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Confronting Fear to Reality: Analysing the European Union TTIP Negotiating Positions and the Criticisms Raised by Civil Society

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INTRODUCTION

‘TTIP threatens the very values underpinning our societies.’

(Greenpeace International, February 2016)

‘The US-EU trade deal is a Trojan horse treaty; a dangerous deal that puts big business ahead of our society, health and environment.’

(Friends of the Earth Europe, March 2016)

‘Safety regulations, workers’ rights, environmental protection rules and food standards regulations are all threatened by TTIP.’

(Global Justice Now, November 2015)

‘TTIP is a challenge to democracy.’

(Democracy International, February 2015)

These are just few of the most recurrent sentences and slogans permeating the actual debate on the Transatlantic Trade and Investment Partnership (TTIP) being negotiated between the European Union and United States. If successfully concluded, the TTIP will be the biggest free trade area ever existed affecting about one quarter of global trade.

Since the starting of negotiations, TTIP has attracted fierce criticisms from a large part of civil society: non-governmental organizations, trade unions, associations, etc. They firmly oppose the conclusion of such a treaty between EU and US because, in their opinion, it will engender disastrous consequences for the European Union and its citizens affecting negatively the European environmental, social, economic and political standards and values.

On the other side, there are the Council of the European Union and the European Commission pushing for the conclusion of a comprehensive and ambitious transatlantic partnership to boost the economy, create jobs and shape global standards and values.

Moved by the desire to shed light on such controversial treaty in order to better understand what is at stake and what there is behind the negotiations of this ambitious transatlantic free trade area, I dedicated the present work to the opposition that sees on one side the Civil Society accusing the European Institutions to compromise the fundamentals of the EU and, on the other side, the European Commission trying to overcome such criticisms and getting to the end line of the negotiations.

Therefore, I posed myself the following research question which guided me in drawing up the present document: **In relation to the European Union negotiating positions, are Civil Society’s concerns about TTIP, seen as a menace to the European high level environmental, social, economic and political standards and values, well founded?**

To find an answer to this research question I focused my attention on the different reasons which brought the Civil Society to harshly campaign against TTIP and on those supported by the European Commission and the Council to defend and promote the conclusion of it. These opposite perspectives are studied through the lens of a qualitative methodology analysing official documents, specific literature, position papers, case studies, and interviews which usefully contributed to deeply comprehend parties’ position on the Transatlantic Trade and Investment Partnership issue.

During the research other interesting questions interconnected one another arose on which I also focused my attention, enriching the purpose of the work and enlarging the field of study, such as: Is the European

Commission taking into account civil society claims in the negotiating process? Is there any possibility to reach a compromise between them? Is civil society participating to the negotiating process?

The present work is structured in three chapters, each of them aims at explaining the position assumed by those actors taken into account for the purpose of the thesis, respectively: 1. Council of the EU; 2. civil society; 3. European Commission.

The first chapter starts making a brief historical excursus of EU-US relations, describing the key institutional links that since about sixty years have been established between them, creating a long-standing and solid political and economic partnership. Analysing such a relation, the chapter continues mentioning the decision of leaders of both countries to further strengthen their relation through a transatlantic treaty, creating on purpose a High Level Working Group (HLWG) to explore new ways of cooperation. Then it introduces the main findings of the final report released by this group, consisting in a series of recommendations that negotiators should follow for reaching an ambitious transatlantic partnership. But the very core of the first section is represented by the deep analyses of the Council negotiating mandate which, departing from those recommendations made by the HLWG, dictated the 'red lines' with which the European Commission must comply in negotiating TTIP provisions, a framework delimiting the areas of negotiations.

The second chapter analyses the civil society perspective. It begins introducing those civil society organizations which are in the forefront of the campaign against the TTIP, firstly taking into account their means of action. Indeed, it focuses on the online platform 'StopTTIP.org' created by them which accounts as the largest anti-TTIP front of the European Union. Then, the chapter continues analysing the majeure criticisms raised by civil society, carefully describing their concerns towards those critical issues involved in the negotiations. To better understanding their worries, I interviewed one of the main organiser guiding the anti-TTIP campaign whose arguments represent a good tool for having an effective overview of civil society perspective.

The third chapter describes the perspective of the European Commission, since it is charged to carry out the negotiations on behalf of the EU. This section analyses the behaviour assumed by the European Commission vis-à-vis civil society's claims, studying its attitude to take into considerations their will and requests and to resolve their discontents. In this chapter the lens is particularly pointed towards the position papers and proposals for legal text on TTIP tabled during the negotiation rounds by the Commission in order to understand the positions and principles followed by the European Union for such a treaty.

In conclusion the present work aims at matching the negotiating positions put forward by the European Commission through the textual proposals with the criticisms raised by civil society in order to find an answer to my research question.

CHAPTER ONE:

1. COMPREHENSIVE AND AMBITIOUS PARTNERSHIP

1.1. HISTORY OF EU-US RELATIONS: ORIGINS AND EVOLUTIONS

The bilateral relation between United States and European Union is one of the most important relationship in the world, representing the biggest economic and military powers having a leading role in the international political relations. In economic terms, they account as the largest and wealthiest market in the world: '70% of outward stock and 60% of inward stock of global Foreign Direct Investment (FDI); over 35% of global GDP in terms of purchasing power; a quarter of global exports; 30% of global imports'.¹

This relationship date back to 1953, when the US and the old European Coal and Steel Community started a series of diplomatic meetings which brought to the establishment of the first US mission in Luxemburg on 1956, then replaced by another mission on 1961 in Brussel, and to the establishment of a European observer in Washington D.C. on 1954,² a delegation of the European Commission which reports on US developments to the headquarter in Brussel. But it was only on 1990 when for the first time the EU-US relationship was formalised through the 'Transatlantic Declaration' which prepared the ground for a greater cooperation on economy, education, science and culture areas. Since then the European Community and United States became more solid international partners in many areas, beyond trade matters. Indeed, on 3 December 1995 the 'New Transatlantic Agenda' (NTA) was issued, establishing four fields of cooperation³:

- Promotion of peace and stability, democracy and development around the world;
- Response to global challenges;
- Expansion of world trade and closer economic relations;
- Build 'bridges' across the Atlantic;

It was then followed by other important meetings aiming at further strengthening their cooperation, particularly the EU-US Summit in London on 1998 which laid the basis of the 'Transatlantic Economic Partnership' (TEP), and the Summit in Brussels on 2005 about 'EU-US initiative to enhance transatlantic economic integration and growth'. In line with these initiatives on 2007 EU and US created the Transatlantic Economic Council (TEC) enlarging their cooperation to comprehend a broad range of areas, such as: regulatory cooperation, capital markets, innovation, trade and transport security, energy

¹ Daniel S. Hamilton and Joseph P. Quinlan; 'The Transatlantic Economy 2016: Annual Survey of Jobs, Trade and Investment between the United States and Europe'; Centre for Transatlantic Relations Johns Hopkins University | Paul H. Nitze School of Advanced International Studies, 2016.

² Delegation of the European Commission to the United States; 'The European Union and the United States: Global partners, global responsibilities', 2006; Available here: https://eeas.europa.eu/us/docs/infopack_06_en.pdf

³ Ibidem.

efficiency, intellectual property rights, investment, competition, public procurement and services.⁴ Today, as a result, the European Union and the United States are each other's main trading partners in goods and services and, as mentioned above, account for the largest bilateral trade relationship in the world. This situation shows the strong interdependence existing between these two economies.

Thus, in strengthening their bilateral relations UE and US engaged in pursuing, reinforcing and spreading those values and principles on which both societies are built, confirming their willingness to spread these values and principles worldwide: for instance the foreign policy objectives pursued by the European Union are, between the others, the promotion of democracy, the protection of human rights and the promotion of sustainable development. Therefore, in one hand these initiatives aim at increasing security, stability and prosperity at global level and, on the other hand, at reinforcing prosperity and well-being on both sides of the Atlantic, making EU-US partnership more fruitful and mutually beneficial.

1.1.1. HIGH LEVEL WORKING GROUP ON JOBS AND GROWTH (HLWG) EXPLORES DEEPER COOPERATION

During the annual Transatlantic Economic Council summit meeting of 29 November 2011, EU and US commissioned a study to explore a closer economic partnership. To this aim, they established a common High Level Working Group on Jobs and Growth (HLWG), led by the US Trade Representative Ron Kirk and the EU Trade Commissioner Karel De Gucht, 'to identifying new ways of strengthening [their] economic relationship and developing its full potential' and therefore to envisage 'policies and measures to increase EU-US Trade and Investment to support mutually beneficial job creation, economic growth and international competitiveness'.⁵

In the document establishing the HLWG, the leaders of European Union and United States listed the areas on which the study group had to work to find new ways for a closer cooperation. These concerned:⁶

- Conventional barriers to trade in goods (tariffs and tariff-rate quotas);
- Reduction, elimination or prevention of barriers to trade in goods, services, and investments;
- Reduction, elimination or prevention of unnecessary non-tariff barriers to trade;
- Opportunities for enhancing the compatibility of regulations and standards;
- Enhancing cooperation for the development of rules and principles on global issues of common concern and also for the achievement of shared economic goals relating to third countries;

The HWLG issued its final report on February 2013, where it recommends to leaders of both sides to 'initiate as soon as possible the formal domestic procedures necessary to launch negotiations on a

⁴ Council of the European Union, Brussels, 20 June 2005; 'EU-U.S. Declaration – Initiative to Enhance Transatlantic Economic Integration and Growth Washington', 10305/05 (Press 159); Available here: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/er/85383.pdf

⁵ EU-US Summit, Washington, 28 November 2011; 'Fact sheet on High-Level Working Group on Jobs and Growth'; MEMO/11/843; Available here: [http://europa.eu/rapid/press-release MEMO-11-843 en.htm](http://europa.eu/rapid/press-release_MEMO-11-843_en.htm)

⁶ Ibidem.

comprehensive trade and investment agreement'.⁷ The HLWG's report is characterised by recommendations about the topics and fields that should be debated during the negotiations for the eventual transatlantic agreement. Such an agreement, as the HLWG stated, would need to break ground to create additional bilateral market openings and establish new trade rules that are globally relevant, suggesting to US and EU to be 'creative, flexible and open-minded in negotiating solutions that respond to the specific characteristics of the transatlantic economic partnership.'⁸

The High Level Working Group suggested to go beyond what both the European Union and the United States have ever achieved in previous Free Trade Agreements (FTAs) with other partners in order to contribute also to the development of global rules. According to the final report, the parties should negotiate on three main areas for reaching a comprehensive trade and investments agreement:

1. Market access in goods, services, investment and government procurement;
2. Regulatory Issues and Non-tariff barriers;
3. Rules and principles on Intellectual Property Rights (IPR), labour, environment, customs and trade facilitation, competition policy, state owned enterprises and other areas of cooperation to address shared global challenges and opportunities.

Some days after the conclusion of the HLWG works, on 13 February 2013 President Barack Obama and leaders of the European Union committed themselves to launch negotiations on a Transatlantic Trade and Investment Partnership as soon as possible. Indeed they started to pave the way towards such deal pursuing several 'confidence building' measures, demonstrating that each side was ready to invest sufficient political capital in the talks to get to the finish line. Some interpreted these efforts as 'de facto preconditions for entering into trade negotiations.'⁹

Therefore, US and EU started the internal procedures to launch negotiations for TTIP: on the American side, on 20 March 2013, the Obama Administration formally communicated to the Congress its willingness to negotiate the treaty with EU, which was followed by a consultation period for Congress and stakeholders groups to comment on the proposed negotiations before the Administration could begin to negotiate; on the EU side, on 12 March 2013, the European Commission drafted a negotiation mandate for TTIP which was transmitted to the Council of the European Union who adopted and approved the negotiating directives only on June 2013 giving the green light to the European Commission to start the negotiations. The European Parliament also issued a resolution on 23 May 2013 welcoming the results of the HLWG final report and fully endorsed the recommendation to launch soon the negotiations, believing that 'the strategic importance of the EU-US economic relationship should be reaffirmed and deepened, and that EU and US should design common approaches to global trade, investment and trade-related issues such as standards, norms and regulations, in order to develop

⁷High Level Working Group on Jobs and Growth, 11 February 2013, Final Report. Available here: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf

⁸ Ibidem.

⁹ Jeffrey J. Schott and Cathleen Cimino, March 2013, 'Crafting a Transatlantic Trade and Investment Partnership: What Can Be Done', Peterson Institute for International Economics, N. PB13-8.

a broader transatlantic vision and a common set of strategic goals.’¹⁰ Thus, after US and EU completed all their internal procedures and consultations, negotiations were officially launched on 17 June 2013.

1.2. EUROPEAN COUNCIL MANDATE

Based on the main recommendations made by the HLWG, the EU directives for negotiations provided the working ground for the European Commission’s delegations vis-à-vis the American counterpart. The Council of the EU negotiating mandate¹¹ has forty-six paragraphs divided into two sections: the first one concerning the scope, principles and objectives that such a comprehensive agreement shall include; while the second section contains the substantial provisions that the Commission has to negotiate, which is in turn divided into three main areas: Market Access, Regulatory Issues and Non-Tariff Barriers, and Rules.

1.2.1. FIRST SECTION: SCOPE, PRINCIPLES AND OBJECTIVES

In the first section of the mandate, the directives set the scope for an ambitious, comprehensive and balanced agreement containing provisions on ‘trade and trade-related areas’¹² aiming to a ‘reciprocal liberalisation of trade in goods and services’,¹³ and ‘based on common values’.¹⁴ These values are carefully mentioned in the negotiating mandate, stressing that they must be compatible with the principles and objectives of the European Union’s external action, such as: the protection of human rights, fundamental freedoms, democracy and rule of law, sustainable development in its economic, social and environmental dimensions, the protection of health, safety, labour, consumers and environment, and the promotion of cultural diversity. The mandate makes also explicitly reference to the principle concerning the involvement of interested parties, from private sector to civil society organizations which must be taken into account during the negotiation process. Pursuing this scope and respecting these principles, the agreement has the objective to:

- Increase trade and investments between EU and US by creating a truly transatlantic market place, generating new economic opportunities for the creation of jobs and growth, and setting the path for global standards;
- Promote high levels of protection for the environment, labour and consumers, consistent with the EU acquis and Member States’ legislation;
- Preserve Union’s and Member States’ cultural and linguistic diversity, protecting their capacity to implement policies and measures for developments in this sector.

¹⁰ European Parliament, ‘Resolution of on EU trade and investment negotiations with the United States of America’ 2013/2558(RSP), 23 May 2013. Available here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0227+0+DOC+XML+V0//EN>

¹¹ Council of the European Union; 14 June, 2013; ‘Directives for the negotiation on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, Between the European Union and the United States of America’.

¹² Ibidem; paragraph 1.

¹³ Ibidem; paragraph 3.

¹⁴ Ibidem; paragraph 1.

Thus, the European Commission has the task to negotiate on trade and trade-related issues and pursue these objectives, without compromising those principles constituting the fundamentals of the European Union.

1.2.2. SECOND SECTION: MARKET ACCESS, REGULATORY COOPERATION AND RULES

The second section of the mandate regards in concrete the substantial provisions to negotiate, listing the dispositions to introduce in TTIP for a greater transatlantic economic cooperation. As already suggested by the High Level Working Group, the directives enshrined in the Council mandate concern three main areas: Market Access, Regulatory Cooperation and Rules.

1.2.2.1. MARKET ACCESS

In the words of the European Commission the part concerning Market Access, in the same way as other EU trade deals, would help European companies, small and large, to get better access to the American market. Cutting customs tariffs and duties on goods and services, bidding for public contracts, investing in the US and the possibility to easily protect the European products, determining when a product is ‘Made in Europe’, will benefit a lot to European companies which in consequence would be able to export more in the United States. Therefore, the EU aims at opening the market for trade in goods, services, investments and public procurements, as described below.

Concerning market access for **trade in goods**, since customs duties make it more expensive for EU firms who face high costs when exporting in the United States, the European Commission is negotiating the removal of these customs duties and other barriers to trade in order to stimulate the economy, create jobs and help EU companies grow and compete worldwide. To this regard, paragraph ten of the mandate indicates that the main goal in this area is ‘to eliminate all duties on bilateral trade, with the shared objective of achieving a substantial elimination of tariffs upon entry into force and a phasing out of all but the most sensitive tariffs in a short frame. In the course of negotiations, both Parties will consider options for the treatment of the most sensitive products, including tariff rate quotas. All customs duties, taxes, fees, or charges on export and quantitative restrictions or authorisation requirements on exports to the other Party which are not justified by exceptions under the agreement shall be abolished upon the application of the agreement’.¹⁵ Under this directive the European negotiators are called to consider options for the treatment of the most sensitive products and where the removal of duties could immediately pose difficulties for European firms, the EU would agree on a longer phase-out period to allow them to adapt, and where the European firms would still face problems, even in the case of a longer phase-out period, the market will only partially be open.¹⁶

It has to be said that the average of customs duties on goods between EU and US are already low. Indeed, the simple average of all customs duties is 5.3 per cent for US products exported in Europe, and 3.5 per

¹⁵ Ibidem.

¹⁶ European Commission; February 2016; ‘Inside the TTIP, The Transatlantic Trade and Investment Partnership, Towards an EU-US trade deal.’

cent for European products exported in the US. In both countries at least 25 percent of all imported products are not subject to import duties.¹⁷ Therefore gains from duties elimination may appear to be not significant. Nevertheless, this low average hides the high level of tariffs still existent in some sectors: tariff peaks may reach 350 percent in the United States and 74.9 percent in the EU for products import-sensitive categories such as dairy products, sugar and confectionery, beverages and tobacco, fish and fish products, textiles and apparel. So further elimination and reduction of tariffs on these products could trigger considerable economic gains.¹⁸

A key provision, as enounced in paragraph eleven, concerns **‘Rules of Origin’** which aim at creating user-friendly rules to guarantee and specify the origins of the products benefiting from TTIP, indicating when they are produced in Europe or in the United States. Such negotiating directive pushes negotiators to reconcile ‘EU and US approaches to rules of origin in a manner that facilitates trade between Parties and that takes into account the rules of origin of the EU and the interests of European producers.’ As introduced in all FTAs, the rules of origin are useful to determine the national source of a product, and guarantee that only the products made by the parties can benefit from these agreements, being excluded from paying customs duties, excluding goods coming from other countries. Thus, paragraph eleven aims at creating a simple and common way to determine where a product is made, developing common rules to prove their origins and establishing appropriate customs checks.

Under paragraph twelve, the Council of EU calls for the inclusion of articles XX and XXI of the General Agreement on Tariffs and Trade (GATT)¹⁹ in the Transatlantic Trade and Investment Partnership. These articles refers to general exceptions to market access, more precisely article XX states that the agreement shall not compromise the power of the parties to adopt measures necessary to protect public moral, human, animal or plant life or health, or measures necessary to protect the national treasure of artistic, historic or archaeological value, etc. While article XXI concerns the market access exceptions related to security issues, it is to say that TTIP shall not contain provisions which prevent the parties to safeguard their security interests.

Concluding paragraphs in the part related to trade in goods aim at including provisions that give the possibility to EU and US to introduce measures protecting and safeguarding national industries. In fact, paragraphs thirteen and fourteen go in this direction stating that ‘the Agreement should include a clause on anti-dumping and countervailing measures, acknowledging that any Parties may take appropriate measures against dumping and/or countervailing subsidies’. Moreover, TTIP ‘should contain a bilateral safeguard clause by which either Party may remove, in part or in full, preferences where rise in imports of a product from the other Party is causing or threatening to cause serious injury to its domestic industry.’ Therefore, the treaty should allow the parties to take action to protect their domestic industries

¹⁷ World Trade Organization (WTO), World Tariffs Profiles, 2015.

¹⁸ Shayerah Ilias Akthar and Vivian C. Jones, June 2014; ‘Proposed Transatlantic Trade and Investment Partnership (T-TIP): in Brief’; Congressional Research Service, p. 6.

¹⁹ World Trade Organization (WTO); ‘The General Agreement on Tariffs and Trade’; Geneva, 1947. Available here: https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

not only providing a longer phasing-out of tariffs for the most sensitive products or limiting the market access as stated in the paragraph ten, but even in the case where the market has been already open and it is damaging their domestic industry they can act appropriately to protect their own products. Anyway, the mandate recommends to establish on purpose a regular dialogue on trade defence matters.

In regard to the market access related to **trade in services** the Treaty should, in one hand, ensure that EU services companies can compete in the United States on the same terms as US firms and, in the other hand, safeguard EU governments' right to run public services just as they wish. As for trade in goods, EU and US export each other a lot of services but they firms still face many hurdles. Services are the backbone of both economies, for instance services in the EU economy account for about sixty percent. Thus, negotiating directives on market access for trade in services, listed from paragraph fifteen to paragraph twenty-one of the mandate, aim to 'bind the existing autonomous level of liberalisation of both Parties at the highest level of liberalisation captured in existing FTAs.' Some analysts suggested that it would be better for the two sides to learn from the success of recent comprehensive bilateral free trade agreements, notably the accords that the European Union and the United States have concluded with South Korea, using them as the starting point for negotiations,²⁰ but at the same time going beyond 'achieving also new market access by tackling remaining long-standing market access barriers'. Nevertheless the Council of EU recognise the sensitive nature of certain sectors, excluding them from negotiations, as those 'services supplied in the exercise of governmental authority as defined by Article I.3 of GATS',²¹ that is to say those services that are supplied neither on a commercial basis nor in competition with other suppliers, such as: public health and education, water distribution, social services and TV, radio and films.²² The sector concerning audio-visuals services, considered as culturally sensitive, has been put out of the table due to opposition of some European Member States, especially France.²³

The mandate also indicates to the European Commission to negotiate 'a framework to facilitate mutual recognition of professional qualifications',²⁴ enabling professionals to enter more easily in the US territory and to practice their work on either side of the Atlantic. In doing so the Commission has to pay attention that any provisions in the Agreement will prevent 'the Parties from applying national laws, regulations and requirements regarding entry and stay [...] The EU and Member States' laws, regulations and requirements regarding work and labour shall continue to apply.'²⁵

The chapter on market access continues with the directives aiming at open the **investments market** which, as the trade in goods and services, is already largely open with the level of Foreign Direct

²⁰See Schott Jeffrey and Cimino Cathleen, March 2013.

²¹ European negotiating mandate; paragraph 20.

²² World Trade Organization, 1995; 'General Agreement on Trade in Services'.

²³ See Shayerah Ilias Akthar and Vivian C. Jones, June 2014, p. 6.

²⁴ European negotiating mandate; paragraph 17.

²⁵ European negotiation mandate; paragraph 18.

Investment between US and EU rather high: bilateral FDI stock stood at about €2.400 billion in 2011.²⁶ Notwithstanding, TTIP should provide new opportunities for companies of both countries to invest in each other market ensuring them a level playing field. Paragraph twenty-two states that ‘the aim of negotiation on investment will be to negotiate investment liberalisation and protection provisions [...] on the basis of the highest levels of liberalisation and highest standard of protection that both Parties have negotiated to date’.²⁷ To this regard, it is suggested that US may use as starting point the provisions granted in the US-Korea FTA relating to investment protection, while EU may use the investment protection chapter of EU-Singapore FTA, because EU-Korea FTA does not have a separate investment chapter, since investment protection is already enshrined in the Bilateral Investment Treaty (BIT) between South Korea and EU Member States.²⁸

Well conscious about the problem arising from the introduction of investment protection and investor-to-state dispute settlement system in TTIP, the Council continues in the same paragraph stating that ‘after prior consultation with Member States and in accordance with the EU Treaties the inclusion of investment protection and investor-to-state dispute settlement will depend on whether a satisfactory solution [...] is achieved.’ The ISDS aims at giving each other’s investors more certainty when they invest money on the other side’s market, ensuring them a treatment in line with some basic principles known as ‘standards of investment protection’ as listed in the paragraph twenty-three of the mandate:

- Non-discrimination against each other’s investors on the ground of nationality;
- Fair and equitable treatment (FTE):
- Prohibition of unlawful expropriation of investment;
- Free transfer of funds;
- Etc.

Generally speaking, the existing treaties guarantee protection to investors through the investor-to-state dispute settlement system which give them the possibility to bring the host country before an international arbitration and claim damages if these standards of protection are not respected, providing a rapid and effective means of settling disagreements when a country has not acted in conformity with its international obligations.²⁹ But, as specified below, the EU wants to use the TTIP as a starting point for creating a new way of protecting investments, setting up a new Investment Court System (ICS) in order to make sure in one hand that governments respect these basic guarantees mentioned above and, in the other hand, enabling governments and investors to resolve any potential disputes that do arise

²⁶ European Commission, 2013; ‘Impact Assessment Report on the Future of EU-US trade relations’; Staff Working Document, Strasbourg. Available here:

http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150759.pdf

²⁷ European Negotiating mandate; paragraph 22.

²⁸ Seshadri V.S., 2013; ‘Transatlantic Trade and Investment Partnership’; Research and Information System for Developing Countries; Discussion Paper #185, p. 8.

²⁹ European Commission on Dispute Settlement, 4 August 2016, Available here:

<http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/>

between them in a fair, transparent and impartial way.³⁰ This mechanism shall be characterised by transparency, independence of arbitrators and predictability of decisions, containing also ‘safeguards against manifestly unjustified and frivolous claims’. Anyway, as explicitly provided by the mandate, the inclusion of investment protection clause in TTIP ‘should not prejudice the right of EU and Member States to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives, such as social, environmental, security, stability and financial system, public health and safety in a non-discriminatory manner. The agreement should respect the policies of the EU and its Member States for the promotion and protection of cultural diversity.’³¹

Finally, the last paragraph of the chapter on market access foresees the liberalisation of **public procurement**, aiming at enable EU firms to bid for more public contracts in the United States. The EU and US have the largest public contracts markets in the world and have rules aimed at ensuring that public money is spent in an efficient, transparent and non-discriminatory way. The United States and the European Union are members of the Government Procurement Agreement (GPA) under the WTO that has the objective to open government procurement markets among its parties.³² According to a report,³³ the EU has larger GPA commitments than the US: indeed the EU has open €340 billion of its public procurement market versus only €40 billion of the US one. Thus, TTIP should ensure an ‘enhanced mutual access to public procurement markets at all administrative levels (national, regional and local) [...] ensuring treatment no less favourable than that accorded to locally established suppliers.’ Removing the remaining obstacles at all administrative levels, federal, sub-federal, local authorities and public entities, and ensuring that EU and US firms equally bid for public tenders, could offer better opportunities to both companies and public authorities: companies can increase the demand for their products or services, create opportunities for growth and safeguard existing jobs and creating new ones; public authorities can obtain greater economic efficiency, good governance and more offers in the market. Moreover, the European delegation should negotiate the removal of ‘barriers having a negative impact on each other’s public procurement markets, including local content or local production requirements, in particular Buy America(n) provisions, [...] increasing the market access.’ Indeed, the access of European companies to US public procurement market is further restricted because of the wide use of ‘Buy American’ provisions, creating legal uncertainty for their access since it requires that American state and local governments prefer US made material in its purchase.

³⁰ European Commission; February 2016; ‘Inside the TTIP, The Transatlantic Trade and Investment Partnership, Towards an EU-US trade deal’; p. 41.

³¹ European negotiating mandate; paragraph 23.

³² World Trade Organization on Agreement on Public Procurement. Available here: https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

³³ Business Europe, March 2012; ‘Jobs and Growth through a Transatlantic Economic and Trade Partnership’, p.12. Available Here: <https://www.buinessurope.eu/sites/buseur/files/media/imported/2012-00391-E.pdf>

1.2.2.2. REGULATORY ISSUES AND NON-TARIFF BARRIERS (NTBs)

The second section of the European mandate proposes a cooperation between EU and US to make regulations converge, in order to render them more compatible with each other. Since complying with different regulations causes time wasting and costly procedures for both countries' companies, especially the smaller ones, the regulatory cooperation should remove 'unnecessary obstacles to trade and investment, including existing Non-Tariff Barriers (NTBs) [...] by reaching an ambitious level of regulatory compatibility for goods and services, including through mutual recognition, harmonisation and through enhanced cooperation between regulators.'³⁴ This is regarded by many stakeholders as the core of TTIP negotiations, and potentially the part which will determine the 'making or breaking' of the agreement.³⁵ Indeed, it will concern key sectors of both economies, such as automobiles, chemicals, cosmetics, information communication technologies, medical devices, pesticides, and pharmaceutical. More importantly, paragraph twenty-five claims that the regulatory cooperation shall not compromise the right to regulate of the parties 'in accordance with the level of health, safety, consumer, labour and environmental protection and cultural diversity that each side deems appropriate'.

Concerning **Non-Tariff Barriers**, they play a stronger trade-restricting role because compared to tariff duties NTBs are quantitatively higher. Thus, a greater regulatory cooperation and compatibility could bring significant economic gains. For instance, while European exports to US of products as alcohol and tobacco face about fourteen percent of additional costs, these rise till fifty percent for US alcohol and tobacco exported in the EU; and yet chemical industries of both sides of the Atlantic facing about 112 percent of additional costs when exporting each other.³⁶ Hence, under the chapter on regulatory cooperation the negotiators should introduce provisions regarding Sanitary and Phytosanitary measures (SPS), Technical Barrier to Trade (TBT), regulatory coherence and sectoral provisions for dealing with specific sectors.

Sanitary and Phytosanitary Measures concern the prevention of the risk that import of animals, plant materials and food products may pose to our livestock, plants and animals. International trade agreements³⁷ provide for sanitary and phytosanitary measures to ensure, in one hand, that strict health and safety regulations are being respected and, on the other hand, that these measures are not used as a form of protectionism by countries. Thus, as indicated in the mandate, the negotiations should start from and go beyond the current WTO SPS agreement and the existing veterinary agreement, introducing also disciplines as regards to plant health. To this aim, the parties should provide to 'set up a bilateral forum for improved dialogue and cooperation on SPS issues.'³⁸

³⁴ European negotiating mandate; paragraph 25.

³⁵ See Shayerah Ilias Akthar and Vivian C. Jones, June 2014, p. 7.

³⁶ Gabriel J. Felbermayr and Mario Larch, 2013; 'The Transatlantic Trade and Investment Partnership (TTIP): Potential, Problems and Perspectives; CESifo Forum 2/2013 (June); p.53.

³⁷The Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement") entered into force with the establishment of the World Trade Organization on 1 January 1995.

³⁸ European Negotiating Mandate; paragraph 25.

Currently, EU and US have two different methods to determine the safety and health of products: the EU relies more on the precautionary principle,³⁹ while the US on science based determinations. Albeit both countries ensure high standards of protection they use different means, leading to costs duplication checks on products that have already been proved to be safe. Thus, the compliance of regulations in this field can have a big impact on trade. To this regard, paragraph twenty-five called for the inclusion of SPS measures provisions ‘based on science and on international standards or scientific risk assessments’, preserving at the same times ‘the right for the Parties to appraise and manage risk in accordance with level of protection that each side deems appropriate [...] applied only to the extent necessary to protect human, animal, or plant life or health’. In recent years, this topic has been controversial, since several trade disputes have figured among EU and US, such as those relating to chlorine treated poultry, genetically modified crops and hormone treated beef which are allowed in US but banned in EU as consequence to their different method of safety evaluation. While the hormone-treated beef dispute has been settled, the other two are not. Indeed, as for hormone-treated beef the two sides reached a deal through a Memorandum of Understanding⁴⁰ (MoU) which permits the EU to keep the ban on the entry of such product. At the same time EU and US signed the Organic Equivalence Agreement for a mutual recognition of certified organic products, focusing on the importance of agricultural production using organic methods.⁴¹

Another important issue related to regulatory cooperation constituting a non-tariffs barrier to trade concerns the technical differences between EU and US on standards and regulations in many sectors between EU and US, even when they share similar aims. **Technical Barriers to Trade** affect different fields as, for example, vehicle safety, emission and energy efficiency standards, but also chemicals, cosmetics, biotechnology and aerospace. These technical regulations and standards determine the size and shape, the design, the labelling, marking and packaging, the function and performance of a product. Therefore, TTIP shall include provisions to ‘yield greater openness, transparency and convergence in regulatory approaches and requirements and related-standards-development processes [...] to reduce redundant and burdensome testing and certification requirements’,⁴² improving cooperation between EU and US standardisation bodies for promoting confidence between them when they draw up new standards. As for SPS regulations, the parties should start from the existing WTO Agreement on TBT and go beyond enhancing ‘cooperation on conformity assessment and standardisation issues globally.’ Since TBT differ even between EU Member States and between US countries on specific issues, the

³⁹ The precautionary principle is applied in case of danger to human, animal or plant health, or to protect the environment. In particular, 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.

⁴⁰ Council of the EU, 18 October 2013; ‘Memorandum of Understanding with the United States of America Regarding the Importation of Beef from Animals Not Treated with Certain Growth-Promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Union’; (2013/523/EU).

⁴¹ See Seshadri V.S., 2013, p. 11.

⁴² European negotiating mandate; paragraph 25.

European Commission in a position paper⁴³ called for the extension of these commitments to regulations of both sub-regional level in the EU and sub-federal level in the US.

The European Commission has to negotiate also the introduction of another important chapter regarding **regulatory coherence** which refers to the establishment of good practices and transparency in the EU and US domestic regulatory process, concerning the ‘development and implementation of efficient, cost effective, and more compatible regulations for goods and services’. To this aim TTIP will provide principles, objectives and processes to encourage regulatory coherence, ‘including early consultation on significant regulations, use of impact assessments, evaluations, periodic review of existing regulatory measures, and application of good regulatory practices.’⁴⁴

These provisions on regulatory cooperation could be applied either in a horizontal way across industries or creating sectoral annexes to deal specifically with strategic sector. The mandate of the Council calls for the inclusion of sectoral annexes in TTIP to deal specifically with some sectors including ‘provisions or annexes containing additional commitments or steps aimed at promoting regulatory compatibility in specific, mutually agreed goods and services sectors [...] ensuring the removal of existing NTBs, preventing the adoption of new NTBs and allowing market access at a level greater than that delivered through horizontal rules of the Agreement.’ Therefore, the Council opted for a ‘hybrid’ approach applying the provisions of the Treaty in a horizontal way across the industries but, at the same time, recognising ‘sectors of significant importance to the transatlantic economy’ and provide specific and substantive provisions. Such sectors are: chemicals, pharmaceuticals and other health industries, Information and Communication Technology (ICT), financial services, vehicle, textiles, engineering products, etc.

The chapter on regulatory cooperation and Non-tariff Barriers is one of the most important part of the Treaty. According to analysts, finding a compromise on these issues could engender significant economic gains for companies, especially for small and medium-sized enterprises. For this reason paragraph twenty-six aims at including in the treaty ‘a framework for identifying opportunities and for guiding further work on regulatory issues, [...] provide an institutional basis for harnessing the outcome of subsequent regulatory discussions.’

1.2.2.3. RULES

The last section of the Council of the EU negotiating mandate deals with trade-related rules and cover a wide range of sensitive issues, such as: Intellectual Property Rights (IPR) and Geographical Indications (GIs), sustainable development, customs and trade facilitation, energy and raw materials, small and medium-sized enterprises, investment, state-to-state dispute settlement, and competition policy. Many trade-related rules have become a standard part of US and EU free trade agreements with other countries.

⁴³ European Commission; ‘Initial EU Position Paper on Technical Barriers to Trade’, July 2013. Available here: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151627.pdf

⁴⁴ European negotiating mandate; paragraph 25.

As analysts agree, both countries have more in common than differences with respect to trade-related rules.⁴⁵

As for **Intellectual Property Rights** (IPRs) EU and US have sophisticated rules, since the innovation and creativity drive the economic growth in both countries. As demonstrated by a recent study of the European Commission, IPR-intensive firms account for nearly forty percent of the EU economy. European IPR includes: patents, trademarks and designs, copyright, and geographical indications. Hence, the mandate affirmed that TTIP shall ‘reflect the high value placed by both Parties on intellectual property protection and build on the existing EU-US dialogue in this sphere’, ‘fostering the exchange of goods and services with IP content’.⁴⁶ A particular issue that could engender some problems under the chapter of IPRs concern the EU rules on **Geographical Indications**. Since many high quality food and drink products are produced, processed or prepared in specific European regions, these products are protected in EU through specific GI rules which provide these products with a label specifying their ‘names of origin’ linked to the place from where they come from; while US law allows companies to protect their products only through trademarks, resulting in a lack of protection for a lot of European names. Currently, American enterprises can produce European products using their name of origin from that particular region of EU (e.g. Parmesan cheese from Italy, Tiroler Speck from Austria and Beaufort cheese from France, etc.) without specifying where they have been made, misleading the consumers in the US. For this reason the European Union attaches a lot of importance to GIs, also demonstrated by the mandate in paragraph twenty-nine which states that ‘negotiations shall aim to provide for enhanced protection and recognition of EU Geographical Indications [...] with the aim of solving existing conflicts in a satisfactory manner.’

Other trade related rules on which EU and US put much importance are those on **sustainable development**, through which both countries ensure good levels of protection for workers and environment in their domestic economies. For this reason, it is said that agreeing to similar rules in TTIP should not pose a major problem for either. The only difference between them consists in the approaches to solve controversies on labour and environment provided in other free trade agreements. Indeed, if the US labour and environmental commitments are subject to dispute settlement procedures, the EU approach tends to take a more consultative approach to resolve differences. In general these rules on sustainable development have been already internationally codified in the ILO Declaration of Fundamental Principles and Rights at Work of 1998 and the Multilateral Environment Agreements. Therefore, the mandate pushes in one side ‘to promote adherence to and effective implementation of internationally agreed standards and agreements’ and, in the other side, to enforce international provisions on ‘recognised standards of corporate social responsibility [...] and promotion of trade in legally obtained and sustainable natural resources’.⁴⁷ Moreover, the Council calls for the introduction of

⁴⁵ See Shayerah Ilias Akthar and Vivian C. Jones, June 2014, p. 8.

⁴⁶ European negotiating mandate; Paragraphs 28-29.

⁴⁷ Ibidem; paragraph 31.

a new ad-hoc element to monitor and control the economic, social and environmental impact of the treaty through the establishment of an independent Sustainability Impact Assessment (SIA) ‘to clarify the likely effects of the Agreement on the sustainable development, as well as to propose measures (in trade and trade-related areas) to maximise the benefits of the Agreement and to prevent or minimise potential negative impacts’. This instrument should also provide a framework to involve civil society, conducting regular dialogues with all relevant stakeholders.

Concerning **Small and Medium-sized Enterprises** the mandate explicitly called for the inclusion of provisions addressing trade-related aspects of particular interest to SMEs, since in the European Union there are twenty million smaller enterprises which form the backbone of its economy. It is said that SMEs are those who will benefit more from TTIP rules which will render exportations cheaper and simpler through the reduction of customs duties, the simplification of procedures and the reduction of those costs tackled when dealing with diverging standards. For instance, another costly trade barrier is given by current rules on customs and harbour maintenance fees provided by parties’ legislations when companies transit from their ports. To this regards, EU and US should negotiate the inclusion in TTIP of ‘commitments on rules, requirements, formalities and procedures of the Parties related to import, export and transit’, promoting ‘modernisation and simplification of rules and procedures, standard documentation, transparency, mutual recognition of standards and cooperation between customs authorities’, and ensuring at the same time ‘effective controls and anti-fraud measures.’⁴⁸

The Council wanted also introduce in the mandate some recommendations about **transparency** in the negotiating process, tasking the European Commission to provide prior consultations with stakeholder before the introduction of measures with an impact on trade and investment, and to publicise the general rules and measures with an impact on international trade and investment in goods and services.⁴⁹

In order to make all these measures included in TTIP effective an **institutional structure** should be established ‘to ensure an effective follow up of the commitments under the Agreement, as well as to promote the achievement of compatibility of regulatory regimes’.⁵⁰ Moreover, paragraph forty-five calls for the establishment of a mechanism to resolve disputes between EU and US governments in case of violation of TTIP dispositions: the state-to-state dispute settlement. This mechanism would ensure that the ‘Parties observe mutually agreed rules’, paying special attention to facilitating the resolution of differences in NTB issues.

⁴⁸ Ibidem; paragraph 34.

⁴⁹ Ibidem; paragraph 40

⁵⁰ Ibidem; paragraph 43.

CHAPTER TWO:

2. THE THIRD SIDE OF THE TREATY: CIVIL SOCIETY

2.1. CIVIL SOCIETY'S PLATFORM TO STOP TTIP

The Transatlantic Treaty and Investment Partnership has received fierce criticisms by many non-governmental organizations and trade unions. Indeed, as soon as the negotiations were launched, a European common web platform grouping hundreds NGOs has been established: Stop-TTIP.org.⁵¹ The German NGO 'Mehr Demokratie' is hosting this European Initiative which was founded together with other NGOs, such as Friend of the Earth Germany, Compact, Umwelt Institut and Attac. In this chapter, to better comprehend civil society's claims against TTIP, I will make reference to the interview⁵² I did to Stephanie Danielle Roth, an activist working for Mehr Demokratie and a promotor of StopTTIP Initiative. Mehr Demokratie is involved in issues like the promotion of democracy and participation at the local, national as well as European level. It has gathered many successes thanks to its activities, such as the establishment of the European Citizens' Initiative, in which Mehr Demokratie was a driving force in helping to design it.

Since its establishment, the StopTTIP platform has gathered the support of hundreds NGOs and millions European citizens coming from each part of the European Union, accounting as the biggest anti-TTIP platform: today, it counts about five hundred civil society organizations⁵³ which are supporting the StopTTIP Initiative and which helped to collect numerous signatures for the 'self-organised' European Initiative against TTIP. At the beginning StopTTIP coalition, till then supported by only 148 non-governmental organizations, prepared the European Citizens' Initiative (ECI) 'STOPTTIP' which was submitted to the European Commission on July 2014. Through such ECI they invited the European Commission to recommend to the Council of the EU 'to repeal the negotiating mandate for the Transatlantic Trade and Investment Partnership'. Their opposition to this agreement comes from several concerns, as I will explain in detail below, regarding mainly the inclusion of 'investor-to-state dispute settlement and regulatory cooperation that pose a threat to democracy and the rule of law', thus aiming at stopping it 'to prevent employment, social, environmental, privacy and consumer standards from being lowered, and public services (such as water, social services and public health) and cultural assets from being deregulated in non-transparent negotiations.'⁵⁴

⁵¹ The European platform against the Transatlantic treaty and Investment Partnership: <https://stop-ttip.org/>

⁵² ANNEX; Interview to Stephanie Roth, 1 July 2016.

⁵³ The partner organizations backing the StopTTIP initiative come from each Member State of the European Union: Europe (37); Germany (130); Spain (40); UK (37); Hungary (35); Romania (25); France (23); Austria (18); Poland (17); Portugal (17); Luxembourg (16); Italy (15); Belgium (14); Ireland (14); Slovenia (14); Lithuania (11); Netherland (10); Bulgaria (8); Greece (8); Croatia (6); Denmark (6); Slovakia (5); Finland (4); Latvia (4); Czech Republic (4); Estonia (2); Malta (2); Cyprus (1). The whole list is available here: <https://stop-ttip.org/supporting-organizations/>

⁵⁴ StopTTIP alliance, 15 July 2014: 'European Citizens' Initiative demands: Stop negotiations for TTIP and CETA'; Available here: <https://stop-ttip.org/blog/european-citizens-initiative-demands-stop-negotiations-for-ttip-and-ceta/>

On 10 September 2014 the European Commission replied⁵⁵ to the StopTTIP coalition's ECI refusing it for two main reasons, laying on the definition of the European Citizens' Initiative itself, as described in the Article 11(4) of the Treaty on the European Union⁵⁶: that is to say that it should 'invite the Commission, within the framework of its powers, to submit an appropriate proposal on matters where citizens consider that legal act of the Union is required for the purpose of implementing the Treaties.' Firstly, they asked for repealing the Council decision authorising the opening of TTIP negotiations which is only a preparatory act with respect to the Council decisions authorising the signature and conclusion of an international agreement, thus deploying legal effects only between the institutions concerned without modifying EU law. Such modification occurs only once the result of the negotiations is signed and concluded. Therefore, the preparatory Council decision authorising the opening of international negotiations or repealing such authorisation do not fall within the scope of the ECI regulation because they are not a legal act of the Union. Thus, this recommendation proposed to the Commission for such a Council decision does not constitute an 'appropriate proposal', as described in the Article 11 of the TUE. Secondly, the proposed ECI did not fall within the framework of the Commission's powers because it is not admissible, under the Article 4(2b) of the ECI Regulation,⁵⁷ inviting the Commission to propose a 'decision' not to adopt a legal act, since such decision would not deploy any autonomous legal effect beyond the fact of the legal act at issue not being adopted. An ECI proposing not to enforce a legal act is not possible, it may be formulated only positively, i.e. work towards the enactment of a legal act.

Consequently to the European Commission refusal, the StopTTIP coalition, which in the meanwhile gathered more and more support from other European civil society organizations, launched the 'self-organised' ECI which in one year, from seven October 2014 to six October 2015, collected about 3.285.000 signatures. Moreover, it menaced to submit the Commission's decision to refuse 'STOPTTIP' ECI to the European Court of Justice accused of 'stifling citizens', since they considered this rejection as 'legally not tenable' and as part of the European Commission's strategy to exclude citizens and parliaments from TTIP negotiations, undermining the principle of transparency and worsening the democratic deficit affecting the European Union.

In this chapter, I will try to find an exhaustive answer to the following question: what are the reasons bringing hundreds non-governmental organizations and trade unions to harshly campaign against the TTIP?

2.2. CRITICISMS AGAINST THE TTIP

In general, one of the most recurrent discourse promoted by StopTTIP coalition aims at contrasting the official line of the European Commission who declared that TTIP will create jobs and increase economic

⁵⁵ The Secretary-General of European Commission; Brussel, 10 September 2014; C(2014) 6501 final; subject: 'Your request for registration of a proposed citizens' initiative entitled STOPTTIP'.

⁵⁶ Consolidated version of the Treaty on European Union (TUE); 2016/C 202/1.

⁵⁷ The European Parliament and the Council of the EU; 'Regulation on the Citizens' Initiative', Official Journal of the EU, No 211/2011, 16 February 2011.

growth, affirming instead that such treaty will benefit much more big corporations, rather than citizens. Accordingly, as reported by CNCD-11.11.11 NGO,⁵⁸ the negotiations are subject to intense lobbying by various interest groups and, as stressed also by the European Observatory on Businesses, among the 560 meetings between the Commission and interest groups before the start of negotiations, 92% represented the private interests of companies. Moreover, they underlined the fact that among the twenty-five lobbies who mostly have contacts with the Commission during TTIP preparation of negotiations, no one represented labour, environmental, or consumer unions. In the same way, the US counterpart on 2012/2013 has held hearings and consultations to gather negotiating advices for TTIP where about five hundreds contributions from businesses, trade association and NGOs were deposited⁵⁹: about 90% of these contributions were made by companies and the rest 10% by NGOs.

Concerns further worsened by the Council negotiating mandate directives, described in the first chapter, as well as by the way in which the negotiating process is being conducted and by the likely negative consequences of such treaty, which brought civil society organizations to harshly oppose such controversial treaty. In particular, the worrying elements regard:

- The Investor-to-State Dispute Settlement (ISDS) system;
- The regulatory cooperation, characterised by common regulatory processes, such as the regulatory coherence and the regulatory convergence;
- The liberalisation of public services and public procurement;
- The lack of transparency in the negotiating process;
- The limited economic effects of TTIP.

According to StopTTIP coalition, all these aspects, which are all interrelated one another, endanger the fundamentals and values of the European Union, having bad effects not only for European citizens but also for the rest of the world. These worrying elements are likely to affect negatively:

- The democratic institutions and practices;
- The European standards on health, food quality and consumer protection;
- The European environmental standards and climate requirements;
- The jobs and related rights for workers;
- The principles guiding the public services and the public procurements;
- The European cultural diversity;
- The Small and Medium-sized Enterprises.

As stated by Stephanie Roth, there is not some issues more important than other, they are equally important: the platform is composed by different NGOs, some of them working more on democracy

⁵⁸Arnaud Zacharie, Nicolas Van Nuffel and Michel Cermak ; June 2015, Brussel; 'Transatlantic Treaty (TTIP): topography of a controversial treaty'; the CNCD-11.11.11. Studies, No. 13, pg. 5. Available here: <http://www.cncd.be/Transatlantic-Treaty-TTIP>

⁵⁹ Stephanie Danielle Roth, 6 March 2015; 'If you love good food & farming: Stop TTIP'; Available here: <https://stop-ttip.org/blog/if-you-love-good-food-farming-stop-ttip/>

issues, other on environmental issues, social issues, and there are also trade unions which are focused more on workers' rights, etc. 'Our arguments come from all these directions and reflect the diversity of the alliance[...] We have to give weight to each singular argument, taking into account also the cumulative impact of all these arguments.'⁶⁰

2.2.1. INVESTOR-TO-STATE DISPUTE SETTLEMENT THREATS EUROPEAN DEMOCRACIES

Beyond any doubt the ISDS system is the most controversial measure in TTIP. In essence, it offers an investor direct recourse for complaint in a private international jurisdiction against the authorities of the country where the investment has been made, in case the latter does not respect the 'standards of investment protection' stated in the paragraph twenty-three of the mandate: concretely it may be used when an investor considers himself victim of discrimination or expropriation for reasons other than public policy goals and in the absence of fair compensation, or when he is victim of unjust and unfair treatment, and of measures that prevent him from transferring capital.⁶¹

According to StopTTIP coalition ISDS system, granting to foreign investors the right to sue European States if they believe that laws and measures of the EU or any Member States damage their investments and reduce their expected profits, will affect negatively those laws and measures promulgated in the interest of the common good, such as environmental, workers and social protection, etc.

Gus Van Harten in a paper⁶² has hardly criticised the investor-to-State Dispute Settlement system in the context of TTIP, indicating five serious flaws, such as:

1. The replacement of judges with arbitrators, blaming the shift of powers from domestic and international courts to 'for-profit' arbitrators whose proposed powers and procedures do not satisfy basic standards of judicial independence and fair process;
2. The lack of institutional safeguards of independence and fairness of ISDS, caused by the 'for-profit business' of arbitration, the risk of conflict of interests of the arbitrators, its non-reciprocal character who gives the right only to foreign investor to initiate the claims, the lack of judicial supervision of potential legal and factual errors of the arbitrators, and the absence of an objective method which defines how and who may judge a case;
3. The privileging of foreign investors over other actors, due to procedures which advantage foreign investors, without taking into account other levels of government, domestic investors, community or private individuals who may have a legal, economic or reputational interest in the outcome of the adjudication, having implications for the principles as the equal access to justice, regulatory flexibility, democratic accountability, judicial independence and sanctity of contract;

⁶⁰ ANNEX; Interview to Stephanie Roth, 1 July 2016, pg. 1.

⁶¹Claude Sefati; 'The Transatlantic Trade and Investment Partnership (TTIP): a controversial agreement and dangerous for workers'; European trade union institute, Working Paper July 2015; pg.19.

⁶² Gus Van Harten, April 2015; 'A report on the flawed proposals for investor-state dispute settlement (ISDS) in TTIP and CETA'; Osgoode Legal Studies Research Paper No. 16, York University, Toronto.

4. The massive expansion of ISDS, since such system will not be used only for TTIP but it will be also applied to other treaties pursued by the European Commission and the US Administration (e.g. the Trans-Pacific Partnership, the EU-China investment treaty and the US-China investment treaty), expanding ISDS coverage to over 80% of the world investment flows;
5. The risk for European standards of regulation, since legislative or administrative decision-maker may take into account whether ratifying a decision, over the objections of a foreign investor, will lead to uncertain but potential costly liability. Thus, compromising the regulatory flexibility, the democratic accountability and, at the same time, increasing the influence of foreign investors on domestic regulations which may undermine the high standards guaranteed by the EU in different fields (e.g. environment, workers' rights, food quality, health, etc.).

Therefore, StopTTIP alliance argues that under the ISDS many European laws for the environment protection and for workers protection regarding employment policy, social security, occupational health and safety protection and the protection of minority rights could be threatened as they could be deemed to affect the profits of foreign investors.

As for workers protection there are fears that through TTIP the workers would not be able to enforce their current rights or, even worst, it could lead to a reduction of labour standards, e.g. US has not yet ratified the core of International Labour Organizations' conventions, such as collective bargaining and freedom of association and operates anti-union policy for workers in many of its states.⁶³ Therefore, as the European Trade Union Confederation (ETUC) has stated, 'labour rights should be enshrined in the body of the agreement, be applicable to all levels of government in each party, and be subject to equivalent dispute settlement mechanisms as other issues covered by it, including enforcement'.⁶⁴

As for environmental protection and climate requirements, the ISDS system may be used by big companies to make pressure on European governments, discouraging positive government actions aiming at restrict oil and gas drilling, impose pollution controls, limit the use of fracking, encourage the development of renewable energy, or limit the use of GM traits in grains, etc. Thus, representing a step back in the fight against the environmental degradation.

To this regard, Mrs Roth talks about the so-called 'regulatory chill' indicating the effects that the threat of an ISDS case will have on the governments' decision-making process, discouraging them to enforce laws and regulations in the public interests, which by definition 'are being chilled'.⁶⁵

⁶³ Commercial analysis: The ongoing US and EU Transatlantic Trade and Investment Partnership (TTIP) negotiations set out to reduce the regulatory barriers to trade for businesses. Saskia Sassen, Robert S. Lynd Professor of Sociology and chair of the Committee on Global Thought at Columbia University New York, and Diane Anderson of the bargaining and campaigns team at Unison, assess TTIP's implications for jobs and employment; 'TTIP-ing point—Employment', March 2015; Lexis PSL Commercial.

⁶⁴ European Trade Union Confederation, Brussel, 25 April 2013; 'ETUC position on the Transatlantic Trade and Investment Partnership'; Available here: <https://www.etuc.org/documents/etuc-position-transatlantic-trade-and-investment-partnership#.V3OjEriLTIU>

⁶⁵ ANNEX; Interview to Stephanie Roth, 1 July 2016; pg.2.

In the same way, civil society organizations move also against the new Investment Court System (ICS) proposed by the European Commission to ameliorate the contested ISDS system. As mentioned in the first chapter, the ICS aims at enforcing the independence, the impartiality and the fairness of the process through the principle of transparency, the arbitrators independency and predictability of the judgement. Moreover, the European Council affirmed that such system ‘should not prejudice the right of EU and Member States to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives’.

Nevertheless, in the words of a joint report⁶⁶ published by some NGOs, the European Commission refuses to abolish the ISDS system, changing its name without putting an end to its controversial form. Indeed, the report talks about ICS as ‘the zombie ISDS’ because, according to their analysis, the proposed ICS grants the whole range of rights to foreign investors in the same way as the ISDS does, and does not assure the judicial independence. In the same line, Stephanie Roth argues that the same claims raised by NGOs against ISDS are reflected again in the ICS, because the majeure issues have not yet been resolved since there will still be a private tribunal overriding governments’ democratic decision.⁶⁷

2.2.2. REGULATORY COOPERATION VS EUROPEAN STANDARDS

According to StopTTIP alliance also the regulatory cooperation, which aims at ‘reaching high levels of regulatory compatibility for goods and services’⁶⁸ between the two countries through regulatory coherence and regulatory convergence, is an attempt to European institutions, standards and legislations. Stephanie Roth states that the regulatory cooperation is strictly related to ISDS and goes also beyond worsen even more the scenario, because it ‘means that the EU and its Member States need to invite the US counterpart when developing their own laws to check if their law proposal are in line with the American legislation’, otherwise once approved they can be threaten by the call of ISDS procedure.⁶⁹

Accordingly, the regulatory coherence which refers to ‘regulatory practices, transparency, and stakeholder engagement in a domestic regulatory process’, represents also an attempt to European democracies. NGOs say that since it allows big businesses and bureaucrats from both sides of the Atlantic to influence draft laws in expert groups even before these are discussed in the parliaments, the regulatory coherence undermines the fundamentals of democratic institutions, the legislators’ freedom to negotiate their own laws and to establish the standards deemed appropriate. They blame the Commission’s proposal to create a system that will not be focused on developing public interest

⁶⁶ Pia Eberhardt (Corporate Europe Observatory), March 2016; ‘The zombie ISDS Rebranded as ICS, rights for corporations to sue states refuse to die’; Published by Corporate Europe Observatory (CEO), Association Internationale de Techniciens, Experts et Chercheurs (AITEC), Attac Austria, Campact, ClientEarth, Ecologistas en acción, Forum Umwelt & Entwicklung, Instytut Globalnej Odpowiedzialności (IGO), PowerShift, Seattle to Brussels Network (S2B), Traidcraft, Transnational Institute (TNI), Umanotera, Védegylet, Vrijschrift, War on Want, 11.11.11. Available here: http://corporateeurope.org/sites/default/files/attachments/the_zombie_isds_0.pdf

⁶⁷ ANNEX; Interview to Stephanie Roth, 1 July 2016; pg. 1.

⁶⁸ European negotiation mandate, paragraph 25.

⁶⁹ Ibidem; pg. 2.

standards, rather prioritising trade and investment interests and giving enormous power to ‘a small group of unelected officials’⁷⁰: the Regulatory Cooperation Body (RCB), as proposed by the European Commission, aims at facilitating the creation of an information system of consultations and influence over the development of new laws.

In the same way, the regulatory convergence, which refers to the rapprochement of existing regulations between US and EU, makes civil society concerned about the maintenance of European high level standards, since there exist important differences on regulations in the two sides of the Atlantic. Such regulations include Non-Tariff Barriers (NTB), like Technical Barriers to Trade (TBT), Sanitary and Phytosanitary (SPS) measures and sector-specific regulatory arrangements, whose ultimate aims are meant to protect consumers, workers, comprehending also public health, and the environment. Therefore, StopTTIP alliance states that the high standards provided by European legislation are under threat, risking of being lowered by the harmonisation and coordination with Americans’ ones⁷¹.

Concerning food quality and consumer protection, the NGO Friends of the Earth International has expressed its worries⁷² about those European laws that aim at checking the food safety and at minimising the risk for people and the planet, which are stricter than in the USA. For example:

- while the US allow the so-called ‘pathogen reduction treatment’, which is supposed to reduce harmful bacteria washing or spraying chicken, turkey, pork and other meats before going on sale, this practice is banned in Europe since 1997, who prefers a preventive approach by ensuring high levels of hygiene at all stage of food production;
- while the US permit hormone-treated beef, using oestrogen, testosterone, progesterone and other synthetic versions, the EU has banned it since 1981, reaffirming it on 2003, due to public health concerns;
- while in the US 80% of pigs are drugged with roctopamine as a growth promoter to build muscles, in EU it is banned since 1996 for its high risk to human health;
- while the US allow Genetically Modified Organisms (GMO), the EU bans them thanks to its ‘zero tolerance’ law.

If the European Commission assures that European high level standards will not be touched by TTIP negotiations, declaring the refusal to bow to US and big businesses pressure to allow these products in the European internal market, contrarily NGOs considered the ‘Commission’s unilateral decision in April 2015 to allow the import of 19 new GMOs products including 11 from the agriculture giant Monsanto’ as a direct consequence of US pressure within TTIP framework. Therefore, the safeguard of

⁷⁰ Joint communication of 170 NGOs; February 2015; ‘TTIP: Regulatory cooperation is the ultimate tool to prevent or weaken future public interest standards for citizens, workers, consumers, and the environment’; Available here: <http://corporateeurope.org/international-trade/2015/02/statement-170-civil-society-organizations-regulatory-cooperation-eu-us>

⁷¹ See Arnaud Zacharie, Nicolas Van Nuffel and Michel Cermak, June 2015, pg. 20.

⁷² Friends of the Earth Europe, Institute for Agriculture and Trade Policy, Center for Food Safety, Compassion in World Farming, Grain, 4 February 2015; ‘How TTIP undermines food safety and animal welfare’; Available here: <https://www.foeeurope.org/how-TTIP-undermines-food-safety-animal-welfare-040215>

European standards, expressed by the European Commission as well as by the Council mandate is not considered enough vis-à-vis the US offensive position. This strong US position was further confirmed by the US Secretary of agriculture Tom Vilsack who stated that ‘there will be no trade agreement with the Europeans unless Brussels agrees to seriously discuss beef trade, along with other difficult issues such as technology-based production and its Geographical Indications preference program’.⁷³

Giving concessions in this direction to the US counterpart makes civil society even more worried also in regard to the precautionary principle with which European Union bans unsafe and unhealthy products. Since, according to Mrs Roth, for US the TTIP chapter on food and farming is one of the most important, as they want to overcome the existing trade deficit with EU related to this sector, the precautionary principle is regarded as one of the main trade barrier that prevent them to reach this objective. For this reason, American companies have been asking since the start of negotiations the elimination of such principle.⁷⁴ As mentioned in the first chapter, while the US apply a ‘science based’ determination which directly allows the commercialization of a product and only when it reveals to be harmful it can be dropped out of the market, the EU applies the precautionary principle in case of supposed danger to human, animal or plant health, or to protect the environment, when scientific data do not permit a complete evaluation of the risk of products, therefore stopping the distribution and ordering the withdrawal from the market. This different kind of approach has led, for example, to the EU banning around 1300 substances from use in cosmetics in stark contrast to the US which only ban 13.⁷⁵

Hence, US want TTIP to open up European market ‘making sure that they can import feed and food which have been made from genetically modified organisms, and animals which have been fed with antibiotics that at the moment are banned in EU under the precautionary principle’.⁷⁶ In fact, the American Chamber of Commerce, American companies and US government are putting pressure on EU to change the precautionary principle with their science based approach that as result could cause problems to the environment and people’s health for allowing dangerous substances.

2.2.2.1 GEOGRAPHICAL INDICATIONS (GIS): A THREAT TO CULTURAL HERITAGE AND SMES

An issue that has to be settled through the regulatory cooperation concerns the contentious topic of Geographical Indications, on which even the two parties involved in TTIP seem to be miles distant to reach an accord. Indeed, if the EU with GIs protects the traditional products coming from specific regions of the European regions from which these products take the name, the US companies produce a lot of these European typical products using also their name of origin, without specifying the real place

⁷³ See statements of Tom Vilsack, US Secretary of Agriculture, supporting the inclusion of GMOs, chicken chlorine and beef hormones in the negotiations of the TTIP; Available here: <http://www.euractiv.com/sections/trade-industry/us-wants-science-settle-gmo-debate-trade-deal-eu-302876>

⁷⁴ ANNEX; Interview to Stephanie Roth, 1 July 2016; pg. 3.

⁷⁵ Sam Lowe, 3 June 2014; ‘Asbestos anyone? In defence of the precautionary principle’; Friend of the Earth International; Available here: <https://www.foe.co.uk/blog/asbestos-anyone-defence-precautionary-principle>

⁷⁶ Ibidem; pg. 4.

of production and process. Therefore, StopTTIP alliance has been warning about the danger it implies for the European cultural heritage and for the small and medium enterprises. As argued by Stephanie Roth⁷⁷, in Europe there is a culture heritage much more important than the American one: such cultural heritage comprehends also the culinary heritage enriched with many typical and quality products, such as cheeses and wines, which today represent also an important part of the European local economies. With the entry into force of TTIP, if the EU will not come to impose to US the acknowledgement of GIs, the European market could be invaded by American products using the same label as those Europeans protected under the GIs, but at cheaper price and lower quality, misleading the consumers and resulting in a completely unfair competition. Nevertheless, the US regard GIs as local trade barriers because it gives unfair advantage to the producers of that particular region. Thus, they are up for the elimination of GIs, but removing it means to damage the high quality of European culinary heritage and the stability of local economies.

Indeed, as already said, these products represent an important part of European local economies, since lot of them are produced by SMEs of those regions. American companies are usually global companies which manufacture products with lower costs than the European ones, because they enjoy less demanding regulations than the higher regulatory hurdles to respect in Europe. The Movement for Responsibility in Trade Agreement argues that in this scenario ‘US companies should be able to take significant market shares from SMEs in many sectors. SMEs would then be faced with two equally unpalatable options: either cut their cost base by as much as 30%-40% (the average difference in US-EU salaries) to remain competitive, or totally transform their offer and production systems in short order. After a few years of fruitless struggle, many SMEs would possibly go to the wall, and close up shop, bringing about job losses and devastation to many of the communities which these businesses support. It is worth remembering that over 60% of all workers in Europe are employed by SMEs.’⁷⁸

2.2.3. LIBERALISATION PUTS PUBLIC SERVICES AND PUBLIC PROCUREMENT UNDER THREAT

Other conflictual topics being negotiated under the transatlantic treaty are: the liberalisation of public services, such as health, education, social services or water to private companies, and the opening of public procurement.

As for the liberalisation of public services, civil society is particularly concerned about two majeure issues that may affect them negatively, prejudicing once again the high standards of the EU. Firstly, the agreement threatens public services because of the ‘negative list’ approach and, secondly, the consequent ‘ratchet effect’. The negative list approach indicates that all services will be liberalised except those who will be explicitly mentioned as exception in the treaty. Contrarily, the ‘positive list’ which NGOs and

⁷⁷ ANNEX; Interview to Stephanie Roth, 1 July 2016; pg. 11.

⁷⁸ Richard Elsner, 2 February 2015; ‘Five questions SME businesses need to ask themselves about TTIP’; Movement for Responsibility of Trade Agreement, Project MORE, pg. 6. Available here: http://projekt-more.eu/wp-content/uploads/2015/12/Five-questions-SMEs-need-to-ask-themselves-about-TTIP-new-logo-5-12-15_.pdf

Trade Unions would like to see in the treaty, consists in listing exclusively the services that would be liberalised. The negative list approach has been hardly contested since the liberalisation of those services excluded from the list, and as such not subject to exemptions or limitations, will prevent European countries from reversing this liberalisation trend, producing the so-called ‘ratchet effect’. This means that it will produce a sort of ‘lock-in’ of the future services liberalisation and privatisation, which will render more difficult or even impossible to make them public again in case of negative effects.⁷⁹

The services which will be exempt from liberalisation, as reported in the mandate, are those ‘supplied in the exercise of governmental authority’, referring to services which are not carried out ‘neither on a commercial basis nor in competition with one or more economic operators’.⁸⁰ According to some NGOs, this exemption is very limited and does not constitute at all a safeguard for public services in general.⁸¹

The most important services for the public interest being threatened by TTIP are health, education, water and social services which through further liberalisation and privatisation could break down those European principles on which public services are based, such as universal access, equal treatment, affordability and sustainability. The private for-profit sector will be increasingly contracted by governments to provide public services, raising great concerns about whether profit will distort the ability of these services to be run in the public interest.⁸² In a pejorative scenario, the following attempts of government to regulate them could be deemed as ‘barriers to trade’ and overturned, creating the ‘ratchet effect’ of liberalisations and privatisations. For example, as Claude Serfati stated, ‘the threat to the National Health Service is acutely perceived’ in the European Member States’ health system, because ‘[r]ecourse to ISDS would allow investors to initiate legal proceedings to attack measures taken by governments and that could be regarded as a direct or indirect assault to their interests’.⁸³

As for the opening up of public procurement, strictly linked to public services, NGOs and trade unions oppose its inclusion in the negotiations because it may further ‘restrict contracting authorities’ ability to avoid competitive tenders in order to retain services within the public sector. Limiting the in-house option [...] could increase the risk of outsourcing ever more public sector jobs to private companies and of impairing equal access to affordable public services.’⁸⁴ Indeed trade unions defend public contracts on the ground of employee status, since public sector workers generally enjoy better protection than those in the private sectors; in terms of the quality of services supplied which could negatively impact

⁷⁹ Stany Grudzielski, June 2014; ‘TTIP a threat for public services: national governments can act to protect public services in TTIP, but as it stands, they are not lobbyists and trade negotiators’; The Greens, European Free Alliance. Available here: <http://ttip2016.eu/blog/Services%20TTIP%20threat.html>

⁸⁰ European negotiation mandate; Paragraph 20.

⁸¹ Thomas Fritz, October 2015 ; ‘Public Services under attack: TTIP, CETA, and the secretive collusion between business’; Published by Association Internationale de Techniciens, Experts et Chercheurs (AITEC), Corporate Europe Observatory (CEO), European Federation of Public Services Unions (EPSU), Instytut Globalnej Odpowiedzialności (IGO), Transnational Institute (TNI), Vienna Chamber of Labour (AK Vienna), and War on Want.

⁸² Ibidem; pg. 8.

⁸³ See Claude Serfati, July 2015, pg.23.

⁸⁴ See Thomas Fritz, October 2015,

the priority given to the user satisfaction in favour to consideration of profitability; and because the provision of these services pursues specific public policy goals in the public interest.

Moreover, as explained by Stephanie Roth, since in many European countries public procurement are in the hand of territorial governments, which tend to make local tenders in order to incentive local economy, especially in peripheral areas, their liberalisation will have unfavourable economic consequences also for Small and Medium Enterprises, which are the driving force of local economies. She continues saying that ‘without liberalising public procurements more jobs and more economic stability can be ensured by local procurements which permit to assign contract to local enterprises, rather than assign them to multinational companies whose scope is just to maximise shareholders’ profits’.⁸⁵ As a matter of fact, in Europe many local authorities have set up plans to strengthen the local economy by giving priority to local job creators in their public procurements. Therefore, in addition to what I said in the precedent paragraph, TTIP will bring high risks for SMEs also from this perspective, because in getting public contracts they will compete with multinational companies which benefit a lot from a level playing field and from the elimination of those ‘unnecessary’ obstacles to their profits.

2.2.4. LACK OF TRANSPARENCY

Other criticisms that fall outside the controversial contents of the negotiations have been addressed to European Commission by civil society as well as by members of the European Parliament in regard to the way in which the negotiating process is being conducted. StopTTIP coalition contested the fact that public representatives as well as general public are not allowed to see any of the official agreement’s texts until the negotiations are finished, accepting or rejecting them as a whole without being able to ask for changes. For this reason, Mrs Roth claims that NGOs want to see the ‘consolidated texts’ containing the stakeholders’ positions and not the documents that have been already negotiated which cannot be changed anymore. She continues stating that ‘if the European Commission want to involve civil society into the decision making process then it has to do it at the moment when civil society can still influence the decision and not afterwards.’⁸⁶

To this regard, the European Ombudsman⁸⁷ have been collecting many complaints about the lack of transparency which permeates TTIP negotiations. For this reason, the European Ombudsman Emily O’Reilly, from 29 July 2014 to 6 January 2015, activated an own-initiative inquiry helping to ensure that Council and Commission establish a more proactive approach to the transparency of these negotiations, trying to enhance their legitimacy in the eyes of European citizens. In her opening letter to the Commission, the Ombudsman presented a first set of suggestions, collecting also the ideas that civil

⁸⁵ ANNEX; Interview to Stephanie Roth, 1 July 2016; pg.6.

⁸⁶ Ibidem; pg. 10.

⁸⁷ The European Ombudsman is an independent and impartial body that holds the EU administration to account. The Ombudsman investigates complaints about maladministration in EU institutions, bodies, offices, and agencies. Only the Court of Justice of the European Union, acting in its judicial capacity, falls outside the Ombudsman’s mandate. The Ombudsman may find maladministration if an institution fails to respect fundamental rights, legal rules or principles, or the principles of good administration.

society exposed during the public consultations of her inquiry. Such as, for instance, StopTTIP UK on 31 October 2014 wrote a letter to the Ombudsman where it states that since ‘negotiations are on behalf of the public, they should be public otherwise democracy is undermined. If documentation, core and contributing, is not publicly accessible, there is the very real danger that negotiators may act disproportionately for particular interests as well as the danger of corruption.’ Once again the accent has been put by StopTTIP UK on the risk for the well-being of European democracy which implies that ‘elected representatives, both at the EU and national parliament levels, have access to all negotiating documents’.⁸⁸ Therefore, Emily O’Reilly suggested to European Commission to disclosure TTIP documents, common negotiating texts and to assure more transparency of TTIP meetings in order to ensure greater legitimacy and public trust to the negotiating process.

Furthermore, on 3 July 2014, also the European Court of Justice with the Case C-350/12 P⁸⁹ invited the Commission and Council of the EU to be more transparent on the negotiations process of TTIP. With this case involving the Member of the European Parliament Sophie in’t Veld against the Council accused to unjustifiably refuse the access to the documents related to the opening of negotiations between US and EU. The ECJ affirmed that the access to documents related to international agreements should be ensured, unless it is demonstrated that disclosure would undermine the conduct of negotiations.

Thus, following the European Ombudsman’s own-initiative inquiry and the ECJ recommendations, but also thanks to Trade Commissioner Cecilia Malmström’s pressure to Commission for a better transparency strategy,⁹⁰ the Commission and the Council took some steps forward to meet public interest and increase the transparency of TTIP negotiating process: starting public consultations on TTIP, publishing most of documents related to the transatlantic negotiations, such as the declassification of the negotiating mandate in October 2014, until that moment marked as ‘UE restraint’, and the access to ‘confidential’ documents, including ‘consolidated texts’ to members of European and national Parliaments in December 2015.

Nevertheless, civil society organizations still complain about the way in which European and national public representatives can have access to negotiating documents. Indeed, they blame the European Commission about the restrictive rules to have access to the ‘reading room’, where the confidential documents are deposited, which are: public representatives must apply a week before to have access to

⁸⁸ Linda Kaucher, 31 October 2014; ‘European Ombudsman’s public consultation on the transparency of the Transatlantic Trade and Investment Partnership (TTIP) negotiations; Response from StopTTIP UK’. Available here: <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58713/html.bookmark>

⁸⁹ Judgment of the Court (First Chamber); Case C-350/12 P of 3 July 2014; Council of the European Union v Sophie in ’t Veld; Appeal - Access to documents of the institutions - Regulation (EC) No 1049/2001 - Third indent of Article 4(1)(a), second indent of Article 4(2), and Article 4(6) - Opinion of the Council’s Legal Service concerning the opening of negotiations for the conclusion of an international agreement - Exceptions to the right of access - Protection of the public interest as regards international relations - Protection of legal advice - Decision partially refusing access.

⁹⁰ European Commission, Strasbourg, 25 November 2014; ‘Communication to the Commission concerning Transparency in TTIP Negotiations’; C(2014) 9052 final. Available here: http://ec.europa.eu/news/2014/docs/c_2014_9052_en.pdf

the reading room of the European Ministry of Trade; the reading room is composed only by eight seats and opened only sixteen hours per week, only during the week when the parliament is in session; any electronic devices is admitted in the reading room and the documents cannot be diffused or taken home; public representatives are subject to the permanent control of security personnel in the room; they have only two hours to stay in it to read the numerous documents. Moreover, public representatives have to sign a security briefing form where they engage themselves to the respect of all these constraints before having access in the reading room, the infringement of which can bring to the suspension of these operational arrangement by the European Commission. Such measures, according to NGOs, further undermine the principle of transparency and the fair involvement of civil society, since they impede public representatives to take view of all the documents and to comprehend them, given the short time limit and the documents' highly complicated language on commercial and international law. Therefore, in the eyes of NGOs the greater transparency pledged by the European Commission is not enough to guarantee the right functioning of democratic institutions and procedures which characterise the European Union and its Member States.

2.2.5. SMALL GAINS, HIGH RISKS

If the European Commission predicts TTIP's positive economic impact for the whole European Union, stimulating the economic growth and creating jobs, StopTTIP alliance oppose this view stating that it will rather engender limited economic gains and considerable downside risks. Since trade and investment between the two economic areas are already very open, with tariffs on goods and services at a very low level, they wonder 'what is the actual stake of such agreement which implies more risks than benefits for European citizens?'

To motivate their assumptions, NGOs make reference to a report⁹¹ made by the OFSE, an Austrian foundation for development research, in which the reports commissioned by the European Commission⁹² about the positive effects of TTIP are analysed and criticized from different points of view, such as:

1. The small estimated growth: even the reports released by the European Commission envisage a limited growth of GDP and real wages, estimated to range from 0.3 to 1.3% within 10 to 20 years period. In the same way, unemployment in the EU will either remain unchanged or will be reduced by up to 0.42%, again over a 10-20 years period. Moreover, the TTIP will engender an increase from 5% to 10% of EU exports, mostly due to the abolition of NTBs because tariff barriers, as mentioned above, are already low. Here, the worries concern the possibility of

⁹¹Werner Raza, Jan Grumiller, Lance Taylor, Bernhard Tröster and Rudi von Arnim, 31 March 2014; 'Asses_TTIP: Assesing the Claimed Benefits of the Transatlantic Trade and Investment Partnership TTIP'; ÖFSE, Austrian Foundation for Development Research, Vienna. Available Here: <https://stop-ttip.org/material-list-for-information-on-ttip-ceta-tisa/>

⁹² The reports commissioned by the European Commission are from Ecorys (2009), CEPR (2013), CEPII (2013) and Bertelsmann/ifo (2013).

reducing intra-EU trade as consequence of cheaper extra-EU imports, lowering trade between Member States of about 30%;

2. The high macroeconomic adjustment costs, mostly neglected by Commission's studies, produced by three likely consequences of TTIP: first, the changes to the current account balance, given by the rise of imports vis-à-vis exports after trade liberalization, therefore producing a trade deficit; second, the losses of public revenues during the transition period (10-20 years) for EU and Member States due to tariffs elimination, which may lead to losses close to 2% of the EU budget; lastly, the displacement of thousands workers in the short term, especially in import-competing sectors, which will determine lower wages in their new jobs, more retraining expenses particularly for low-skilled workers, and the risk for old and low-skilled workers to remain unemployed for a long time, increasing costs on national unemployment benefit schemes and social spending. Accordingly, it is estimated that to finance the adjustment of labour market during a TTIP implementation period of 10 years may costs between 5 to 14 billion euros.
3. The high social costs generated by the reduction of Non Tariffs Measures (NTMs) which, as said, pursue precise policy goals, such as correcting market failure or safeguarding collective preferences of a society, therefore acting as welfare-enhancing. These costs come from changes of standards on administrative procedures, production processes and products for public administrations and firms, from the increase of information costs for consumers confronted with a more complex and potentially less transparent multiplicity of permissible standards, and from the potential welfare loss of the society, since pursuing public policy goals is under threat by NTMs elimination.

The study concludes making a parallelism with the North American Free Trade Agreement (NAFTA),⁹³ often cited as a role-model for TTIP, where ex-ante evaluations of it described positive economic effects which have been refuted by ex-post assessments, where US NAFTA impact on welfare and GDP was negligible and Mexico NAFTA impact was negative on GDP, real wages and the distribution of income.

2.3. TTIP = POWER

Concluding this chapter I would like to stress NGOs' answers to the question that I posed in the precedent paragraph about what is the real stake of the Transatlantic Trade and Investment Partnership. As underlined at the beginning of the chapter, NGOs stress the fact that TTIP is only a means to allow multinational companies to conquer new markets, creating a level playing field worldwide. Indeed, TTIP will permit EU and US to set new international norms that third countries have to follow because 'countries that dominate production networks and have big consumer markets possess the economic clout to induce other countries to follow them.'⁹⁴ Apropos, Claude Serfati underlined the fact that the

⁹³ This Agreement was signed on 1 January 1994 between US, Mexico and Canada, creating the largest free trade region in the world.

⁹⁴ Christian Odendahl and Rem Korteweg, April 2016 ; 'Shaping 21st century trade TTIP, global standards and multilateralism'; Centre for European Reform; pg. 8.

collapse of the Doha Round, launched in 2001 in the framework of the World Trade Organization, pushed the EU and US to turn towards bilateral agreement avoiding the multilateral framework of WTO.⁹⁵ Thus, in this terms it seems to civil society organizations that the only stake at play is power, since TTIP geopolitical aim to forge new global rules looks to be more important than the great economic benefits flaunted by the European Commission. In fact, according to Stephanie Roth, it's all about power, defining the promises made by the European Commission as the modern version of Lenin's Thesis offering 'peace, bread and land' to people in order to keep the power, but in modern terms: 'security, money and jobs'.⁹⁶

CHAPTER THREE:

3. EUROPEAN COMMISSION PERSPECTIVE

3.1. EUROPEAN COMMISSION VIS-à-VIS CIVIL SOCIETY

TTIP negotiations started on July 2013 under the Commission Presidency of José Manuel Barroso and conducted by the Directorate General for Trade under the guide of the trade Commissioner Karel De Gucht. After the European elections on 2014, the negotiations have been guided by the trade Commissioner Cecilia Malmström, under the Commission Presidency of Jean-Claude Juncker, who brought forward novelties in the way how negotiations have been conducted and what is being negotiated, some of which were already advanced by Commissioner De Gucht. As mentioned above, Commissioner Malmström put pressure on the European Commission to introduce greater transparency and better involvement of civil society in the EU trade and investment policy. She made clear the Commission's willingness to meet civil society worries with a clear and strong strategy 'to deliver real economic results for consumers, workers and small companies', but at the same time recognising that 'open markets do not require [them] to compromise on core principles, like human rights and sustainable development around the world or high quality safety and environmental regulation and public services at home.' Thus, Commissioner Malmström expressed her awareness towards the problems perceived by civil society who wants 'to know more about trade negotiations carried out in their name'.⁹⁷ In line with these statements, the Commission released its new trade and investment strategy on October 2015: 'Trade for all: Towards a more responsible trade and investment policy.'⁹⁸

The Commission has tried very hard to react to all kinds of criticism brought forward during TTIP negotiations.⁹⁹ It seems that with such strategy the Commission has taken on board the criticisms

⁹⁵ See Claude Serfati, July 2015, pg. 9.

⁹⁶ ANNEX; Interview to Stephanie Roth, 1 July 2016; pg. 7.

⁹⁷ Foreword by Trade Commissioner Cecilia Malmström on the new European Commission's trade strategy; October 2014.

⁹⁸ European Commission, 14 October 2015; 'Trade for all: Towards a more responsible trade and investment policy'. Available here: http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf

⁹⁹ Sebastian Dullien, 17 March 2016; 'The EU trade strategy: Where is the "strategic" part?'; European Council on Foreign Relations (ECFR), Berlin. Available here: http://www.ecfr.eu/article/commentary_the_eu_trade_strategy_where_is_the_strategic_part6030

addressed to TTIP negotiations in regards to transparency, regulatory issues and dispute settlement as well as concerns about the external effects of the treaty.¹⁰⁰ Indeed, through the ‘Trade for all’ strategy and other specific initiatives the Commission tried to reply and overcome the fierce criticisms towards TTIP:

- Introducing greater transparency in the negotiation process;
- Improving the participation of civil society;
- Negotiating the replacement of ISDS mechanism with the new Investment Court System, previously mentioned;
- Invoking a comprehensive horizontal carve-out on market access in the area of public services;
- Ensuring that no trade agreement will ever impact levels of regulatory protection, safeguarding the European social and regulatory model at home, rather promoting abroad values such as sustainable, inclusive, climate- and environmentally-friendly and ethical trade;
- Upholding and protecting the governments’ right to regulate;
- Including the monitoring of human rights, labour rights and sustainable development alongside with the support for ‘fair trade’, the conservation of natural resources and the fight against climate change.

Thus, aware of all the problems perceived by civil society, the European Commission took some concrete measures modifying its approach to make TTIP fairer and more equitable, trying to increase its legitimacy, public trust and support to the negotiating process. In the following paragraphs, I will analyse more closely the steps undertaken by the Commission to meet civil society’s claims in order to identify the existing divergences between them and comprehend the effectiveness of such measures in meeting NGOs worries.

3.1.1. INCREASING TRANSPARENCY

As underlined in the second chapter the Commission and the Council of the EU received strong pressure from civil society and from different institutions, such as the European Ombudsman, the European Court of Justice and the European Parliament pushing them to take measures to increase the transparency around TTIP negotiation process. Some important steps in this direction have been made. First and foremost, on October 2014 EU governments decided to make TTIP negotiating mandate public, as advocated by the Italian Council President Carlo Calenda who consequently stated that ‘the declassification of the negotiating mandate is an important step towards ensuring the transparency of negotiations with the US. This can only strengthen arguments in support of the conclusion of the TTIP agreement, a pillar of the future economic recovery of EU countries’.¹⁰¹ Some days later, on 21 November during a Foreign Affairs/Trade Council meeting with EU’s Trade Ministers, Cecilia

¹⁰⁰ Sieglinde Gstöhl, January 2016; ‘Trade for All’ – All for Trade? The EU’s New Strategy’; College of Europe Policy Brief (CEPOB), Paper #3.16.

¹⁰¹ Council of the European Union, Brussels, 9 October 2014; ‘TTIP negotiating mandate made public’; Press Release; ST 14095/14 PRESSE 507.

Malmström proposed a new approach to transparency, receiving the approval from the Council who recognised the ‘importance to better communicate the scope and the benefits of the agreement and to enhance transparency and dialogue with civil society’.¹⁰² Such new approach was transmitted on 25 November 2014 to the European Commission¹⁰³ through a Communication where Commissioner Malmström exposed the points established together with the Council to ensure that general public receive accurate and full information of EU’s intentions in the negotiations, to address the concerns and to evacuate misperceptions in order to relaunch a ‘fresh start’ of TTIP¹⁰⁴:

- Provide more extensive access to TTIP documents, endorsing the principle of publishing those TTIP EU negotiating texts that the Commission has shared with the Council and the European Parliament, as for example the formal negotiating proposal on the rules of the trade agreement. Some exceptions concerned those ‘CONFIDENTIEL UE’ documents on opening market offers on tariffs, services, investment and procurement when their release could harm EU international relations.¹⁰⁵ Anyway, the Commission refused to publish US documents or common negotiating documents without the explicit agreement of US;
- Review the protection of European Union Classified Information (EUCI) of documents related to TTIP that is to say, where legally possible, declassifying them from ‘RESTREINT UE’ documents to ‘LIMITED MARKING’ documents. It means to make ‘restreint’ documents, by definition those documents ‘the disclosure of which could be disadvantageous to the interests of the European Union or of one or more of the Member States’,¹⁰⁶ to ‘limited marking’ documents which are ‘covered by the obligation of professional secrecy’.¹⁰⁷
- Permit to all Members of the European Parliament to have access to ‘RESTREINT UE’ documents extending the use of a ‘reading room’ with appropriate modalities to be agreed with the Parliament in order to ensure the confidentiality of the information provided, and at the same time providing actions in case of unwarranted disclosure of these documents or their contents. Anyway, without changing the arrangements provided for joint EU-US texts, the so-called ‘consolidated texts’ (part of the ‘CONFIDENTIEL UE’ documents, the disclosure of which could harm the essential interests of the European Union or of one or more of the Member

¹⁰² Council of the European Union, Brussels, 21 November 2014; ‘Outcome of the council meeting’, 3348th, Council meeting Foreign Affairs/Trade; 15792/14, PRESSE 598, PR CO 60.

¹⁰³ See European Commission, November 2014, C(2014) 9052 final.

¹⁰⁴ Ibidem;

¹⁰⁵ Regulation (EC) No 1049/2001 of the European Parliament and of the Council, 30 May 2001; ‘Regarding public access to European Parliament, Council and Commission documents’; ‘Exceptions’, Article 4.

¹⁰⁶ Council of the European Union, Decision of 23 September 2013; ‘The Security Rules for Protecting EU Classified Information’; Official Journal of the European Union, 2013/488/EU; Article 2(d).

¹⁰⁷ Consolidated version of the Treaty on the Functioning of the European Union (TFEU), 2016/C 202/1; Article 339: The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

States¹⁰⁸) which combine the textual proposals of the parties, on which the US counterpart had not yet agreed to make them public, therefore remaining classified;

- Report more extensively on the outcome of the negotiating rounds;
- Increase the involvement of civil society and the general public at political and working level, in Brussels and within Member States;
- Publish additional online documents explaining the negotiating positions and approaches;
- Improve the communication and outreach efforts, including through social media (Twitter, Facebook, blogs, etc.);

As said, these measures have been well welcomed by the Council of the EU but also from the Chair of the International Trade Committee (INTA) of the European Parliament and from the Commission itself, who backed altogether these important initiatives.

Starting from these commitments the European Commission engaged to seriously improve the transparency around TTIP negotiations. As a matter of fact from 7 January 2015 for the first time in negotiating a bilateral trade agreement the Commission has been publishing all the EU's legal text proposals and position papers on its website, dedicating on purpose a whole section to TTIP.¹⁰⁹ Moreover, such documents have been published online alongside with 'reader's guides' explaining the meaning of the texts in a non-technical language, rendering them more accessible to non-expert, and 'factsheets' describing EU's aims in each area of negotiations and what is at stake in each chapter of TTIP. It represents a real break point with the past because if before the Commission published just the factsheets, press releases, memos, studies and meeting report, from the beginning of 2015 more important texts have been made public, clarifying the EU positions towards salient topics. To make it clear, the documents available to general public concern:

1. EU legal texts indicating European Union's initial proposals for legal text on topics in TTIP as tabled in the discussion with the US in negotiating rounds;
2. EU position papers describing the EU's general approach on topics being negotiated in TTIP as tabled in the discussion with the US in negotiating rounds;
3. Other EU documents, including drafts, non-papers, studies and other documents used in the negotiations or provided to the European Parliament and Member States.

Concerning the joint EU-US documents ('consolidated texts') have not been made public given US opposition, which later on have been declassified and made available only for public representatives. Indeed, if at the end of 2015 the access to these confidential documents was permitted only to few selected Members and officials at EU level¹¹⁰ (e.g. the chair and vice-chairs of the INTA Committee, the political group coordinators on the INTA Committee, and the rapporteur and shadow rapporteurs),

¹⁰⁸ See Council of the European Union, 23 September 2013, Decision 2013/488/EU, Article 2(c).

¹⁰⁹ European Commission's Website on the Transatlantic Trade and Investment Partnership: <http://ec.europa.eu/trade/policy/in-focus/ttip/>

¹¹⁰ Laura Puccio, Brussels, Briefing July 2016; 'TTIP: Access to consolidated texts and confidential documents'; European Parliamentary Research Service (EPRS), Members' Research Service, PE 580.909; pg. 6.

in December 2015 US and EU agreed to extend the access to confidential documents to all members of the European Parliament¹¹¹ in an appropriate reading room. While concerning EU's Member States in December 2014 US agreed to concede access to these documents also to governments' officials on a 'need to know' basis,¹¹² giving the possibility to 'accredited civil servants'¹¹³ to consult, under strict rules, the documents in the US embassy. But under the pressure of Member States parliaments, especially Italian, German and French ones, on December 2015 EU and US reached an agreement extending the access to consolidated negotiating texts also to members of national parliaments. While other documents referring exclusively to US positions are only available for negotiators.

TABLE 1: TTIP NEGOTIATING DOCUMENTS AND ACCESS

Documents	EU Positions	EU documents containing reference to US positions (e.g. tactical state of play)	Consolidated Texts**	US Positions
Public	X*			
Members of the European Parliament	X	X	X	
Members of National Parliaments	X	X	X	
Governments Officials on a 'need to know' basis	X	X	X	
Negotiators	X	X	X	X

* EU positions are often published after they have been approved by the Council and tabled for discussion with the US.

**These include partially consolidated texts, i.e. texts for which work has begun on merging the positions, even if some provisions are still missing.

Source: European Parliamentary Research Service (EPRS), Members' Research Service, PE 580.909.

¹¹¹ Article 218(10) of the Treaty on the Functioning of the European Union (TFEU) stipulates: 'The European Parliament shall be immediately and fully informed at all stages of the procedure.'

¹¹² As described in the Council of the European Union document No 14029/15: '...European Commission officials, officials of Member State central governments and members of Member State national Parliaments who have a need to know the text of a particular document because they are vested with trade policy or legislative oversight responsibilities...'

¹¹³ See Laura Puccio, July 2016, pg. 7.

The rules enshrined in the Council Document 14029/15,¹¹⁴ providing the establishment of reading rooms, the modalities and procedures for consulting the negotiating documents at Member States and European level were the result of a long negotiation between the Commission and US. As briefly enounced in the second chapter, these modalities and procedures concerning the consultation of these documents are:

1. TTIP documents ('CONFIDENTIEL UE', 'RESTREINT UE') must be consulted in a reading room;
2. A designated security officer should be always present during the opening hours, ensuring that:
 - a. Any document is taken from the reading room;
 - b. Any technological device (e.g. camera, scanner, recorder, etc.) is introduced;
 - c. Only authorised persons enter in the room.
3. Each authorised person have to sign a 'logbook' whereby he/she engage to protect the documents and the information from the unauthorised disclosure, according to Council decision 2013/488/EU on EU CI, and to follow the reading room rules, the infringement of which could result in disciplinary and/or legal action (e.g. termination of his/her access)
4. Visitors are allowed to take only hand-written notes, the content and extent of which must not be a copying of the documents;
5. A security officer will be present during the entire duration of the consultation of documents.

Thus, starting from the beginning of 2016, the European Union and Member States, except Bulgaria, following these strict rules have been providing such reading rooms for public representatives, whose logistic organization (size of the room, and thus the number of public representatives that can consult the documents at any one time, maximum amount of time allowed for consultation, office hours, etc.) may differs from a country to another; as well as for who has the right to have access to the reading room depending on the interpretation of the 'need to know' basis rule that may change between the countries according to national legislation.¹¹⁵

3.1.2. CIVIL SOCIETY DIALOGUE

Strictly connected to the transparency issue is the involvement of Civil Society in TTIP process. In general terms, the issue of majeure engagement of civil society in EU decision-making has been since long time on the agenda of the European Commission in order to face the democratic deficit affecting EU institutions. To this regard, the European Commission already on 2001 released the White Paper on Governance where it stressed the importance of involving civil society organizations in its consultation processes, recognising their important role as facilitators of a broad policy dialogue, stating expressly

¹¹⁴ Council of the European Union, Brussels 17 December 2015; 'Improving access of Member States to certain classified documents concerning the Transatlantic Trade and Investment Partnership (TTIP) - Establishment of reading rooms in Member States'; No 14029/15, WTO 245-CSC 267.

¹¹⁵ See Laura Puccio, 2016; pg. 8.

that ‘it will continue to encourage the activities of non-governmental organizations, the social partners and civil society in general’.¹¹⁶

As stressed by Deirdre Curtin, a neoliberal consensus has been emerging among the European institutions who defined the Economic and Social Committee¹¹⁷ as the institutional home of civil society,¹¹⁸ considering the participation from the bottom through the framework of a governance structure as a good facilitators of the discursive process, giving the right importance to deliberation among citizens, between citizens and representatives and among representatives (top-down/bottom-up) in a representative democracy.¹¹⁹ Since then the European Commission has been setting up advisory committees in different policy areas composed by representatives with various social and economic interests. In the context of TTIP, former trade Commissioner Karel De Gucht launched on January 2014 the creation of a temporary and informal¹²⁰ special committee to provide the EU negotiating team external ‘high quality technical and practical advices on areas under negotiations.’¹²¹ It is composed by 16 members (six females and ten males) representing a broad range of interests, such as environmental, health, consumer and workers’ interests as well as different businesses’ interests. This special committee has been established to facilitate exchanging views on important TTIP issues to negotiate and examining the difficulties arising from negotiations through discussions of different perspectives. As mentioned on the Terms of Reference¹²² the aim of such group is not necessarily to reach a consensus, but to shed light on those important topics of negotiations. Since its establishment, the advisory group has been convened twenty-eight times debating about a broad range of issues¹²³: from environmental impact to animal welfare, from investments to services market, from SMEs to rules of origin, etc. The meetings are chaired by TTIP Chief Negotiator, who draws up the agenda and convenes the meetings either on his own initiative or at the request of at least five members of the group, with the Chair’s agreement. The advisory group was expected to operate for up to two years, but since TTIP has not yet been signed it is continuing and will continue to operate till the end of negotiations.¹²⁴

¹¹⁶ European Commission, Brussels, 25 July 2001; ‘European Governance – a White Paper’; COM(2001) 428 final Official Journal C 287.

¹¹⁷ The ESC was set up by the 1957 Rome Treaties in order to involve economic and social interest groups in the establishment of the common market and to provide institutional machinery for briefing the European Commission and the Council of Ministers on European Union issues.

¹¹⁸ Ibidem; pg. 57.

¹¹⁹ Ibidem; pg 58.

¹²⁰ Informal group are those set up by an individual Commission department that has obtained the agreement of the Commissioner, Vice-President responsible and of the Secretariat-General, while formal group are those set up by Commission decision.

¹²¹ European Commission, 27 January 2014; ‘Expert group to advise European Commission on EU-US trade talks’; Press Release. Available here: http://europa.eu/rapid/press-release_IP-14-79_en.htm

¹²² European Commission, 27 January 2014; ‘Transatlantic Trade & Investment Partnership (TTIP), Advisory Group. Terms of Reference’; Available here: http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152103.pdf

¹²³ Advisory Group’s meeting reports, available here: <http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/#advisory-group>

¹²⁴ European Commission, ‘Advisory Group - Terms of Reference’; paragraph 17.

However, the establishment of this advisory body does not exclude direct contact between the Commission and interest groups out of the institutional framework. Generally speaking, less institutionalised consultations have been undertaken by the European Commission in order to reinforce the culture of consultation and dialogue in the EU. Consultations and dialogues are intended to give opportunities for input to representatives of civil society organizations and all interested parties in the whole legislation process ‘from policy-shaping prior to a Commission proposal to final adoption of a measure by the legislature and implementation’,¹²⁵ helping to improve the quality of policy outcome and at the same time enhancing the involvement of interested parties and the public at large. Furthermore, in order to ensure equitable representation between all interested parties, the Commission issued the Transparency Register of Interest Representatives¹²⁶ having a say in the decision-making process and a Code of Conduct¹²⁷ to ‘reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access’.¹²⁸ In this way, it recognised the legitimate and useful role that lobbying activities¹²⁹ represent for the European democratic system. However, the Commission carefully specifies that such activities ‘can only ever supplement and never replace the procedures and decisions of legislative bodies which possess democratic legitimacy; only the Council and Parliament, as co-legislators, can take responsible decisions on the context of legislative procedures [...]’.¹³⁰ Coherently, the European Commission has been organising different kind of consultations in many policy areas, sometimes targeting specific stakeholder groups and sometimes making open public consultations, as for example: targeted consultations, workshops, meetings, seminars and online discussion fora.

Under these inputs and giving the importance of trade policies, already on 1998 Commission’s Directorate-General for Trade created its own Civil Society Dialogue (CSD) on Trade, encouraging all EU civil society organizations with an interest in EU trade policies, negotiations or related topics to take part to it. It aims at hearing civil society’s views on trade issues, addressing civil society’s concerns on trade policy, improving the way how to make trade policies and making progress in terms of transparency and accountability. The Civil Society Dialogue works as a platform for exchanging views on issues ranging from economic development and job creation, labour rights and the environment, to

¹²⁵ Commission of the European Communities, Brussels, 11 December 2002; ‘Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission’; COM(2002) 704 final, pg. 4.

¹²⁶ European Commission launched on 2008 the first Transparency Register of Interest Representatives; On 2011 European Commission and Parliament launched the first joint Transparency Register; on 2015 they launched a new version of it and on March 2016 they launched a public consultation to make the Register mandatory and to improve it, following the stakeholders’ feedbacks on the previous version. Available here: <http://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en>

¹²⁷ Commission of European Communities, Brussels, 27 May 2008; ‘European Transparency Initiative: a framework for relations with interest representatives (Register and Code of Conduct)’; COM(2008) 323 final.

¹²⁸ See European Commission, 25 July 2001, COM(2001) 428 final.

¹²⁹ With the term ‘lobbying’ the Commission means: “activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions”.

¹³⁰ See European Commission, 25 July 2001, COM(2001) 428 final.

poverty reduction and sustainability, involving civil society at all stages: before, during and after negotiating processes.

As a matter of fact, Trade Directorate-General has launched open public consultations (open to each stakeholder) on TTIP matters employing different consultation tools, such as meetings, events and online public consultations to keep civil society informed, discuss about the most controversial topics and plan the strategy to follow. As showed in the following table seven meetings, fifteen events and five public online consultations on TTIP have been held from April 2012 to July 2016.

TABLE 2: NUMBER OF CONSULTATIONS HELD ON TTIP TOPICS

Year	Online Consultations*	Meetings	Events
2012	3	/	/
2013	/	1	2
2014	1	3	5
2015	1	2	5
2016	/	1	3

Source: Author

As for online consultations, Trade DG has organised four open consultations, three on 2012 and one on 2014, and a targeted consultation on 2015. These consultations aimed at receiving:

1. Stakeholders' comments on objectives and priorities that the EU-US High Level Working Group on Jobs and Growth should take into consideration in its final report (April 2012);
2. Stakeholders' opinions on the interim report of the High Level Working Group aiming at having a more detailed and structured feedback on the future of EU-US trade and economic relations (September 2012);
3. Stakeholders' input on how to make regulatory regimes more compatible across the Atlantic (October 2012);
4. Stakeholders' views on a possible approach to investment protection and ISDS in TTIP (July 2014);
5. EU businesses' (especially SMEs) opinions regarding trade barriers faced by European industries and individual companies when doing business with the US (January 2015).

At this stage what may represent a relevant fact to observe is the number of position papers received during the open consultations held on 2012 and those received on 2014. Indeed, if during the first and third consultations (the data of second consultation have not been published) the Commission received on average fifty position papers, mostly coming from businesses and just few from civil society, during the fourth consultation it received about 150.000 position papers, among which more than 99% came from individuals. But, as reported by the Commission, a big portion of them (97%) 'was submitted collectively through various on-line platforms containing pre-defined answers which respondents

adhered to’,¹³¹ Something that the former Trade Commissioner Karel De Gucht defined as an ‘outright attack’ and a ‘coordinated action’ since, according to him, ‘[c]ertain organizations created separate websites allowing users to submit the response to the consultation with ‘one-click’ without opening or reading the public consultation's form. Indeed a vast majority of responses were almost identical.’¹³² But on the other side the Commission received individual replies from more than 3,000 individual citizens and from 450 organizations representing a wide spectrum of EU civil society (business organizations, trade unions, consumer organizations, law firms, academics, etc.). While concerning the targeted consultation in 2015, the Commission received 727 replies from SMEs and 142 replies from big companies.

As for meetings, Trade DG has been convening them to give to civil society the opportunity to hear from negotiators first-hand details about progress made during the negotiation rounds and about the plans for the months ahead. Since the beginning of TTIP process seven meetings have been held, on average twice a year (after the first, the third, the fifth, the seventh, the ninth and the eleventh negotiating rounds), to discuss about specific proposals made by the Commission during the last rounds of negotiations. While the last meeting aimed at discussing with civil society on TTIP Sustainable Impact Assessment (SIA) draft interim report published by ECORYS.¹³³ Therefore these meetings are mostly discussions on the state of play and on the steps to undertake in the following negotiation rounds.

Last but not least, European Commission has been organising events on TTIP, involving non-governmental organizations, consumers’ associations, workers/trade unions, professional organizations, companies, business and other civil society organizations coming from both sides of the Atlantic. Fifteen events have been held up to July 2016, varying from fora, hearings and press conferences on TTIP negotiations. Such events take place during the negotiation rounds in EU or US to provide an update on negotiations and solicit input and feedback from either European Union or the United States’ stakeholders. During these events stakeholders have the opportunity to explain their views to EU and US negotiators through a short presentation (5 minutes) on topic related to TTIP, then followed by the Chief Negotiators briefing where EU and US negotiators report on the status of negotiations and answer to stakeholders’ questions.

Moreover, as it will be explained in the following paragraphs, the European Commission proposes to further extend the participation of civil society even after the end of negotiations, introducing some provisions in the treaty to involve it during the implementation of TTIP and for monitoring its effects.

¹³¹ European Commission, Brussels, 13 January 2015; Report on Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement’; Commission Staff Working Document, SWD(2015) 3 final; pg. 3.

¹³² Answer given by Mr De Gucht on behalf of the Commission to a Parliamentary Question about the ‘Public consultation on ISDS’; 10 October 2014, P-006719-14. Available here: <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2014-006719&language=EN>

¹³³Paul Wymenga, Erik Merkus, Joachim Schellekens and Stephanie Bouman, Brussels, 30 May 2016; ‘Trade Sustainability Impact Assessment on the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States of America – Draft Interim Technical Report’; Civil Society Dialogue, ECORYS.

Indeed, the European Union's legal text proposal on institutional, general and final provisions¹³⁴ suggests the introduction of a domestic advisory groups in each party, composed by independent representative organizations of civil society in a balanced representation of different interests (economic, social, environmental, etc.) with the tasks of advising on issues related to the treaty and submitting views and recommendations on the implementation of it;¹³⁵ and yet it suggests the establishment of a joint Civil Society Forum composed by representatives of independent civil society organizations established in their territories, including also participants in the domestic advisory groups, in order to incentive the dialogue on the implementation and application of TTIP.¹³⁶

3.1.3. REFORMING ISDS SYSTEM

At the end of 2013, after having received lot of criticisms from civil society organizations and the European Parliament towards the investor-to-state dispute settlement mechanism, the European Commission suspended the negotiations on this chapter of TTIP. Therefore, after having consulted the Council, European Parliament, national parliaments and stakeholders through a public consultation, on 16 September 2015 the Commission presented a new proposal on investment protection, conceiving the establishment of an Investment Court System. Such new textual proposal permitted the EU to resume discussions on this topic on February 2016.¹³⁷ The European Commission said that introducing the investment protection chapter is very important for many reasons:

- EU is the world's largest source and destination of foreign direct investment¹³⁸ and therefore it has a strong interest to facilitate and protect international investment and to support the investors. Thus, promoting high standards to protect investments in its territory, the EU could obtain credible and enforceable guarantees also for EU investments and investors abroad;
- Investments are essential for the economic recovery stimulating growth, creating jobs at home and abroad and establishing businesses as well as in setting up global supply chain. Accordingly, outward and inward investments produce many benefits for enterprises, increasing enterprises' competitiveness, boosting their productivity and trade, optimising resource allocation, transferring technology and skills;¹³⁹
- The investor is the key decision maker over where production of goods and services takes place and their decisions have a direct impact on trade, jobs and capital movements;

¹³⁴European Commission, 'EU Proposal for Institutional, General and Final Provisions'; It was tabled for discussion with the US in the negotiating round of 11-15 July 2016 and made public on 14 July 2016.

¹³⁵ Ibidem; Article X.7.

¹³⁶ Ibidem; Article X.8.

¹³⁷ European Commission, 27 April 2016; 'The Transatlantic trade and Investment Partnership (TTIP) – State of Play'; pg. 6.

¹³⁸ In 2015 inward flow of FDI was 439.457,6 millions of dollar (US: 428.536,8), while outward flow of FDI was 287.149,9 millions of dollars (US: 367.150,6). Source: Eurostat, UNCTAD.

¹³⁹ Commission's Directorate-General for Trade on Investments, October 2015; Available here: <http://ec.europa.eu/trade/policy/accessing-markets/investment/>

- Almost all the agreements signed by EU Member States (roughly 1400) contain rules on investment protection and the investor-to-State dispute settlement system which has permitted to protect the high volume of inflow and outflow investments. Therefore it works as a guarantee aiming at encouraging FDI in the EU and abroad.

Being aware of civil society's fierce criticisms Commissioner Malmström affirmed 'we're delivering on our promise to propose a new, modernised system of investment courts, subject to democratic principles and public scrutiny. What has clearly come out of the debate is that the old, traditional form of dispute resolution suffers from a fundamental lack of trust.'¹⁴⁰ The new system proposed by the European Commission and tabled for discussion with the US counterpart tries to overcome the criticisms on areas of concern as emerged from the public consultation on ISDS,¹⁴¹ such as: 1. the protection of the governments' right to regulate; 2. the establishment and functioning of arbitral tribunals; 3. The review of ISDS decisions for legal correctness through an appellate mechanism; 4. The relationship between domestic judicial systems and ISDS arbitration.

Coherently, the reform proposed on September 2015 introduced some important novelties in the EU approach to investment protection and ISDS:

1. Substituting ad hoc arbitrations, composed by arbitrators chosen by disputing parties, with a public Investment Court System composed of a First Instance Tribunal (Investment Tribunal) composed by 15 judges (5 EU nationals, 5 US nationals, 5 nationals of third countries), and an Appeal Tribunal¹⁴² composed by 6 members (2 EU nationals, 2 US nationals, 2 nationals of third countries) tasked to control the legal correctness of Investment Tribunal's decisions;
2. The 15 judges of the Investment Tribunal and 6 members of the Appeal Tribunal would be publicly appointed by jointly decision of EU and US governments, for a six-year term, renewable once, on the basis of strict qualifications and ethical requirements. Moreover such judges and members would receive their own remuneration under the remuneration system provided also for the WTO Appellate Body (a monthly retainer fee and fees for days worked);
3. Providing a Code of Conduct for judges of Investment Tribunal and for members of Appeal Tribunal¹⁴³ on their responsibilities, independency, impartiality, disclosure obligations, absence of conflict of interest, etc.;
4. Imposing precisely defined rules about when an investor can take a case before the Investment Tribunal, limited to those standards investment protection of 'fair and equitable treatment' as

¹⁴⁰ European Commission, Brussels 16 September 2015 ; 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations'; Press Release.

¹⁴¹ European Commission, 13 January 2015; 'Report on the online consultation on investment protection and investor-to-State dispute settlement in the Transatlantic Trade and Investment Partnership agreement'; MEMO.

¹⁴² European Commission, 31 July 2015, 'Transatlantic Trade and Investment Partnership – Trade in services, Investment and E-commerce', Text Proposal, Chapter II – Investment; articles 9-10, Available here: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf.

¹⁴³ Ibidem; Annex II.

mentioned in the first chapter, such as targeted discrimination on the base of gender, race, religion, or nationality, expropriation without compensation, or denial justice;

5. Introducing and guaranteeing through a specific provision on the agreement¹⁴⁴ the governments' right to regulate and issue public policy for the common good, which would be supervised by the Appeal Tribunal;
6. Making clear the relationship between investment dispute resolution and domestic remedies, obliging investors to withdraw from any domestic proceedings they had started in domestic courts if they want to make appeal to the Investment Tribunal, thus avoiding parallel and multiple proceedings;
7. Permitting the intervention of third parties, legal or natural, who may have a direct and present interest in the result of the dispute.¹⁴⁵

Moreover, the European Commission specifies that all these new elements would be an additional warranty to the existing approach which already ensures: full transparency of proceedings, banning of forum shopping and quick dismissal of frivolous claims.

Such reform was made public on 12 November 2015 and represents just a text proposal made by the European Commission. The negotiations have not yet advanced in this area, since up to day the parties have tabled their proposals without reaching an agreement or laying down a consolidated text.

3.1.4. REGULATORY ISSUES

As described in the second chapter, the introduction of regulatory cooperation in TTIP has caused many alarms among civil society who fears for European democratic institutions and high standards of protection (consumer, health, workers, environment, etc.). The first legal text proposal on this topic was tabled by the Commission during the negotiations of April 2015, then a revised text proposal was advanced in the negotiations of February 2016, after discussions with civil society, consumers, businesses and other stakeholders and continuous dialogue with the European Parliament and all Member States. EU objective is to establish a framework for enhanced cooperation between regulators in a way that reduces obstacles to trade, and which provides specific outcomes on key industrial sectors.¹⁴⁶ Eliminating unnecessary regulatory differences may create useless barriers which reduce opportunities for businesses (especially SMEs) to export, reach new customers and expand their businesses, creating growth, new jobs and higher wages. The European Commission retains that regulatory cooperation is one of the most important and innovative chapter of TTIP for four main reasons:

¹⁴⁴ Ibidem; Article 2. 'The provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.'

¹⁴⁵ Ibidem; Article 23.

¹⁴⁶ See European Commission, April 2016, 'The Transatlantic trade and Investment Partnership (TTIP) – State of Play'; pg. 5.

1. To lower the costs of trading across the Atlantic given by diverging and inconsistent regulatory requirements;
2. Reducing trading costs would lower also the price of products, giving to consumers more choice;
3. To ensure better guarantees on safe and legal products on sale;
4. To influence regulation at the international stage, pushing the development, update and implementation of international regulations and standards.

Therefore, regulatory cooperation will permit EU and US to work together on those regulations already in place (regulatory convergence) and to coordinate better the process of making regulations in the future (regulatory coherence). If in its initial proposal for legal text the European Commission proposed the establishment of a Regulatory Cooperation Body (RCB)¹⁴⁷ to facilitate such cooperation, after the criticisms addressed to this ‘small group of unelected officials’, in its revised textual proposal¹⁴⁸ it indicated as regulatory authorities the Commission itself and the US rule-making authority. Defining a clear authority for regulatory cooperation between regulators of both sides contributes to make cooperation more effective, setting up priorities, ensuring regular reviews of progress, fostering cooperation in new areas, exchanging information and devising new regulations. As proposed on February 2016, the European Commission specified that any cooperation between EU and US on existing and future regulations must follow these guiding principles:

- Improving or at least maintaining, without reduce, undermine or otherwise compromise the level of protection in public policy areas, such as¹⁴⁹: public health; human, animal and plant life and health; health and safety; working conditions; animal welfare; the environment, consumers, social protection and social security; personal data and cybersecurity; cultural diversity; and financial stability;
- Upholding governments’ right to regulate, which will ensure that governments can pursue their public policy goals and guarantee the protection they deem appropriate, respecting each party’s regulatory procedures and autonomy;¹⁵⁰
- Guaranteeing transparency at all levels of regulatory process;¹⁵¹
- Ensuring that any regulatory cooperation initiatives is based on EU and US common interest, who decide together to take initiatives on a voluntary basis.¹⁵²

Moreover, the European Commission, replying to civil society claims, added in the revised proposal on regulatory cooperation a specific provision regarding the precautionary principle specifying that

¹⁴⁷ European Commission, 4 May 2015; ‘TTIP – Initial Provisions for Chapter – Regulatory Cooperation’; Article 14. Available here: http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf

¹⁴⁸ European Commission, 21 March 2016; ‘TTIP – EU Proposal for Chapter: Regulatory Cooperation’; Article x2; Available here: http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf

¹⁴⁹ Ibidem; Article x1;

¹⁵⁰ Ibidem; ‘Preamble to the TTIP’

¹⁵¹ Ibidem; Article x6.

¹⁵² Ibidem; Articles x3-x4.

‘nothing in this chapter shall affect the ability of each Party to [...] apply its fundamental principles governing regulatory measures in its jurisdiction, for example in the areas of risk assessment and risk management’.¹⁵³ Thus, any provisions in TTIP will undermine the precautionary principle which is enshrined already in the Article 191 of the Lisbon Treaty and as such standing as a fundamental principle of the European Union.

The Commission presented also a proposal¹⁵⁴ for a separated chapter on regulatory coherence including provisions on Good Regulatory Practices (GRPs)¹⁵⁵ in order to promote certain principles for developing and implementing regulations in EU and US. Such GRPs are meant to promote good governance in the regulatory process for efficient, effective and high quality goods and services. The European Commission believes that introducing GRPs will help to create a better understanding and trust between the parties’ respective regulatory systems. TTIP should foster the introduction of GRPs within the administrations of both parties and at the same time spreading them worldwide. More importantly, with the introduction of Good Regulatory Practices and Principles the Commission will be able to affirm once again the guarantee for governments to pursue their public policy objectives based on high level of protection without undermining the regulatory sovereignty,¹⁵⁶ while facilitating trade and investment. Moreover, it aims at:

- Making publicly available information on how each side develops and reviews regulations;¹⁵⁷
- Providing transparent process and consultations with stakeholders and civil society;¹⁵⁸
- Assessing potential impacts of future regulations before issuing them;¹⁵⁹
- Evaluating regulations performance, according to the intended outcomes, after they have been put in place.¹⁶⁰

The Commission clearly specified also that the dispute settlement mechanism will not be applicable to the provisions of the Good Regulatory Practices chapter.¹⁶¹

At the present stage, EU and US have reached consolidated texts on Technical Barrier to Trade and on Sanitary and Phytosanitary issues, while concerning the provision in specific sectors the parties have

¹⁵³ Ibidem; Article x1.

¹⁵⁴ European Commission, 16 March 2016; ‘TTIP – EU proposal for Chapter: Good Regulatory Practices’; Available here: http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154380.pdf

¹⁵⁵ Organization for Economic Cooperation and Development (OECD), 22 March 2012; ‘Recommendation of the Council on Regulatory Policy and Governance’; ‘The Recommendation sets out the measures that Governments can and should take to support the implementation and advancement of systemic regulatory reform to deliver regulations that meet public policy objectives and will have a positive impact on the economy and society. These measures are integrated in a comprehensive policy cycle in which regulations are designed, assessed and evaluated ex ante and ex post, revised and enforced at all levels of government, supported by appropriate institutions.’ Available here: <http://www.oecd.org/governance/regulatory-policy/2012-recommendation.htm>

¹⁵⁶ See European Commission, 16 March 2016, ‘TTIP – EU proposal for Chapter: Good Regulatory Practices’, Article 1.

¹⁵⁷ Ibidem; Article 4.

¹⁵⁸ Ibidem; Articles 6 – 7.

¹⁵⁹ Ibidem; Article 8.

¹⁶⁰ Ibidem; Article 9.

¹⁶¹ Ibidem; Article 11.

tabled their proposal for cooperation in seven industry sectors (cars, textiles, pharmaceutical, medical devices, engineering, cosmetics and chemicals) where consolidation is underway.

3.1.5. MARKET ACCESS: PROTECTING PUBLIC SERVICES

Concerning the market access related to trade in services, the European Commission tabled its textual proposal¹⁶² during negotiations on July 2015, specifying EU's commitments: firstly, give European service suppliers the opportunity to have access to US domestic service market (Market Access), and secondly that these suppliers enjoy no less favourable treatment than local ones when selling their services abroad (National Treatment).¹⁶³ This implies that the parties may not impose certain restrictions limiting the access to their internal market, such as the imposition of a limited number of suppliers or limited service operations, and that foreign suppliers are not discriminated in favour to domestic ones. Thus, TTIP negotiations aim at making it easier for companies providing services to do so in both the EU and the US, while protecting public services and sectors that play a particular role for citizens. Indeed, the EU treats differently many of the so-called sensitive sectors, such as:

- audio-visual services which are excluded from commitments related to the opening of the market in accordance with the negotiating mandate;¹⁶⁴
- public services and other particular sectors which play a special role such as public health, public education, social services or the management, collection, purification or distribution of water.¹⁶⁵

Thus the above mentioned general commitments do not necessarily apply without exceptions ('reservations') to all services. It means that if in one hand parties will not impose quotas and will not discriminate, applying the same rules to domestic and foreign services suppliers, in the other hand they can set conditions or exceptions to their commitments in specific sectors. For instance, the EU has presented three annexes defining the commitments and the exceptions to these commitments in various services sectors: concerning the commitments and reservations about Market Access, annex III is a 'positive list' which enounces those service sectors to open, including also some existing 'quantitative exceptions' to these open sectors; concerning the commitments and reservations about National Treatment, annexes I and II are 'negative lists' enouncing those service sectors that will not be open, describing in the annex I the limiting measures already existing on certain service sectors but which will be subject to the 'ratchet clause',¹⁶⁶ and in the annex II the limiting measures already existing or that may be introduced in the future in sectors like those public services above mentioned and which will not be subject to the 'ratchet clause'. In this regard, on March 2015 US Ambassador Froman and Commissioner Malmström discussed the important role that public services play in the United States

¹⁶² See European Commission, 31 July 2015; 'TTIP – Trade in Services, Investment and E-Commerce'.

¹⁶³ Ibidem; Article 3.

¹⁶⁴ Ibidem; Article 3-1

¹⁶⁵ Ibidem; Annexes II-III.

¹⁶⁶ The ratchet clause 'is a provision through which the Parties commit that, if they unilaterally decide in the future to further open up their respective markets in one specific sector, such opening would be 'locked in' – i.e. there can be no step backwards.' – European Commission, April 2016; 'Services and investment in EU trade deals Using 'positive' and 'negative' lists'; Available here: http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154427.pdf

and the European Union issuing a joint statement to confirm that TTIP ‘do not prevent governments, at any level, from providing or supporting services in areas such as water, education, health, and social services’.¹⁶⁷

Generally speaking, EU protects public services through four important guarantees ensuring to all Member States, and at all levels of government, the freedom to manage them effectively.¹⁶⁸ Such guarantees regard: first, protecting monopolies who provide services considered by governments as ‘public utilities’, therefore they may decide to organise such services in monopolies (either managed by the public itself or by a private actor) in order to protect them from being liberalised; second, as already said, excluding access to the market for those public services as publicly funded education, health, water and social services; third, allowing governments to continue to finance any public sectors through subsidies; and lastly, protecting the government’s freedom to regulate any services, especially those which they consider to be public utilities, for instance giving the licence to suppliers to provide a particular service, setting the quality standards that suppliers have to meet, etc. To this purpose, the Commission’s proposal clarifies that ‘each party retains the right to adopt, maintain and enforce measures necessary to pursue legitimate policy objectives such as protecting society, the environment and public health, consumer protection, ensuring the integrity and stability of the financial system, promoting public security and safety, and promoting and protecting cultural diversity.’¹⁶⁹ Moreover, if governments decide to procure some public services from a private contractor, this one must comply with the rules that apply to public procurement. However, they are free to reverse their decision to buy public services from the private provider, of course respecting the terms of the contract involved, and decide instead to provide these services by themselves. This is possible because, contrarily to what stated by civil society, sensitive public services will not be subject to the ‘ratchet effect’, meaning that the public services which have been privatised could return in the hand of governments.

3.1.6. KEY RULES: GIs, SMEs AND SUSTAINABLE DEVELOPMENT

The third section of the transatlantic treaty concerns trade-related rules and cover a broad range of important areas, as those on Intellectual Property Rights, Small and Medium-sized Enterprises and Sustainable Development between the others.

Under the chapter of Intellectual Property Rights, the European Commission has set out its objective for negotiations in the area of Geographical Indications with which, as mentioned in the previous chapters, the EU protects typical agricultural food, foodstuffs, wines and spirits produced in specific regions of EU. The text proposal on GIs was tabled during negotiations of February 2016 during which the Commission made clear that this chapter constitutes a key priority for the European Union, who wants

¹⁶⁷ European Commission, Brussels, 20 March 2015; ‘Joint Statement on Public Services’; Available here: http://europa.eu/rapid/press-release_STATEMENT-15-4646_en.htm

¹⁶⁸ European Commission, Brussel. 13 July 2015; ‘Protecting public services in TTIP and other EU trade agreements’; Available here: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1115>

¹⁶⁹ See European Commission, July 2015; ‘TTIP – Trade in Services, Investment and E-Commerce’; Article 1-1.

resolutely pursue its goal of ensuring better protection for a selected list of EU GIs.¹⁷⁰ The textual proposal to protect these products aims at establishing the following guarantees¹⁷¹:

- Providing effective rules which ensure an appropriate level of protection for EU GIs;
- Issuing administrative enforcement against misuse of GIs, in addition to judicial means;
- Establishing list(s) of GI names to be protected directly through the agreement. This list could include EU and US GI names and it would be open, i.e. parties by consensus can amend the initial list after the entry into force of the agreement as to insert new names;
- Specifying ad hoc solutions in case of GI names conflicting with prior uses, or prior trademarks or when these names have acquired generic meanings.

According to the Commission the inclusion of this chapter in TTIP will be beneficial for EU providing adequate protection to this essential intellectual property right which serves small GI holders and SMEs in particular. Anyway, the parties have presented their proposals but there is not yet a consolidated text, therefore discussions on this issue are still ongoing.

Concerning SMEs, EU and US have agreed to include a separate chapter focused specifically on helping them to take advantage from TTIP. In fact, as the EU advanced in its initial proposal on May 2014 the parties, recognising the SMEs contribution to economic growth, employment and innovation, should take them into account in TTIP negotiations in order to support and reinforce their growth and development ‘by enhancing their ability to participate in and benefit from the opportunities created by such agreement.’¹⁷² Accordingly, SMEs will particularly benefit from the removal of custom duties, the simplification of customs procedures and the reduction of the costs of diverging standards as well as from the protection of IPRs. But for making them able to exploit the potential benefits of TTIP, the parties must ensure that SMEs have a voice in implementing the treaty and that they have access to the essential information they need, helping them to export and invest abroad. To this aim, the European Commission proposed the establishment of a Committee on SME issues, composed by officials of both parties, with the following tasks: take into account SME needs in the implementation process to increase their opportunities on trade and investment; sharing all necessary information on TTIP creating on purpose a website or webpage; discuss the matters arising from the implementation of the agreement related to SMEs and work closely with committees of other sectors on specific issues of particular

¹⁷⁰ European Commission, New York, 25-29 April 2016, ‘Report of the 13th Round of Negotiations for the Transatlantic Trade and Investment Partnership’; Available here: http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154581.pdf

¹⁷¹ European Commission, 21 March 2016, The European Commission Paper on Geographical Indications (GIs) in the EU - U.S. Transatlantic Trade and Investment Partnership’. Available here: http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154384.Paper%20Geographical%20Indications%20FINAL.pdf

¹⁷² European Commission, 7 January 2015; ‘Textual Proposal – Small and Medium-Sized Enterprises’. Available here: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153028.pdf

interest to SMEs; develop a close interaction with SME stakeholders (SME Dialogue) to provide information, receive and discuss feedback on the implementation and impact of the treaty on SMEs.¹⁷³ Last but not least, the chapter on sustainable development is one of the most important part of TTIP because it concerns those rules within which the agreement will take shape. It aims at bridging the economic growth to high level of environmental protection and social equity and cohesion, trying to meet ‘the needs of present generations without jeopardising the needs of future generations’.¹⁷⁴ The EU within the Lisbon Treaty has recognised the sustainable development as a fundamental and guiding principle of EU policy-making process putting it as a priority on the agenda of EU institutions. Indeed, European Commission textual proposal on ‘trade and sustainable development’,¹⁷⁵ presented during TTIP negotiations on October 2015, includes substantial provisions on labour and environmental protection, setting the following objectives in this area, such as:

- Making TTIP contribute to sustainable development, formulating and implementing policies which contribute to the achievement of sustainable development goals;
- Enhancing mutual supportiveness among labour, environmental and trade and investment policies and measures;
- Upholding the parties’ environmental and labour protection objectives, recognising the right of each party to determine its priorities and policies in these fields;
- Promote dialogue and cooperation among the Parties on environmental and labour matters of relevance in TTIP, including with regard to third countries;
- Encourage businesses, social partners, environmental groups and other civil society organizations as well as citizens to develop and implement practices that contribute to the achievement of sustainable development goals;
- Promote public consultations and participation on discussion of sustainable development issues.

The EU textual proposal suggests the introduction in the treaty of the principles enshrined in the Rio Declaration and the Agenda 21 on Environment and Development of 1992, the ILO Declaration on Fundamental Principles and Rights at Work of Development of 1998, and the Johannesburg Plan of Implementation on Sustainable Development of 2002.¹⁷⁶ Moreover, on July 2016 the Commission proposed the introduction of a sub-chapter on ‘trade favouring low-emission and climate-resilient development’ within the chapter on sustainable development, underlining their commitment to the achievement of the objectives and goals set out in the 1992 United Nation Framework on Climate

¹⁷³ European Commission, 6 November 2015, ‘Textual Proposal – For an SME Committee in the SME Chapter’; Available here: http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153934.pdf

¹⁷⁴ European Commission, ‘EU – US Transatlantic Trade and Investment Partnership: Trade and Sustainable Development’; EU Initial Position Paper. Available here: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151626.pdf

¹⁷⁵ European Commission, 6 November 2015; ‘EU textual Proposal: Trade and Sustainable Development’; Article 2. Available here: http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf

¹⁷⁶ Ibidem; Article 1.

Change and the 2015 Paris Agreement.¹⁷⁷ The EU proposal is ambitious and goes beyond the provisions in any existing EU trade agreements but, as for other chapters, the parties have tabled their proposals and discussions are still ongoing.

3.2. ECONOMIC AND GEOPOLITICAL IMPACT

Concluding this chapter I would like to mention the potential economic and geopolitical benefits implied in TTIP which constitute the main arguments used by both parties to promote the conclusion of the agreement. As for the economic effects, the key reference study for EU and US is the CEPR report¹⁷⁸ which predicts that an ambitious deal would increase the size of both economies. The main findings of such report indicates encouraging data for a comprehensive transatlantic trade and investment agreement, as follow:

1. Significant economic gains for EU and US, respectively €119 and €95 billion a year;
2. Increase global income by almost €100 billion;
3. Increase of total export of 6% in the EU and 8% in the US;
4. 80% of total potential gains come from reducing non-tariff barriers as well as liberalising trade in services and public procurement;
5. Increase of benefits for EU and US labour markets, in terms of overall wages and new job opportunities for high and low-skilled workers. While labour displacement will be within normal labour market movements and economic trends (0.2 to 0.5% of the EU labour force);
6. Negligible effects on CO2 emissions and on the sustainable use of natural resources.

It has to be said that TTIP economic impact depends upon the final nature of the arrangements included in it. If the parties will achieve an ambitious treaty, eliminating or reducing most transatlantic tariffs, lowering barriers to the services economy, aligning or reducing inefficiencies in regulatory discrepancies, and ensuring continued high standards in such areas as labour, consumer, safety and health and environment, then it is likely to boost jobs and growth significantly in both countries.¹⁷⁹

But, as put by the Centre of European Policy Study (CEPS) TTIP is more than just trade, it aims at creating a strategic, dynamic and holistic EU-US relationship that is better positioned with regard to third countries to open markets and to strengthen the ground rules of the international order.¹⁸⁰ In the era of globalisation TTIP assumes a strategical role in the geopolitical arena. Indeed, a series of contingent conditions, like the rise of China (and other Asian countries) combined to the relative decline of the US and the economic crisis affecting the EU, are spurring the both sides of the Atlantic to combine their economic and political preponderance to write new global rules reflecting their economic principles

¹⁷⁷ European Commission, 14 July 2016; ‘Trade Favouring Low-Emission and Climate-Resilient Development’; Available here: http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154800.pdf

¹⁷⁸ Joseph Francois (project leader), ‘Reducing Transatlantic Barriers to Trade and Investment, an Economic Assessment’; Centre for European Policy Research, Final Project Report, March 2013.

¹⁷⁹ Daniel Hamilton and Steve Blockmans; ‘The Geostrategic Implications of TTIP’; Paper No. 5 in the CEPS-CTR project “TTIP in the Balance” and CEPS Special Report No. 105, April 2015; pg. 4.

¹⁸⁰Ibidem; pg. 5.

and political values: the rules-based market economy and the liberal democracy.¹⁸¹ In this regard, TTIP could indeed represent a new form of transatlantic collaboration to strengthen multilateral rules and lift international norms. Given the size and scope of the transatlantic economy, standards negotiated by the US and EU could become a benchmark for future global rules, reducing the likelihood that others will impose more stringent, protectionist requirements for either products or services. Therefore, ‘mutual recognition of essentially equivalent norms and regulatory coherence across the transatlantic space not only promise economic benefits at home but could also form the core of broader international norms and standards’.¹⁸²

‘If we do an ambitious TTIP deal, we will be saying loud that future true global standards [...] are going to be high standards’, stated trade Commissioner Malmström underlining the geopolitical challenge implied in TTIP, ‘[...] And we will be saying that we believe trade should support rather than undermine sustainable development’.¹⁸³

¹⁸¹ Peter Van Ham, ‘The Geopolitics of TTIP’; Clingendael Policy Brief, Clingendael Institute; No. 23, October 2013; pg. 1.

¹⁸² See Daniel Hamilton and Steve Blockmans, 2015, pg. 10.

¹⁸³ Commissioner for trade Cecilia Malmstrom, Brussels, 3 June 2015; ‘The Geopolitical aspect of TTIP’ Available here: http://trade.ec.europa.eu/doclib/docs/2015/june/tradoc_153511.pdf

CONCLUSIONS AND REMARKS

“But of course, TTIP can’t come at any price. We have to make sure, for example, that it protects Europe’s high standards, including our food safety rules. That it encourages investment while strengthening EU governments’ rights - to protect people and the environment, or run public services just as they wish. And that it protects our cultural diversity, and ensures developing countries gain, too. TTIP is ambitious and innovative. So of course people have concerns about what we’re negotiating – and about how we’re doing so. As negotiators, it’s our job to understand and address those concerns.”

(Cecilia Malmström, EU Trade Commissioner, 17 April 2015)

After three years and fourteen negotiation rounds the Transatlantic Trade and Investment Partnership does not seem to come at the finish line. If at the start EU and US predicted two years of negotiations before to conclude the agreement, at the present stage they are still far from reaching a deal because the negotiating process has been slowed down by contentious topics on which the parties have difficulties to agree. For instance, EU and US have not yet reached good compromise on topics like geographical indications, government procurement, financial services, certain agricultural tariffs and sensitives which will further delay the signature of the treaty. The negotiating process has been restrained also by the lack of political support from those countries which are experiencing many criticisms towards TTIP. Indeed, these criticisms have been playing a crucial role in restraining the process, increasing TTIP negative reputation on the whole European Union. For this reason Commissioner Malmström has blamed EU Member States because they are not doing enough to show responsibility and defend trade negotiation at home.¹⁸⁴ This lack of support can be linked to the fact that next year important European countries will face general elections, on which TTIP arguments will certainly play a particular role since it does not enjoy the largest consensus among civil society due to those issues analysed in the second chapter. Therefore, it is interesting to note that EU Member States are not betting too much on such deal since there has not been any clear stance from them backing altogether the decision to get soon to the finish line, leaving alone the European Union in promoting the conclusion of the treaty. Indeed, discussions on TTIP within Member States are mostly dominated by anti-TTIP arguments which contribute at shaping hostile public opinion without facing enough counter-arguments on TTIP matters. As stressed by Mathias Bauer, in a situation like this, given the asymmetry of anti-TTIP front vis-à-vis pro-TTIP front in the current public arena, there is the real risk for pro-TTIP opinions to enter in the so-called ‘spiral of silence’, according to which people tend to be hesitant to voice a minority view when others think differently for the fear of being isolated,¹⁸⁵ thus putting at risk the conclusion of the Transatlantic

¹⁸⁴ Henriette Jacobsen, 10 May 2016; ‘Malmström concerned about public perception of TTIP’; Press, Euroactive.com. Available here: <http://www.euractiv.com/section/trade-society/news/almstrom-concerned-about-public-perception-of-ttip/>

¹⁸⁵ Mathias Bauer, 28 January 2015; ‘The Spiral of Silence – How Anti-TTIP Groups Dominate German Online Media and Set the Tone for TTIP Opinion’; European Centre for International Political Economy (ECIPE). Available here: <http://ecipe.org/blog/anti-ttip-german-online-media/>

Trade and Investment Partnership. What has emerged from the present work is that the European negotiating positions can be used as counter-arguments vis-à-vis the fears perceived by civil society.

The analyses conducted in this document has aimed at finding an answer to the following research question: In relation to the European Union negotiating positions, are civil society's concerns about TTIP, seen as a menace to the European high level environmental, social, economic and political standards and values, well founded?

From a European perspective, taking into consideration the directives stated in the negotiating mandate of the Council and the positions tabled by the Commission in the legal text proposals during the negotiations, it has been demonstrated that not all civil society organisations' concerns are well founded, since the European Commission is defending positions which are close to their claims. If on one side those criticisms addressed to the likely economic benefits of TTIP cannot be confirmed nor refuted since they concern future perspective to be evaluated ex-post, on the other side the criticisms towards the lack of transparency, investment protection and ISDS, regulatory cooperation, geographical indications, small and medium-sized enterprises and public services cannot be confirmed vis-à-vis the current European Union negotiating positions. Indeed, as the main findings of the present work show:

- Regarding the lack of transparency, if at the beginning the EU did not ensure it at all, from the end of 2014 the European Commission and the Council of the EU engaged to render the negotiating process more transparent, making TTIP negotiating texts available for public in general, and giving access to public representatives to TTIP confidential documents. These transparency measures represented a real break point with the past, making TTIP negotiations the most open ever for trade deals in general. Only those documents concerning exclusively the US positions are not yet available for the simple reason that US have not agreed to make them public;
- In regards to the lack of participation from civil society actors in the negotiating process, the European Commission has been organising, through the Civil Society Dialogue, meetings, events and online public consultations to invite everyone with a stake in TTIP to have their say, guaranteeing at the same time a balanced representation among all actors, such as big companies, small and medium-sized enterprises, non-governmental organizations, trade unions, consumer bodies, etc. Furthermore, the Commission established an advisory group composed by different interest representatives with the task of furnishing TTIP negotiators with external expertise, and foreseeing also the establishment of a committee for civil society once the treaty enters into force in order to involve it during TTIP implementation and to monitoring its effects;
- Concerning investment protection and ISDS, the European Commission has proposed the establishment of an Investment Court System which would overcome the main criticisms advanced by civil society organisations: upholding governments' right to regulate and pursue public policy goals; substituting ad hoc arbitrations with the establishment of an Investment Tribunal and an Appeal Tribunal, in which the second would supervise the correctness of the

decision taken by the first; appointing publicly the judges of these two bodies and foreseeing a remuneration for them to ensure their impartiality; providing a specific ethical code of conduct for judges to guarantee their independency, absence of conflict of interests and impartiality. The general criticisms about whether guarantee or not to foreign investors those standards of investment protection, it has to be said that these standards are necessary to create legal certainty and a stable, predictable, fair and properly regulated environment in which investors can conduct their businesses, generating good level of attractiveness which is necessary to boost the economy. Guaranteeing foreign investors such investment protection standards means that governments engage to treat them as they treat local ones;

- As for the threat to the European high standards consequent to the regulatory cooperation between EU and US, the European Commission's legal text proposal aims at protecting and upholding high level standards guaranteed by the European Union, introducing such protection in the treaty (including the precautionary principle). It would ensure the right of governments to regulate and fix the standards as they deem appropriate in public policy areas, such as: public health; working conditions; health and safety; human, animal and plant life and health; environment, consumer and social protection; social security; cultural diversity, etc. Moreover, the Commission is negotiating the introduction of a chapter on Good Regulatory Practices which would guarantee the transparency in the regulatory process, avoid an unbalanced interest representation, protect regulatory sovereignty, and involve all stakeholders through consultations;
- As for the alarms about liberalisation of public services, the European Commission considers them as sensitive sectors and as such it treats them differently. Indeed, annex II of the proposal on market access for services provides a negative list enouncing all the existing reservations and limitations – or those which may be introduced – to the liberalisation for these sensitive sectors, such as public health, social services, public education and water. These public services will not be subject to the ratchet clause, leaving to governments the freedom to manage them as they wish. Furthermore the European Union protects all those services considered by governments as 'public utilities' through specific tools which permit them to retain public services in the hand of public sector;
- Concerning those criticisms in regards to the menace for European cultural heritage and the threat to Small and Medium-sized Enterprises as consequence to the lack protection for Geographical Indications, the European Commission is negotiating the introduction of a specific chapter to ensure their protection through appropriate rules in the treaty, providing also administrative and judicial means against the misuse of them and fixing an open list of GIs from both countries to be protected under the agreement;
- Regarding those criticisms on the risks implied in TTIP for Small and Medium-sized Enterprises, the European Commission proposed a chapter providing specific means to help

them to take advantage from the treaty. For instance, it has proposed to set up a SMEs committee charged to take their needs into account during the implementation period, and envisaging also a reinforced information system to keep them informed about their opportunities. Moreover a framework for interaction with SMEs should be established: the SME Dialogue;

- TTIP will contain also a chapter on sustainable development where the Commission proposed the recognition of labour and environmental standards already codified by international agreements, making TTIP contribute to further spread sustainable development principles and values around the world. In doing so, the Commission introduced also some provisions to uphold governments' right to determine and adopt policies for sustainable development, and to make businesses, civil society organisations and citizens participate in achieving these goals through public discussions and consultations.

It has to be said that the TTIP final text may differ from those initial legal text proposals described in the third chapter as result of the harmonization of positions expressed by both sides of the Atlantic. But even in a pejorative scenario, the high standards promoted by the European Union cannot be compromise otherwise TTIP will not be ratified neither by national parliaments nor by the European Parliament.

The protection of European high level environmental, social, political and economic standards is recurrently affirmed in the Council negotiating mandate and, consequently, in the negotiating documents tabled during negotiations, which must comply with the willingness of European Member States. As clarified by Commissioner Malmström: 'I am simply not in the business of lowering standards. I have a clear negotiating mandate for the negotiations given to the Commission by 28 EU governments, that clearly spells out what a successful agreement has to look like, and what our non-negotiable red lines are. And as always, the end result of a negotiation would have to be cleared by those 28 Member States and the European Parliament before becoming reality'.¹⁸⁶ Indeed, as for warranty the Council declared TTIP as a mixed agreement, since it concerns competences shared by EU and Member States, and therefore it has to be ratified by all relevant national and regional parliaments.¹⁸⁷ Thus, once the Transatlantic Trade and Investment Partnership will be concluded, Member States must give their consent to the negotiated text which, if it would overcome those red lines stated in the negotiating mandate, risks to be overthrown by national parliaments. Moreover, the agreement must be ratified also by the European Parliament who has released a Resolution¹⁸⁸ on July 2015 setting up the red lines that TTIP must respect in order to receive the consensus from the Parliament, where the protection of European high level standards has been put as a *condicio sine qua non* for TTIP ratification.

¹⁸⁶ Cecilia Malmström, 2 May 2016; 'Negotiating TTIP'; Blog Post, Available here: http://ec.europa.eu/commission/2014-2019/malmstrom/blog/negotiating-ttip_en

¹⁸⁷ Council of the European Union, 13 May 2016; 'Foreign Affairs Council - Trade Issues'; Press, Available here: <file:///C:/Users/Alessio/Downloads/Background%20Trade%20160513.pdf>

¹⁸⁸ European Parliament resolution of 8 July 2015 'European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership'; (2014/2228(INI); Available here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN>

Replying to the other questions posed in the introduction, the research has revealed that even if the European Commission has changed over time its negotiating positions on sensitive issues, taking into account the claims raised by civil society, even if the Commission engaged to make TTIP negotiations more transparent, involving also civil society in the negotiations, it seems that NGOs do not want to arrest their campaign against TTIP. Their only objective is to stop the conclusion of the treaty without participating and trying to reach a compromise, an objective stated also in the name of that platform they created at the beginning of the negotiating process: StopTTIP.org. In this context, the inflexible position assumed by civil society organizations seems the result of ideological reasons, opposing the idea of furthering integration and interdependence of economies around the world.

In conclusion, it has to be recognised the role of ‘supervisor’ assumed by these civil society organizations who represent another warranty ensuring, together with the European and national parliaments, the protection of high level environmental, social, economic and political standards and values which constitute the fundamentals of the European Union since its inception.

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