TTIP.⁵¹ This procedure, however, is not mentioned in the Constitution, which presents a limitation. Even though it lies within the power belonging to Congress (which then delegates it for a certain period of time to the President), some scholars argue that such a procedure is unconstitutional. Laurence H. Tribe⁵² believes that on one hand, a Congressional Executive Agreement called *ex post*⁵³ (in which Congress delegates the power to negotiate after the negotiations through validation), validated by Congress is unconstitutional,⁵⁴ on the other hand, an *ex ante* delegation (in which the power to negotiate is given prior to the negotiation) would enable the President to conclude certain international agreements constitutionally. For the TTIP, Barack Obama has signed the Trade Promotion Authority, which should be enough to satisfy the constitutionality of the agreement. Yet, the debate is still open, as the U.S. Supreme Court never explicitly validated this old constitutional practice. However, it would be hard to deny it. Indeed, a finding that the Congressional-Executive Agreement procedure, such as that used in approving the North American Free Trade Agreement (NAFTA), was unconstitutional, would jeopardize thousands of late-20th-century international agreements

⁵¹ Danielle Haynes, « Obama signs fast-track trade, worker assistance bills into law » (*UPI*, 29 June 2015) <http://www.upi.com/Top_News/US/2015/06/29/Obama-signs-fast-track-trade-worker-assistance-bills-into-law/2111435609873/> accessed 21 May 2016

⁵² Laurence H. Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," (1995) 108 *Harvard Law Review* 1221, 1234-35 n. 47, 1258, 1261, 1269-70, 1277-

⁷⁸ "the Necessary and Proper Clause merely permits Congress to "make all Laws ancillary to executing the power delegated by the Foreign Commerce Clause. This authorization does not appear to confer upon Congress any special role in approving international agreements. Although defenders of the congressional- executive agreement treat this distinction dismissively, the framers took it quite seriously." (1261)

⁵³ Steve Charnovitz, " Using Framework Statutes to Facilitate U.S. Treaty-making" [2004] *American Journal of International*
<<http://poseidon01.ssrn.com/delivery.php?ID=988100070082071115001107086030116111029016091027091055028017024026125121091103110126123010021012119029003111085001092031084008083063078046098081118011124111066067065055000030074113104030099122024114006000105008069069018087001069088013094091003010&EXT=pdf>>
accessed 21 May 2016 "The question of the constitutional validity of a decision by Congress and the President to use a Congressional-Executive agreement may not be justiciable. The legality of the law approving NAFTA was challenged by a group of plaintiffs who contended that NAFTA was void because it had not been consented to by a two-thirds Senate vote. The plaintiffs lost in the U.S. district court, but then that decision was ordered vacated by the U.S. Court of Appeals for the 11th Circuit on the grounds that the case presented a nonjusticiable political question."

⁵⁴ Method followed for the NAFTA.

and implementing statutes.⁵⁵ More than to be acceptable, CEAs are rather necessary. Should they not exist, important international treaties like NAFTA would be void.⁵⁶

III. THE IMPORTANCE OF THE TTIP IN INTERNATIONAL INVESTMENT ARBITRATION MODEL FOR FUTURE TREATIES AND THIRD PARTIES

A. THE INFLUENCE OF TREATIES ON EACH OTHER: THE POTENTIAL IMPACT OF THE TTIP

If the TTIP emerges from the negotiation in a few years, the transformation of arbitration will occur by the role that the agreement will play in another agreement: a sample. Indeed, a lawyer will not draft a new contract from nothing. Rather, he will take a previous, similar one and modify it, studying other contracts, looking at the law and seeking advice from colleagues to know what could work or not. The treaties influence each other in the same way. One of the best examples to illustrate this is probably the CETA's and the TTIP's negotiators.⁵⁷ The CETA has been negotiated within the European Commission by the Directorate-General for Trade, under the authority of the Commissioner for Trade, who leads close cooperation negotiations with all other services of the Commission.⁵⁸ For the TTIP, the scheme is the same.⁵⁹ Currently, Cecilia Malmström is the EU's Trade Commissioner in charge of the negotiation of the TTIP. Even though

⁵⁵ Alan S. Lederman, "11th Circuit declines to rewrite 20th century world history" [December 2001] Florida bar Journal <<http://www.thefreelibrary.com/11th+Circuit+declines+to+rewrite+20th+century+world+history-a080900972>> accessed 21 May 2016

⁵⁶ John C. Yoo, "Laws as Treaties: The Constitutionality of Congressional-Executive Agreements" (2000) 99 Michigan Law Review 757, 823 <<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2765&context=facpubs>> accessed 21 May 2016

⁵⁷ "CETA The Comprehensive Economic and Trade Agreement (CETA) is a freshly negotiated EU-Canada treaty." CETA's ratification by member States is pending. "Once applied, it will offer EU firms more and better business opportunities in Canada and support jobs in Europe. CETA will tackle a whole range of issues to make business with Canada easier. It will remove customs duties, end limitations in access to public contracts, open-up services' market, offer predictable conditions for investors and, last but not least, help prevent illegal copying of EU innovations and traditional products." Available at <<http://ec.europa.eu/trade/policy/in-focus/ceta/>>

⁵⁸ Ministère des affaires étrangères et du développement international, "Questions & réponses - Accord économique et commercial global (AECG - en anglais CETA : Comprehensive Economic and Trade Agreement) entre l'Union européenne et le Canada" (France *Diplomatie*, 2016) <<http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/diplomatie-economique-et-commerce-exterieur/accords-de-libre-echange/le-comprehensive-economic-and/article/questions-reponses-accord>> accessed 21 May 2016

⁵⁹ Ibid.

she earned her position only in the beginning of 2014, and the CETA was published at the end of that year, it seems that she has done a substantial amount of work on the agreement. Since she did work on both agreements, her expertise would eventually influence the agreements in the same way.⁶⁰

Another example is the nine different Bilateral Investment Treaties (BIT) signed between the U.S.A. and various European countries.⁶¹ Those nine different treaties have been signed around the same periods: the Cold War. When it was important for the U.S.A. to secure commercial relationships with countries that were formerly part of the Soviet Communist bloc. Indeed, those agreements were signed after the dissolution of the Soviet bloc in 1991 and mostly with countries that were part of the Warsaw Pact⁶² or the Comecon.^{63, 64} The agreements follow the same structure, the dates of signature are close to each other, and no Western European country has signed such an agreement with the United States.⁶⁵

B. THE IMPACT ON THIRD PARTY AND ON THE ICSIDS JURISDICTION.

1. *The Most Favored Nation clause: the evolution provided by the TTIP*

The Most Favored Nation (MFN) clause is regularly, almost automatically, inserted in international agreements. It provides a protection to the investors. It ensures that a party state to one treaty will provide treatment not less favorable than the treatment they provide to investors under another treaty.⁶⁶ Moreover,

⁶⁰ Judith Mischke, "#CETA: Liberal success of Justin Trudeau and Cecilia Malmström" (*Eureporter World*, 1 March 2016) <<https://www.eureporter.co/world/2016/03/01/ceta-liberal-success-of-justin-trudeau-and-cecilia-malmstrom/>> accessed on 21 May 2016 "I warmly congratulate liberal Commissioner Cecilia Malmström and the Canadian liberal Prime Minister Justin Trudeau for successfully completing the legal review of CETA"

⁶¹ "United States Bilateral Investment Treaties" (*U.S Department of State: Diplomacy in Action*) <<http://www.state.gov/e/eb/ifa/bit/117402.htm>> accessed 21 May 2016

⁶² Petr Lunak, "Un nouveau regard sur les alliances de la Guerre froide" (*Nato Otan*, 20 March 2002) <<http://www.nato.int/docu/revue/2001/0104-09.htm>> accessed 21 May 2016

⁶³ "Comecon : International organization" (*Encyclopaedia Britannica*, 2016) <<http://www.britannica.com/topic/Comecon>>

⁶⁴ See map for more details: <<http://www.monde-diplomatique.fr/cartes/europeguerrefroide>>

⁶⁵ "United States Bilateral Investment Treaties" (*U.S Department of State: Diplomacy in Action*) <<http://www.state.gov/e/eb/ifa/bit/117402.htm>> accessed 21 May 2016. See agreements in a chronological order: Poland – U.S (1990), Slovakia – U.S (1991) ; Czech Republic – U.S (1991); Bulgaria – U.S (1992); Romania – U.S (1992); Estonia – U.S (1994) ; Latvia – U.S (1995) ; Croatia – U.S (1996) ; Lithuania – U.S (1998)

⁶⁶ Claudia Salomon and Sandra Friedrich, "How most favoured nation clauses in bilateral investment treaties affect

the MFN clause avoids economic distortions that would occur through more selective country-by-country liberalization through what could be qualified as a harmonization. However, the MFN clause is also a source of complexity. The drafter, operating freely, can provide restrictions, limit the scope of the clause or extend it. For example, it can be framed to the substantive rule of the agreement or to the standard of fair and equitable treatment.

However, the EU seems to understand the risks attached to the clause, and intends to clarify for the TTIP that “[o]n the ‘importation of standards’ issue, the EU seeks to clarify that MFN does not allow procedural or substantive provisions to be imported from other agreements.”⁶⁷ This is an important step in the limitation of the MFN clause that might be taken into account in the draft of several other treaties. The TTIP incarnates a change, because the CETA, drafted earlier, does not take into consideration the limitation given by the MFN Clause of the TTIP. CETA does not completely fulfill this goal.⁶⁸

Regarding the TTIP, a foreign investor will be able to rely on the procedural privileges that have been given to foreign investors in another treaty, as the MFN clause allows him, but the limit would be procedural and substantive provisions. In the EU context, this could become a complex problem when the MFN clause from the CETA does not exclude substantial rule in the same way that the TTIP might: a foreign investor, for example, would be able to use the Energy Charter treaty which contains broader substantive standards.⁶⁹ This is, however, a good example of awareness of the drafters of the details importance of details and the impact they can have on the future disputes. There is to bet that future international treaty will take into consideration that evolution of the MFN clause given by the TTIP.

2. *Third-party Involvement and influence of the ISDS on third parties*

arbitration" (*Thomson Reuters*) 1 <<https://www.lw.com/thoughtLeadership/favoured-nation-clauses-arbitration>> accessed 21 May 2016

⁶⁷ “Public consultation on modalities for investment protection and ISDS in TTIP” (2014) 4 <http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf> accessed 20 June 2017

⁶⁸ Ibid 20. “Art X.2 Most-Favoured-Nation Treatment (4) a : For greater certainty the « treatment » referred to in Paragraph 1 does not include investor to state dispute settlement procedures provided for in other international treaties and other trade agreement, including compensation granted through such procedure (...)”

⁶⁹ Markus Krajewski, “Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective” (*Friedrich Ebert Stiftung EU Office Brussels*, 2014) 11 <<http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf>>

An ISDS mechanism has been included in most of the Bilateral Investment Treaty generally under the ICSID procedural rules. Some authors believe that the TTIP could improve the current ISDS mechanisms and give the entire system more legitimacy. For instance, the possibility making the UNCITRAL Transparency rule binding in the treaties is discussed.⁷⁰ The TTIP could be employed as a model in future Free Trade Agreements (FTA) negotiations⁷¹ especially between the EU and China as well as other countries.⁷² Treaties influence each other, and the TTIP is a potential breakthrough for the ICSID and the way to settle investor state disputes.

Although, more than simply influencing third parties, as a template may do, the will of the current negotiators would be to also give greater importance to the third party. The EU proposal seeks for the arbitration tribunal to accept an *amicus curiae* brief. Literally “*friend of the court*”. The *amicus curiae* is a person with strong interest in or views on the subject matter of an action, without being a party to the action. *Amicus curiae* is able to petition the court on behalf of a party with its own views. This procedure has been introduced in the ICSID Convention in 2006⁷³ by an amendment to the rules after discussion among States

⁷⁰ Ibid 16 “*Incorporating the UNCITRAL Transparency Rules into CETA and TTIP and making them binding for all ISDS cases arising from these agreements would be a major improvement compared to previous EU Member States’ investment treaties and might significantly change the current investment dispute settlement regime.*”

⁷¹ Prof. Dr. Christian Tietje and Associate Prof. Dr. Freya Baetens, “The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership” (*Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands* , 26 June 2014) 281

<<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj7rrkLzLAhXjsYMKHdPsA-YQFggdMAA&url=https%3A%2F%2Fwww.rijksoverheid.nl%2Fbinaries%2Frijksoverheid%2Fdocumenten%2Frapporten%2F2014%2F06%2F24%2Fthe-impact-of-investor-state-dispute-settlement-ids-in-the-ttip%2Fthe-impact-of-investor-state-dispute-settlement-ids-in-the-ttip.pdf&usg=AFOjCNE0jYzxDIJLKPdNUdfBk46YDdFZWw>> accessed 21 May 2016
“*Given that either the EU or the US is the largest trade and investment partner for almost all other countries in the global economy, the TTIP may serve as a template for future bilateral negotiations and even set the ground for a multilateral breakthrough.*”

⁷² “The Transatlantic Trade and Investment Partnership” (*House of Lords*, 13 May 2014) 14th Report of Session 2013-14, 53 <<http://www.publications.parliament.uk/pa/ld201314/ldselect/ldcom/179/179.pdf>> accessed 21 May 2016 “*US and EU officials joined forces and created a trilateral consumer safety process with the Chinese, in which their major customers got together and indicated they were happy to keep importing the toys but subject to certain standards.*”

⁷³ E. Obadia, “Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration”, (ICSID review - FOREIGN INVESTMENT LAW JOURNAL, 2007) <https://oup.silverchair-cdn.com/oup/backfile/Content_public/Journal/icsidreview/22/2/10.1093/icsidreview/22.2.349/2/2-2-349.pdf?Expires=1498084657&Signature=L8mcSf8XU52968v1fs2X6qauu~1DQnr1~q8IJGmMXIa8uun0dOGjjwIqzqs>

and civil society through the adoption of Article 37 “*Visits and Inquiries; Submissions of Non-disputing Parties*”.⁷⁴ International Trade Law is now mature enough for the acceptance of *amicus curia*, the relationship between the different actors has become so tied that it makes sense to accept such option. Also, the U.S.A. model provides two specific provisions regarding third-party involvement.⁷⁵ First, a “*non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty*.”⁷⁶ Second, the “*tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party*.”⁷⁷ These broad provisions could also be found in the EU Draft.⁷⁸ EU Draft specifically states that the “*tribunal shall permit any natural or legal person which can establish a direct and present interest in the result of the dispute [...] to intervene as a third party. The intervention shall be limited to supporting, in whole or in part, the award sought by one of the disputing parties*”.⁷⁹

Thus, both parties seem favorable to the prospect of *amicus curiae* possibility. Moreover, both the U.S.A. model and the EU model⁸⁰ seek for a mediation procedure to a third neutral party before bringing the claim to the Tribunal.⁸¹ Parties would have to consult one another and should consider using a non-binding third

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 accessed on 20 June 2017, 356

⁷⁴ ICSID Convention, Regulations and Rule (April 2006)
 <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> accessed 21 May 2016

⁷⁵ U.S. Model Bilateral Investment Treaty (*U.S. Department of State: Diplomacy in Action*, 2012)
 <<http://www.state.gov/documents/organization/188371.pdf>> accessed 21 May 2016

⁷⁶ Ibid 30. Art. 28 (2) Conduct of the Arbitration

⁷⁷ Ibid. Art. 28 (3)

⁷⁸ “Transatlantic Trade and Investment Partnership – Trade in services, investment and e-commerce- Chapter II- Investment” (*Commission draft text TTIP- Investment*, 2015)
 <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 21 May 2016

⁷⁹ Ibid 26. Art. 23 (1) Intervention by third parties

⁸⁰ “EU-Singapore Free Trade Agreement” (*European Commission*, 29 June 2015)
 <http://trade.ec.europa.eu/doclib/docs/2015/june/tradoc_153581.pdf> accessed 21 May 2016

⁸¹ Ibid 2. Art. 3 (1)

party - a mediator - before bringing the claim to an Arbitral Tribunal.⁸²

The third-generation agreement's influence on third parties would allow them to be taken into consideration through the *amicus curia* procedure. But, the influence of the TTIP would be stronger than that and might impact the ISDS system itself.

IV. THE FUTURE TRANSFORMATION OF THE ISDS THROUGH THE TTIP

A. THE INCREASED DISTRUST OF THE STATES IN THE ICSID SYSTEM IMPACTING THE DRAFT OF THE TREATY

On its official website, the French government provides the following statement: “*France currently leads a renovation of its policy on the matter [of international treaties], taking into account international developments. In particular, in a context of denunciation by many states of the International Centre for Disputes Settlement of Investment Disputes (ICSID), France searches flexibility to ensure the effectiveness of the procedure of arbitration.*”⁸³ States are now aware of the criticisms that the ICSID is subject to, and the draft of the TTIP or any subsequent important international treaty will eventually take them into consideration as well.

Recognizing the strong public interest inherent to the negotiation and signature of the TTIP and to the extent that it may impact members' legislation and citizens, the EU has decided to use it for the purpose of innovation. The drafting of the agreement is marked by transparency. This is the first time the commission has made public such a proposal in the bilateral trade negotiation and follows a commitment to greater

⁸² Mark Weaver, “The Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation, and Future Trade Implications” (2014) 29 *Emory International Law Review* <<http://law.emory.edu/eilr/content/volume-29/issue-1/comments/proposed-transatlantic-trade-investment-partnership.html>> accessed 21 May 2016

⁸³ Ministère des Affaires étrangères et du Développement international, “Promotion et protection des investissements, un enjeu économique et de sécurité juridique” (*France Diplomatie*, 5 May 2013) <www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/diplomatie-economique-et-commerce-exterieur/peser-sur-le-cadre-de-regulation-europeen-et-international-dans-le-sens-de-nos/faire-de-la-regulation-internationale-un-atout-pour-l-economie-francaise/article/promotion-et-protection-des> accessed 21 May 2016

transparency in the negotiations.

1. *Clarification to the public*

The European Commission makes available “*textual proposals*”⁸⁴ that are discussed between the parties during the negotiations. They establish the actual language and binding commitments which the EU would like to see in the parts of the agreement those covering rules’ issues. The EU textual proposals cover competition, food safety, animal and plant health, customs issues, technical barriers to trade, small and medium-sized enterprises (SMEs), and government-to-government dispute settlement (GGDS, not to be confused with ISDS).⁸⁵ The Commission has also published TTIP’s position papers explaining the EU’s approach to engineering, vehicles, and sustainable development.⁸⁶ For instance, one of the important redundant preoccupations of the Europeans is related to the food safety. The textual proposal, available in multiple languages, clearly states as follow: “*It’s not true that EU rules are always stricter. Both the US and the EU have made it equally clear that TTIP will not change existing food safety rules. The EU will keep its restrictions on hormones or growth promoters in livestock farming just as the US will keep its rules on microbial contaminants*”.⁸⁷ Similarly, when citizens are afraid to lose the “*principle of precaution*”⁸⁸, the commission clearly states that “*the precautionary principle is enshrined in EU law; TTIP will not change this*.”⁸⁹ Of course, the commission is not bound by those declarations, but disrespect them would be sanctioned with a refusal from the European Parliament which would waste the time spent on the

⁸⁴ “EU negotiating texts in TTIP” (*European Commission*, 10 February 2015) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>> accessed 21 May 2016

⁸⁵ “European Commission publishes TTIP legal texts as part of transparency initiative” (*Delegation of the European Union to the United States*) <<http://www.euintheus.org/press-media/european-commission-publishes-ttip-legal-texts-as-part-of-transparency-initiative/>> accessed 21 May 2016

⁸⁶ “EU negotiating texts in TTIP” (*European Commission*, 10 February 2015) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>> accessed 21 May 2016

⁸⁷ European Commission, “Food safety and animal and plant health in TTIP” (*European Commission*, 21 March 2016) <[http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153004.3%20Food%20safety,%20a+p%20health%20\(SPS\).pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153004.3%20Food%20safety,%20a+p%20health%20(SPS).pdf)> accessed on 29 May 2016

⁸⁸ “*where scientific data do not permit a complete evaluation of the risk, recourse to this principle may, for example, be used to stop distribution or order withdrawal from the market of products likely to be hazardous*” <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l32042>>

⁸⁹ European Commission, “Cosmetic in TTIP” (*European Commission*, 21 March 2016) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153006.4.2%20Cosmetics.pdf> accessed on 29 May 2016

negotiations for both parties. The Commission also tried to make these documents more accessible to a larger number of people through the publication of a “*reader’s guide*” that tries to explain the meanings of the texts. Also, a glossary has been published with the definition of the terms and acronyms.⁹⁰

There is to acknowledge this new way of negotiating in international trade law, especially in light of the strong criticisms that the ICSID faces.

2. *Efforts of transparency*

Transparency is a new redundant critique against ISDS, albeit a comprehensible one. The financial burden of international arbitration is quite heavy, and individuals tend to object to the secrecy of the system. One could argue that one of the strengths and benefits of arbitration is, that the system is not necessarily public but rather depend on the parties’ will, as arbitration is contractual in its essence. It is argued that the opaque system is more suitable to disputes that may arise between private companies, rather than between a state and a company. A state, indeed, carries the burden of public wealth, and secrecy within governmental activities tends to create suspicion and forced disclosures (as we could see in the past, with WikiLeaks, for example). That being said, both the U.S.A. and the EU seem to have listened and agreed with the general dissatisfaction. The U.S.A. model provides that the “*notice of consultation*”, “*notice of intent*”, “*notice of arbitration*”, all written documents (pleadings, briefs, etc., by both disputing parties and third parties), expert reports, hearing transcripts, orders, decisions, and awards shall be made public.⁹¹ However, the model does not specify how the information is to be made public.⁹² But as the ICSID website stated it: “*the level of transparency is in the hands of the parties which tailor it to their proceedings.*”⁹³ Similarly, the ICSID

⁹⁰ European Commission, “EU negotiating texts in TTIP” (*European Commission*, 21 March 2016) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>> accessed on 29 May 2016

⁹¹ U.S. Model Bilateral Investment Treaty (*U.S. Department of State: Diplomacy in Action*, 2012) Art. 29(4) : Transparency of Arbitral Proceedings, 32 <<http://www.state.gov/documents/organization/188371.pdf>> accessed 21 May 2016.

⁹² Nathalie Bernasconi-Osterwalder, “Analysis of the European Commission’s Draft Text on Investor-State Dispute Settlement for EU Agreements” (*Investment Treaty News*, 19 July 2012) <<http://www.iisd.org/itn/2012/07/19/analysis-of-the-european-commissions-draft-text-on-investor-state-dispute-settlement-for-eu-agreements/>> accessed 21 May 2016

⁹³ “Confidentiality and Transparency - ICSID Convention Arbitration” (*ICSID*) <<https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Confidentiality-and-Transparency.aspx>> accessed 21 May 2016

convention and Arbitration rules in general do not contain a general presumption of confidentiality, which is always at the discretion of the parties. For instance, in the case BSGR against the Republic of Guinea which revoked the mining title of the investor the parties agreed on the application of the UNCITRAL Transparency Rules. The arbitral tribunal issued a procedural order about those rules applicability to the case subject to few amendments only.⁹⁴ The result was a hearing made publicly available through a video link on the ICSID website. Regarding the TTIP, both parties are favorable to a transparency principle that is new to international trade law and to ISDS.

3. *Consultation of citizens*

Further, the EU model has also, in a unique way, sought for online public consultation.⁹⁵ The European Commission has consulted the EU public on a possible approach of ISDS under the TTIP. The public consultation was launched on 27 March 2014 and was closed on 12 June 2014. It was open to all interested citizens of the EU and stakeholders and available in all EU languages. Finally, the concerns of the public were categorized under 12 different topics, which illustrated the apprehensions of the current system: 1. The scope of the substantive investment protection provision; 2. The non-discriminatory treatment for investors; 3. Fair and equitable treatment; 4. Expropriation; 5. Ensuring the right to regulate and investment protection; 6. Transparency in ISDS, multiple claims and the relationship to domestic courts; 7. Arbitrators' ethics; 8. Conduct and qualification; 9. Reducing the risk of frivolous and unfounded cases; 10. Allowing claims to proceed (potential filter mechanism); 11. Guidance by the parties on the interpretation of the agreement; 12. Appellate mechanism and consistency of rulings.⁹⁶ More than uncovering public concern, the consultation was a success in the view of the citizens' democratic involvement. The commission received

⁹⁴ "ICSID Issues Order on Transparency in Investment Dispute Filed Against Guinea", (Lexis Legal News, 14 October 2015) < <https://www.lexislegalnews.com/articles/3197/icsid-issues-order-on-transparency-in-investment-dispute-filed-against-guinea> > accessed on 1 July 2017

⁹⁵ "Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)" (*European Commission*, 22 May 2016) <http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179> accessed 21 May 2016

⁹⁶ "Online public consultation on investment protection and investor-to-state dispute

settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement

(TTIP)" (*European Commission*, 13 January 2015) 8
 <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> accessed 21 May 2016

nearly 150,000 responses.⁹⁷ Those observations and concerns help the commission in the work of negotiations with the U.S.A. and were the start for more system legitimacy. Citizens have a new crucial impact in a treaty negotiation. The success of the public consultation might be taken into consideration for future treaties.

4. *An appellate system*

Furthermore, ISDS, and especially the ICSID, rules are criticized for their lack of an appellate system, which implies that a decision could not be wrong. If the mediation step is one of the solutions that could be used, as we saw previously, there is not only one remedy to the situation. The negotiators are studying the opportunity to have an appellate procedure in the dispute resolution mechanism. I believe that an appellate mechanism should be integrated to the TTIP. It would be a consecration of a potential trend in international trade law and ISDS as initiated by the CETA. CETA has incorporated in article 8.28 an appellate mechanism that can “*uphold, modify or revers[e] a tribunal’s award based on (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).*”⁹⁸

Even though the grounds are strictly limited to seek an appeal this is an important step forward that the TTIP should follow. The ICSID does not provide for an appellate mechanism. A party can ask for a revision of the award if a decisive new fact is discovered⁹⁹ or request for an annulment¹⁰⁰ (without a new award as

⁹⁷ Ibid 9

⁹⁸ “Comprehensive economic and trade agreement (CETA) between Canada, of the one part, and the European Countries” (*European Commission*, 2015) Art. 8.28 Appellate Tribunal,⁶¹ <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 21 May 2016

⁹⁹ ICSID article 51 “(1) *Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant’s ignorance of that fact was not due to negligence.*”

¹⁰⁰ Article 52 “(1) *Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.*”

in an appeal) on strict grounds not based on the interpretation of the law. The CETA is using a more practical solution. Further, it seems that the independence taken from the ICSID will be more important in the future through the adoption of a “*rendez-vous*” clause,¹⁰¹ which commits the parties to the agreement to look at setting up a multilateral investment tribunal and an appellate mechanism. Indeed Article 8.29 of the CETA expresses a commitment to pursue the negotiations in creating what seems to be their own multilateral investment tribunal and the appellate mechanism that third parties could potentially use as well.¹⁰²

In the same way, both the U.S.A and EU models accept potential appellate mechanism clauses. The U.S.A. model states that “*in the event that an appellate mechanism*” is created to review arbitration awards, “*the parties shall consider*” whether to subject awards of the TTIP to that mechanism. The idea of a bilateral appeal mechanism has found entry into the US BIT with Uruguay, Singapore and Chile. Each of them calls for further negotiations on the creation of an appeals process as part of the agreement dispute resolution provision. The evolution has begun.

The EU’s work on the TTIP takes into consideration the benefits of such a clause: “*The creation of an appellate mechanism might be, in principle, a welcome process of review of the rulings of ISDS tribunals, which are at present largely immune from any challenge. However, the aim of the Commission in proposing this mechanism is to “increase legitimacy” and “ensure uniformity.”*”¹⁰³

Even the ICSID has seemed to pursue this. The problem is that Article 53(1) of the ICSID Convention expressly prohibits appeal mechanisms in its awards, and amendment of the Convention does not seem likely since it requires the unanimous ratification of the contracting states.¹⁰⁴ However, the ICSID proposed

¹⁰¹ “Concept Paper: Investment in TTIP and beyond – the path for reform” (*European Commission*, 2015) 8 <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 21 May 2016

¹⁰² “Comprehensive economic and trade agreement (CETA) between Canada, of the one part, and the European Countries” (*European Commission*, 2015) Art. 8.29 Establishment of a multilateral investment tribunal and appellate mechanism, 63 <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 21 May 2016

¹⁰³ “Contribution” (*European Commission*, 29 June 2014) <<http://trade.ec.europa.eu/consultations-archive/isds/index.cfm?id=251079852152118014&type=2>> accessed 21 May 2016

¹⁰⁴

<https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>

a discussion paper in October 2004 for a change in the institution by introducing an appealing facility.¹⁰⁵ Such developments in ISDS toward appellate mechanism are among the most important ones. Recently, however, ICSID notified the 153 contracting parties of a will to evolve on 7 October 2016¹⁰⁶ as it will require two-third of consent of the administrative council to make a modification in some area of the rules.¹⁰⁷

B. THE CONSIDERATION OF THE ABANDONMENT OF THE CURRENT SYSTEM FOR A POTENTIAL ALTERNATIVE COURT.

This section outlines why there is a need to change the ICSID. The system is still young, but its importance has increased in the past decades. It is more and more criticized and neither the States nor the companies involved seem to be satisfied with it. As we mentioned earlier, individuals severely criticized a system that could fine their country for its engagement to a private investor. For some countries like Argentina, the simple fact of being sued is a cause for alarm and a reason to limit investors' access to international arbitration. But on the other hand, developments have not necessarily been in favor of investors.

South American countries make up a good example of some sort of deficiency in the system that could lead the TTIP to drop the ICSID if changes are not made. In 2008, Venezuela, Suriname, Guyana, Chile, Uruguay, Paraguay, Brazil, Argentina, Peru, Ecuador, Colombia, and Bolivia formed the Union of South American Nations (UNASUR).¹⁰⁸ The organization's goal is to promote regional integration on issues including democracy, education, energy, environment, infrastructure, and security and to eliminate social inequality and exclusion. UNASUR has an arbitration center that challenges the ICSID in the way that it will recognize the distinct nature of these emerging countries with their own social and economic situations.¹⁰⁹ Indeed, those countries have faced some issues that could actually be experienced by other

¹⁰⁵ ICSID Secretariat, "Possible improvement of the framework for ICSID arbitration" (*ICSID*, 22 October 2004) <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>> accessed 21 May 2016

¹⁰⁶ THE ICSID RULES AMENDMENT PROCESS <<https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf>> accessed on 20 June 2017

¹⁰⁷ Article 6, ICSID Convention

¹⁰⁸ "UNASUR: South American Organization" (Encyclopaedia Britannica, 2016) <<http://www.britannica.com/topic/UNASUR>> accessed 21 May 2016

¹⁰⁹ Silvia Karina Fiewwoni, "UNASUR Arbitration Centre: The present Situation and the Principal Characteristics of

states. For instance, the ICSID is problematic because article 54 of the Convention states that every award by the ICSID's arbitrator is binding and should be treated as an award by the courts of the contracting parties. However, Argentina's constitution provides a principle of equality and creates a need for Argentina's courts to review the ICSID judgment to avoid discrimination against domestic investors.

Moreover, some cases illustrate the inherent problem of the actual system of arbitrator's selection in the ICSID. In *EDF International S.A v Argentine Republic*,¹¹⁰ one of the arbitrators was also a director of UBS bank which owned a financial interest in the company, plaintiff in the case.¹¹¹ However, the decision states that such a corporate work interest is not relevant *per se*, the bias could only be minimal, and there was nothing suspect.¹¹²

The system of the ICSID as illustrated by the Argentinian example could be too lenient toward the arbitrator who carries an important burden and has to settle important disputes in both an economic and political sense. More than their impartiality, arbitrators have often taken too much liberty in dispute interpretation, which is a danger for the foreseeability of decisions and the fairness of the court.

Interpreting the U.S.A's Central American Free Trade Agreement (CAFTA), where the parties added an annex for the purpose of narrowing the vague States' obligation to provide a "*minimum standard of treatment*," in *Railroad Development Corporation (RDC) v Guatemala* did not feel bound by the annex signed by both governments. The arbitrators used an extensive interpretation of the "*minimum standard of treatment*" ruled by another ISDS.¹¹³ While it is understandable for arbitrators to look at the interpretation

Ecuador's Proposal" (ITN, 12 January 2012) para 12. <<https://www.iisd.org/itm/2012/01/12/unasur/>> accessed 21 May 2016 "Five years ago, some Latin American countries started a critical movement against the International Centre for Settlement of Investment Disputes (ICSID), the World Bank institution for arbitrating disputes between foreign investors and host states. They perceived that ICSID arbitration proceedings had become problematic due to a lack of transparency and a failure to address the broader needs of society."

¹¹⁰ *EDF International S.A. SAUR International S.A. León Participaciones Argentinas S.A. v. Argentina Republic*, ICSID Case No. ARB/03/23, Challenge decision (25 June 2008) <<http://www.italaw.com/sites/default/files/case-documents/ita0262.pdf>> accessed 21 May 2016

¹¹¹ Ibid 71 "The facts asserted by Respondent give no reason to suspect that Professor Kaufmann-Kohler would be biased in favor of Claimants. Her position as a nonexecutive director at UBS gives her no financial interest in any of the Claimant companies. Nor would she benefit in any way from an award in favor of Claimants"

¹¹² Ibid 97-134 "It follows the services performed by Professor Kaufmann-Kohler at UBS (Chair of the Nominating Committee) create no risk that she will be unreliable to exercise independent judgment in this case"

¹¹³ It is clear with this document that the U.S government attempted to make clear that the "minimum standard of

given to concepts in other decisions, it is an altogether different matter to simply ignore the written clause, law of the parties. Yet, the RDC ruling is not the only one. In *TECO Guatemala Holding v. Guatemala*,¹¹⁴ another CAFTA case, the tribunal ignored the annex once more—an annex that was meant to narrow the “*minimum standard of treatment*” - and instead used a broader interpretation of the obligation from the same ICSID case used by the RDC tribunal.¹¹⁵

The system is also inherently fragile because of its foundations. Some argue that it is discriminatory against local investors and companies.¹¹⁶ Most legal systems base their operation on equality and absence of discrimination, as we could briefly see with Argentina’s Constitution. An individual has the substantial right to bring his case to court. ISDS and especially ICSID are based on differential access. The system is built around the protection of foreign investors only. One party will be the host State, and the other will be a national of another contracting State. The only exception to that rule is that if a foreign investor operates through a company that is registered in the host States, it is possible for the investor and the host state to agree that the company will be treated as a foreign investor when it is under the foreign control.¹¹⁷ Some

treatment” has to be understood in a narrowness way. *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Submission of the United States of America (January 31, 2012), para 3. <http://www.italaw.com/sites/default/files/case-documents/ita0709_0.pdf> accessed 21 May 2016

¹¹⁴ *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (December 19, 2013) para 455 <<http://italaw.com/sites/default/files/case-documents/italaw3035.pdf>> accessed 21 May 2016

¹¹⁵ “Secret TPP Investment Chapter Unveiled: It’s Worse than We Thought” (*Public citizen*, November 2015) 11<<https://www.citizen.org/documents/analysis-tpp-investment-chapter-november-2015.pdf>> accessed 21 May 2016
“*Though this annex was first included in CAFTA, in two of the first investor-state cases brought under CAFTA – Railroad Development Corporation (RDC) v. Guatemala and TECO Guatemala Holdings v. Guatemala – the tribunals simply ignored the annex’s attempt to narrow the definition of “minimum standard of treatment” with a requirement that tribunals examine the actual practice of nations. Instead, the RDC and TECO tribunals both relied on an expansive interpretation of the standard concocted by a previous ISDS tribunal, which included an obligation to honor investors’ expectations*”

¹¹⁶ Judith Resnik, Cruz Reynoso, Honorable H. Lee Sarokin, Joseph E. Stiglitz and Laurence H. Tribe, “5 Leading Legal Scholars on TPP: We Write Out of Grave Concern” (*RSN*, 9 May 2015) <https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphics/oppose_ISDS_Letter.pdf> accessed 21 May 2016 “*Our legal system rests on the conviction that every individual, regardless of wealth or power, has an equal right to bring a case to court. To protect and uphold the rule of law, our ideals of fairness and justice must apply in all situations and equally to everyone. ISDS, in contrast, is a system built on differential access. ISDS provides a separate legal system available only to certain investors who are authorized to exit the American legal system. Only foreign investors may bring claims under ISDS provisions. This option is not offered to nations, domestic investors, or civil society groups alleging violations of treaty obligations*”

¹¹⁷ Article 25 2 (b) states that “*National of another contracting state*” means: any juridical person which had the

individuals and companies find these criteria too strict and inherently discriminatory against the local investors.

However, it could be the answer to the arguments that the ICSID offers a protection to investors inherently weakened by the fact of having to settle in a foreign country. The procedure offered by the ICSID is there to palliate the difficulty of being sued in front of a foreign jurisdiction without the power to invoke its original country's law. Foreign investors who seek the protection of the ICSID can invest considerable capital in the host country and a protection for their peculiar status is necessary. Also, the ICSID system permits to avoid diplomatic claims that could have political consequences between countries.

The third generation treaty will be the impetus needed for the ISDS, and especially the ICSID, to evolve. The power is currently in the hand of the drafters. Indeed the ICSID conventions, the Free Trade Agreements), or other international treaties are basically based on contract law and the way to modify the treaty will come through the draft. Some authors, like Brian Mercurio, believe that threat can be neutralized by the drafting of the treaty as well.¹¹⁸

In the recent case filed by tobacco manufacturer Philip Morris,¹¹⁹ the company challenged restrictions on the advertising and packaging of cigarettes (which is argued by the state's defendant, to implement the World Health Organization's Framework Convention on Tobacco Control) in Uruguay and Australia, on the basis of an infringement on the company's intellectual property rights. The new concept developed with that case is that investors, before this, have never linked intellectual property right to International Investment

nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention." <<https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA-chap02.htm>> accessed 21 May 2016

¹¹⁸ Bryan Mercurio, "International investment agreements and public health: neutralizing

a threat through treaty drafting" (2014) 92 Bulletin of the World Health Organization 465 <<http://www.who.int/bulletin/volumes/92/7/13-130955.pdf>> accessed 21 May 2016 "The article seeks to engage members of the public health community as campaigners not against IIAs but as advocates of better treaty drafting to ensure that IIAs do not infringe upon the right of a nation to take non-discriminatory measures for the promotion and protection of the health of their populations."

¹¹⁹ Philip MBS. *Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay) <<http://www.italaw.com/cases/460>> accessed 21 May 2016

Agreement. This sort of claim, unfortunately, does not serve the international arbitration mechanism's reputation, since the state tried to support and develop public health. However, the reasoning of Philip Morris does make sense: the company is claiming that the restriction on cigarette advertising curtails its rights and destroys the value of its investment so severely that the measures are equal to indirect expropriation. Mercurio explains that the states can write and agree on an addendum to a specified limit, broaden or explain the interpretation that must be given to the text and the extent of protection given to the investor.

For instance, the U.S.A. started to use language that could have avoided the Philip Morris claim:

Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.¹²⁰

V. CONCLUSION

The third generation treaty that is the TTIP is struggling with a lot of internal challenges that the drafters will have to resolve. It is important for them to go further the internal difficulties of their system because the treaty offers a lot of opportunities for the drafters to have an important impact in the domain of ISDS. It is important to keep in mind that the ICSID Convention has been conceived in the framework of the World Bank and that the Preamble's first sentence evokes a "need for international cooperation for economic development and the role of private international investment."¹²¹ The ICSID answers a need felt by both the States parties and the investors. It is not a one-sided jurisdiction. Even though the amount of damages that could be asked to be paid to the government at fault can be gargantuan, the court is not *per se* in favor of the investors. The importance of the court has grown over the years, and there is a call for more legitimacy, transparency and appellate systems. The TTIP could answer those requests, especially with the particular new politics of the EU regarding public involvement. Since the system of the ICSID is frozen in the

¹²⁰ "United States–Korea Free Trade Agreement" (Office of the United States trade Representative: Executive office of the president, 15 March 2012) Chapter Eleven: Investment- Annex 11-B 3(b) <<http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>> accessed 21 May 2016

¹²¹ ICSID Preamble <<https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA-preamble.htm>> accessed on 26 May 2016

unanimous ratification requirement of all member States, the evolution will come through treaties, and especially through the Third Generation Treaty in preparation: the TTIP. Due to its importance on diverse topics, the dispute resolution mechanism will be specifically studied and efficient. By its impact on third parties, and its influence on third parties that could in the future negotiate such agreements, which are the future of international trade, the new concept developed by the TTIP will spread into other international investment agreements.