



TTIP, ISDS and the Implications for Irish Public Health Policy

A Report for the Irish Cancer Society

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Full Report

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Foreword

A country's ability to pass laws that will protect the health and wellbeing of its citizens, without intimidation by large multinationals who claim they are due compensation if the law is changed, is core to the democratic process in most developed countries.

Recently, Ireland has used legislation to curtail the ability of the tobacco industry to recruit child smokers. The leadership shown by the Irish Government is being challenged in Ireland's court system by the tobacco companies who fear their profits will drop. They are arguing that their business interests have been negatively affected and should be paid compensation. The reality is that tobacco companies already force the State to spend millions of Euro in health costs; it is unthinkable that they believe they are due money because fewer people are choosing to smoke.

The Irish Cancer Society is confident that in a domestic court of law, public health will trump the rights of such companies.

The introduction of the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union, however, potentially allows multinational companies, such as the tobacco industry, another avenue by which they can challenge public health law introduced by democratically elected parliamentarians. As part of the TTIP negotiations, the 'investor protection' mechanism known as the Investor State Dispute Settlement (ISDS) has been mooted.

The ISDS mechanism is different from the judicial system because instead of a judge making a decision on a case, a three-member panel made up of representatives from both sides, plus an agreed third member, arrives at an agreement. The introduction of ISDS allows multinational companies to circumvent the domestic courts system and effectively sue the country through the confidential arbitration mechanism that has been criticised by academics as being 'broken'.

It is via ISDS that Australia is being sued by tobacco companies for their extremely successful introduction of standardised packaging of tobacco, and why in turn other countries who want to introduce the measure have delayed their plans thanks to the threat of expensive litigation.

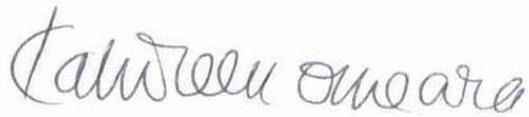
This has brought about a heated debate across Europe about what rights national parliaments should have to introduce public health measures and has resulted in a European Commission consultation which saw an overwhelmingly negative response to ISDS.

As negotiations continue, on 8 July 2015 the European Parliament passed a 'compromise text' on TTIP that promises to 'to replace the ISDS-system with a new system [...] where private interests cannot undermine public policy objectives'.

While this may address many of the issues around ISDS, it remains to be seen whether it will address the major imbalance in such arbitration cases.

The Society believes that TTIP can exist without a commercial arbitration mechanism. Latin American countries are actively seeking to withdraw from trade agreements with ISDS. South Africa has cancelled trade agreements with Germany, Spain and Belgium in a backlash against ISDS. Australia has decided not to include an investor dispute mechanism in some of its future trade negotiations.

It is for this reason the Irish Cancer Society commissioned Dr Joshua Curtis and Dr John Reynolds to investigate the effect of such a mechanism on public health policy in Ireland. I would like to thank them for their comprehensive piece of work which will inform not only the response of the Society to the ongoing negotiations, but the response of European civil society.



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EXECUTIVE SUMMARY

1. INTRODUCTION

1.1 – Overview and Objectives of the Study

Free trade agreements and investment treaties have the stated aims of promoting economic activity and growth through increased global trade and investment flows. The presumptions that broader societal benefits—such as improved population health—will trickle down from such market liberalisation are increasingly called into question by deepening levels of social and economic inequality around the world. Against this backdrop, the proposed Transatlantic Trade and Investment Partnership (TTIP) between the United States (US) and the European Union (EU) has generated concern as to its potential effects on public health policy and standards. The present study seeks to build on and deepen the existing research and analysis in this regard, with the specific purpose of clarifying and evaluating TTIP's implications on health policy in Ireland.

The study is sensitive to Ireland's specific economic situation; that is, its economic model, current financial, regulatory and social situation, medium-term economic prospects and its institutional and policy structure with regard to public health. It is suggested that peripheral EU States like Ireland can benefit from an understanding of the experience of global South countries with respect to trade liberalisation and the evolution of investor protection through international treaties. In light of historical and recent developments in international trade and investment law and policy, the study addresses the likely implications of TTIP on public health policy in Ireland under three categories:

- general or cross-cutting considerations such as government regulatory space, social costs and the obstacles that TTIP may pose to alternative models of public health governance;
- the impact of investment provisions;
- and the impact of trade provisions.

The overarching aims of the study are to:

- map the likely effects of TTIP in the Irish health sector context and critically evaluate the health-related risks and benefits;
- inform debate over the relationship between transnational modes of trade and investment governance on the one hand, and democratic control over localised and national public health policy on the other;
- provide an evidentiary and analytic framework that may better inform public engagement, advocacy strategy and policy-making with respect to economic liberalisation and health policy in Ireland and beyond.

1.2 – A Brief History of International Trade and Investment Regulation

In terms of its potential coverage of the global economy, the proposed TTIP constitutes the most extensive free trade and investment agreement of its kind, and would create the world's largest free trade zone. In its bilateral/regional approach it represents the latest stage in a series of international trade and investment liberalisation processes that have been underway in various forms over recent years.

International trade law has been constituted primarily by a multilateral State-based framework in the form of the General Agreement on Tariffs and Trade (GATT) from 1947, and the World Trade Organisation (WTO) since 1994. The early focus on lowering tariffs on cross-border trade has over time largely shifted to collectively removing 'non-tariff barriers' to trade including domestic laws, regulations and standards.

International investment law, by contrast, does not have a comparable multilateral institution or legal framework, but is made up instead primarily of a more fragmented system of bilateral investment treaties (BITs) between States. A central and controversial feature of this system is the investor-state dispute settlement (ISDS) process whereby foreign investors—i.e. multinational corporations—who perceive their interests to have been adversely affected by a host State policy can bypass the domestic legal system in that State entirely and bring their claim before an ad hoc investment arbitration tribunal.

This system has generally functioned to open up global South resources and markets to investment from the global North, to develop high standards of protection for investors without comparable responsibilities, and to limit the regulatory space of host States. Under ISDS, corporate investors can bring legal claims against States, but not the other way round. Investment arbitration tribunals tend to be favourably disposed towards commercial interests, and developing countries have been ordered to pay large damages claims to foreign investors, even where important public interest factors such as health, the environment or socio-economic rights underpinned the disputed government measure.

Due to increasing resistance from the global South, both to further trade and investment liberalisation measures at the WTO and to investor protection under BITs and ISDS, the recent trend within the global North in particular has been to construct new bilateral, regional or plurilateral agreements that contain both trade and investment components together. This trend, however, is not limited to pure North/South agreements as can be seen in the form of TTIP, as well as the Trans-Pacific Partnership (TPP) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA).

1.3 – The TTIP Negotiations in Context

Deeper economic integration has been raised progressively higher on the agenda of transatlantic relations since the end of the Cold War, and has come to take on particular significance in recent years given the rise of developing economies and a loss of influence in the WTO. The EU and the US have come to view closer economic relations and transatlantic regional development as an important counterweight to the growing influence of Asia in the global marketplace. In 2007, the Transatlantic Economic Council was created, with the aim of intensifying cooperation in the areas of investment, trade, and regulatory cooperation. The signing of the Lisbon Treaty in 2009 expanded the EU's competences in relation to trade and foreign investment. In 2011 the EU and US appointed a High-Level Working Group of senior government officials investigate the scope for a possible trade and investment agreement. Negotiations for TTIP were initiated in 2013, with both parties also investing faith in its possibility to bolster recovery from a deep and persistent post-2008 recession.

The negotiating mandate given by the Council of the European Union to the European Commission refers to the aims of job creation and economic growth through increased market access and greater regulatory compatibility. The market liberalisation agenda and the ISDS mechanism in particular have attracted much scepticism in Europe, prompting the Commission to initiate a public consultation on the ISDS element in 2014. While the overwhelming majority of the response was opposed to the inclusion of ISDS, the Commission is continuing to operate under the expectation that it should seek to negotiate its inclusion in some form.

1.4 – TTIP and Public Health

Despite a certain amount of privatisation of the health sector in many countries, health care in the EU is still seen as a fundamentally public service that is provided and regulated according to a social rationale, rather than as a primarily market-based or economic enterprise. Public health is therefore inseparable from the idea of democratic autonomy exercised through representative government, free to develop and implement policy according to the changing health needs of the population and available scientific knowledge and technologies.

Proponents of TTIP claim that the agreement will deliver economic growth and better regulation, which will ultimately benefit social sectors such as health. Critics argue that the empirical evidence linking trade and investment agreements to economic growth is lacking, and that far from raising social protections, regulatory harmonisation has been shown to reduce regulatory standards to the lower common denominator, restricting the ability of the state to regulate in the public interest. Harmonisation with a country such as the US, where healthcare is heavily susceptible to private and market interests, presents major risks for the EU. State autonomy in determining public health policy may also be limited by investor protection under ISDS, the liberalisation of trade in health services, and the protection of intellectual property rights (of pharmaceutical companies and tobacco companies, among others).

2. GENERAL IMPACTS OF TTIP ON PUBLIC HEALTH POLICY IN IRELAND

2.1 – Net Economic Benefits and Fundamental Rationale of TTIP

The main benefits of TTIP to the people of the EU and Ireland, as projected by its proponents, are economic. Theoretically, these benefits accrue through a process whereby the direct financial and other benefits to multinationals and investors are transmitted downwards in a variety of ways – through the creation of employment, local re-investment of extra earnings, increased tax revenue, and increased demand for secondary goods and services brought about by the presence of foreign investment. The trickle-down theory of economics upon which the bulk of TTIP's presumed socio-economic benefits for the broader population ultimately depend, however, has been widely rejected by leading economists. If a trickle down does occur the key factor is government intervention and management, to actively steer the gains accruing to multinationals into productive benefits for the broader society. This requires the maintenance of government capacity to act and regulate.

This describes TTIP's ironic 'double-bind'. On the one hand the government will need to regulate to ensure the equitable and productive distribution of any benefits; and on the other hand TTIP proponents argue that there will be no benefits unless government regulations are restricted in accordance with the core thrust of the agreement. However, this double-bind only arises if there are clear potential economic benefits from the agreement. Otherwise government capacity is lost for no valid reason and it would make little sense to accept the trade-off.

Yet, even the most optimistic projections in studies cited by the European Commission indicate that the overall economic growth across the EU directly accruing from TTIP will be minimal at best, suggesting that this capacity would indeed be lost for no good reason.

2.2 – US Foreign Investment in Ireland

TTIP also contains potential economic and financial losses for individual EU States through trade and investment diversion to other EU States, as well as financial liability under the ISDS mechanism. This is particularly the case for States that presently receive relatively high volumes of US investment. Ireland's level of US foreign investment as a percentage of GDP is the highest of any EU country, and at seven times the EU average is hugely disproportionate relative to the vast majority of the Member States. This leaves Ireland particularly vulnerable to trade and investment diversion and ISDS claims arising from TTIP. At the same time, it demonstrates quite clearly that Ireland does not need TTIP or an investment chapter to attract US investment, as it is currently attracting very large quantities without such potential liabilities.

2.3 – Public Health and the Right to Health in Ireland

Ireland has legal obligations under international human rights treaties to progressively realise the human right to health for all within its jurisdiction. This entails the highest attainable standard of physical and mental health, and obliges States to ensure a variety of facilities, goods, services, conditions and democratic processes necessary to respect, protect and fulfil the right to health of the population, including access to medical services and essential medicines. This in turn implies that governments need to maintain an ability to intervene in the economy to such a degree as is necessary to realise these obligations, thereby intrinsically connecting the right to health to the State's capacity to regulate. Initiatives to redress the sub-standard and steadily deteriorating nature of Irish public health care provision, particularly if based on greater competition and more private actors in the health sector and insurance market, will require close government oversight and regulation of the system to ensure equitable benefits, attention to marginalised sections of the population and a high quality of services and products. TTIP presents potential obstacles in that regard. International human rights bodies have increasingly highlighted that trade and investment agreements present structural opposition to the States' ability to vindicate socio-economic rights, and are problematic as such. The Irish government should therefore, at a minimum and with some urgency, undertake a comprehensive human rights impact assessment of TTIP before committing the State any further to the agreement.

2.4 – Social Costs and General Impact on Public Health

The potential social costs of TTIP are represented by threats to social security, labour rights and public health standards through the closing of regulatory space and challenges to government action under the ISDS mechanism, the prioritisation of intellectual property rights, and the lowering of standards through regulatory harmonisation or non-tariff barriers to trade. Overall, TTIP may lead to a deterioration in democratic governance, and a potentially decreased respect for human rights without the potential for significant economic benefits that would provide any balance. This is the likely conclusion for the EU as a whole, yet for Ireland in particular the prognosis is far worse than the EU average. For Ireland the likely social costs are significantly higher due to the severity of the financial and public health challenges it currently faces, and the likely economic costs are the highest out of all EU Member States.

3. INVESTMENT IMPACTS

3.1 – Explaining the Investment Law Regime and ISDS

The substantive provisions of international investment law confer high levels of protection on foreign investors, including:

- ‘national treatment’ principles which mandate that foreign investors must be treated the same as nationals of the host State, thus precluding certain forms of legislation or policies aimed at redressing societal imbalances, attending to human rights, or protecting domestic industry and interests;
- full compensation in the event of expropriation, which is broadly construed as including ‘indirect expropriation’ in the form of regulation that has a significant negative impact on an investment’s economic value, even if it is, by nature, enacted through due process of law, is non-discriminatory and is for a public purpose;
- minimum standards of treatment including “fair and equitable treatment” and “full protection and security”, which are vague and subjective standards that have been interpreted broadly by ISDS tribunals as providing very high, and often unintended, levels of investor protection, including an obligation on the State not to violate an investor’s “legitimate expectations”.

Where they are not satisfied that these protections have been upheld, foreign investors have recourse to take the host State directly to ISDS arbitration. This can generally be done without the requirement of any attempt to resolve the dispute within the domestic legal system. National jurisdiction and the normal rules requiring the exhaustion of domestic remedies before recourse to international adjudication are circumvented in a manner that departs from customary practice in almost all other comparable regimes of international law.

As such, investment agreements are in a sense inherently unbalanced in that they confer substantial and powerful rights on foreign investors yet do not bind them to any substantive obligations. Investors must observe certain minimal procedural obligations, such as waiting a set period of time before bringing an ISDS claim against a State, and are under a general expectation to establish and conduct their activities in accordance with the domestic law of the host State. However, contravention of the law is not necessarily a bar to having their rights vindicated by an international tribunal. In the case of *Occidental Petroleum Corporation v. Ecuador*, for example, the oil company was awarded US\$ 1.77 billion in damages by an investment tribunal, despite a finding that the company had clearly violated Ecuadorian law, because the government’s response to such violation was adjudged to have been “disproportionate”.

It is widely accepted that the majority of ISDS arbitrators come from a background in commercial arbitration and arguably are influenced by the interests and viewpoint of investors. The structural biases and imbalances in the system have led to a backlash against it in recent years. Latin American countries have begun to withdraw from the jurisdiction of ISDS tribunals, South Africa and Indonesia have cancelled BITs with a number of European States, and Australia has moved to exclude ISDS from some of its investment agreements.

3.2 – Investment Liberalisation and Social Policy

Over the last 30 years, reductions of State intervention in the economy and a decline in public funding for social programmes and economic assistance both nationally and internationally have led to an increasing dependence of States on foreign investment and trade opportunities to underwrite growth

and living standards. By various measures—economic, fiscal and social—Ireland’s approach to development and liberalisation in this regard may be difficult to sustain. Social protections will be placed under increasing strain by the further marketisation of a socio-economic model already defined by relatively low tax and low spending on public services. The evidence also suggests that investment liberalisation and ISDS pose substantial risks for a peripheral and investment-dependent country like Ireland, in terms of the restriction of regulatory space and exposure to damages claims. As such, any further trade or investment liberalisation measures that are to be legally locked in by a treaty such as TTIP must be scrutinised extremely closely with regard to their social impact.

3.3 – ISDS and Public Health

Trade and investment liberalisation has granted investors a range of legal tools that can be used to influence political and regulatory processes in host States to their advantage. Such tools are not absolute, however, and can be subject to qualification or exception on public health grounds. When it comes to implementation, much will turn on the interpretations and weighting given to such qualifications or exceptions by ISDS arbitrators.

Tobacco company Philip Morris is currently pursuing two separate ISDS claims, against Australia and Uruguay, on the basis that tobacco plain packaging legislation in those countries infringes on the company’s intellectual property rights, violates the “fair and equitable treatment” standard, has a negative impact on its economic interests amounting to expropriation, devalues its trademark, and is disproportionate to the stated aim of protecting public health. With both cases pending, it remains to be seen how plain packaging regulation will fare under ISDS. What is clear is the effect of a ‘regulatory chill’, with concrete evidence showing that some countries which are subject to BIT protections for tobacco multinationals are awaiting the results of the Philip Morris ISDS claims before deciding whether and to what extent to pursue their own legislative proposals on plain packaging. If Philip Morris wins its claims, the regulatory chill on plain packaging will be consolidated and far-reaching. Ireland is not currently bound under any international investment treaties and so does not have to consider such concerns to date, but ISDS jurisdiction under TTIP would change this completely.

Investment protections under TTIP are also likely to impact the health sector through the secondary health impacts arising from investors challenging environmental regulation and food standards, as well as from the liberalisation of health insurance markets. These and other cases highlight the ongoing controversy and unpredictability as to the nature and extent of investor protections on the one hand, and States’ regulatory autonomy on the other. The implementation of an ISDS mechanism that allows investors to circumvent domestic and regional judicial processes (which have more holistic mandates than ISDS tribunals whose primary mandate is investment protection) will be detrimental to the protection of public health, in the context of tobacco regulation and more broadly. As such, if an investment chapter is to be included in TTIP, the explicit exclusion of tobacco control measures and other public health priorities should be considered.

3.4 – Assessing the Case For Investor Protection and ISDS in TTIP

The arguments made in favour of the inclusion of ISDS in TTIP include the following:

- *ISDS depoliticises disputes and overcomes deficient domestic legal systems, thereby giving aggrieved foreign investors a fair hearing and contributing to the development of an international rule of law.* This suggestion that investment arbitration reduces the exposure of

investors to politicised processes and provides increased legal certainty as compared with domestic judicial systems in the EU or US appears unfounded at best and disingenuous at worst.

- *The security afforded by justiciable investment protections leads to increased investment and economic benefits.* There is a notable lack of empirical evidence, however, to positively link investment protection provisions and ISDS to increased levels of foreign investment. In Ireland's case, the country is quite evidently already viewed as a highly desirable destination for US investment for a number of reasons, despite the absence of specific protection under international investment law. On the available evidence, therefore, it is unlikely that investor protection under TTIP will bring discernible economic benefits to Ireland.

3.5 – The Major Cost of Investor Protection and ISDS – Freedom to Regulate

Claims by investors can be raised and vindicated through the established domestic courts and legal systems in the US and the EU. As such, the institution of a supra-national legal structure and claims mechanism, with all of the uncertainties that it entails, appears unwarranted. The primary costs associated with this are the constricting of the State's freedom to regulate in the public interest, and the related chilling effect of investment provisions and arbitration. Within the EU, such costs must be balanced against a status quo situation where the threat of arbitration claims by US investors do not exist.

3.6 – Assessing the EU Position and TTIP's Investment Provisions in Relation to Public Health Policy

The study finds that the existing EU proposals are insufficient to adequately protect public health. There is far too much uncertainty regarding the effectiveness of the proposals to satisfy the requirements of an overall precautionary approach, and unless or until that situation changes the risks must be taken as outweighing the benefits. As such, ISDS should be definitively excluded from TTIP, and in this case it would be of little sense to include any substantive provisions on investment. Many if not most of the reform proposals are essentially bets that the system will thereby be improved and that the regulatory space and other responsibilities of States will be accorded due weight. Such bets are far too risky to proceed with international treaty rules as far-reaching as TTIP's investment chapter.

3.7 – Revenue and Budgetary Implications

The costs of arbitration awards can be high, representing a significant drain on public funds. Awards have typically been in the hundreds of thousands of US dollars, but awards upwards of US\$1 billion are becoming more regular. In addition to the damages awarded, the State will incur costs for the litigation process of around US\$ 8 million per arbitration. There is no reliable 'loser-pays' rule operating in ISDS, and most tribunals have left the State to pay its costs even when it has 'won' the arbitration. These facts put into question the oft-repeated claim that ISDS represents a fast and cheap solution to disputes relative to the workings of domestic courts. In addition, the size of the outlay in defending a case can be a strong incentive for governments to make settlements and pay off dissatisfied investors even when a claim may not have much chance of succeeding. These effects are particularly strong with respect to large claims made by investors with deep pockets and comparatively little to lose relative to the possible gains from arbitration. This potentially significant financial drain on government resources is heightened in countries with high concentrations of foreign investment such as Ireland.

3.8 – An Investment Court?

Debate over ISDS has intensified as its effects begin to be felt closer to the metropolitan centres of the global North through CETA and TPP as well as TTIP. The deep public concern in the EU has brought about a temporary halt to the negotiations with respect to ISDS. In early 2014, the European Commission initiated a public consultation on the issue and received a highly skeptical response, with an overwhelming majority backing the exclusion of ISDS from the negotiations completely and calling for a serious reappraisal of its fundamental rationale. The Commission has responded with a new proposal, outlining a move towards the establishment of an International Arbitration Court. This idea has been in circulation in the broader sphere of international investment law for some time, and may be able to solve some of the deep problems and imbalances of investment arbitration. The Commission's plans have yet to take full shape and much remains to be seen, however. Other proposals have been mooted, including an alternative draft investment chapter that limits the scope of foreign investor protection quite severely, while still ensuring equality of protection with that afforded to domestic investors. These options represent steps in the right direction, but need to be fleshed out and may still remain wed to a significant and unjustified shift in power from democratically accountable governments and domestic judicial systems to supra-national commercial arbitrators.

4. TRADE IMPACTS

4.1 – WTO Tobacco Plain Packaging Cases

Challenges to Australia's tobacco plain packaging legislation have been brought in the WTO in tandem with the ISDS claims made by Philip Morris against the same legislation under international investment law. In contrast to the investment law ISDS system, claims against States under the WTO trade law system can only be brought by other States, not by corporations. Such claims are however typically brought by States for the benefit, if not at the behest, of influential corporations. Over the course of 2012-2013, five countries (Ukraine, Dominican Republic, Honduras, Cuba and Indonesia) initiated proceedings against Australia in the WTO over its plain packaging legislation – all major tobacco exporters acting at the behest of their domestic tobacco manufacturing industries and/or multinational tobacco companies that operate within their jurisdiction.

International trade law primarily imposes obligations on States to liberalise trade conditions. It does not explicitly provide for a State's right to regulate in the public interest, but does allow for specific exceptions from the general rule of removing barriers to trade, including on public health grounds. The burden of proof will be on Australia to demonstrate that its legislation is as good as 'indispensable' to the protection of human life or health, and the WTO dispute resolution body will assess whether such interference with trading conditions, branding methods and intellectual property rights is proportional to the health aims being pursued. Given the explicit public health exceptions in trade treaties, such legislation may be more likely to be upheld in the WTO judicial process than it might be in an ISDS investment tribunal. However, decisions weighing public health considerations favourably over the imperative to reduce barriers to trade are far from guaranteed. In 2011, for example, Thailand's tax regulation of tobacco imports was successfully challenged at the WTO by the Philippines, at the behest of Philip Morris.

4.2 – Intellectual Property Rights

TTIP is intended to complement and build on the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Any such expansion of the protection of intellectual property rights will be of major benefit to the pharmaceutical industry in both the US and the EU, and will have a tangible effect on healthcare costs. As it is, the existing TRIPS system itself is widely viewed as problematic, representing an unfair balance between the interests of pharmaceutical corporations and the value placed on public health. The TRIPS framework has contributed variously to increasing expenditure on pharmaceuticals, longer periods of pharmaceutical patent protection, and the denial of timely access to generic medicines. In this light, the efforts of the EU and the US to strengthen and extend intellectual property rights are likely to have negative rather than positive public health outcomes.

4.3 – Technical Barriers to Trade (Non-Tariff Barriers) – Regulatory Harmonisation

Regulatory convergence, cooperation and harmonisation are one of the most central issues in the TTIP negotiations. With tariffs between the US and EU largely eliminated, attention has shifted over time towards 'technical barriers to trade' – in essence, domestic rules and regulations. This category of barriers to trade is potentially extremely broad and not well defined, but as the chief source of frustration for business, technical barriers are now the primary focus of the drive for continued trade liberalisation. Yet many such regulations have evolved out of processes of long and arduous civil campaigns and legislative debates. They exist at a critical point where common economic conceptions of efficiency and other social conceptions of efficiency and socio-economic justice come into direct contact, and can often collide. An approach to regulatory harmonisation that does not take the social value of regulations to heart runs a serious risk of damaging the public interest, and public health in particular.

Many are now deeply concerned that the unclear but extensive influence that a proposed new Regulatory Cooperation Body (RCB), currently proposed within the framework of TTIP, will internalise an unbalanced approach to regulations. If care is not taken to ensure the continued policy space of States to regulate when necessary, in a timely manner and in a way that respects democratically determined preferences regarding approaches to risk assessment and risk management, public health and democratic self-determination will clearly be threatened. A re-think may be required in relation to setting up a new supra-national regulatory harmonisation regime that does not adequately provide for equitable and full public participation. The fate of the EU's highly valued 'precautionary principle' may hang in the balance, and the question of whose voice will seek to influence the future direction of standard setting at the global level is open to serious debate.

4.4 – Trade in Services

The primary area of concern in relation to the services chapter of TTIP relates to the potential for the agreement to require that public health care services be opened up to private healthcare providers in the interests of market liberalisation and competition. As such, the risk exists that by facilitating greater privatisation of the health services sector, TTIP may lead to an increasing loss of government control, service quality and democratic accountability in this area. TTIP will ultimately contain an option for States to exempt public services, and those pertaining to health in particular, from the relevant provisions of the agreement. In this case, it is recommended that, in addition to the appropriate exclusions at the EU level, Ireland exclude its health services to the full extent possible.

5. CONCLUSIONS AND RECOMMENDATIONS

The clear conclusion drawn from this study is that the predicted economic benefits from TTIP are too small or speculative to justify the associated social risks. The underlying structural causes of the 2008 global financial crisis—and its ongoing impacts—were defined and exacerbated in large part by excessive power being granted to the market, as well as by failures to foreground the social effects of government policy and regulation, and, more importantly, the disastrous social effects of a lack of government regulation. The TTIP process ultimately risks the further disintegration of social fabrics, rather than their restitution. **The study finds that the economic, social, legal and democratic cases for the imperative of TTIP are weak overall. As such, available political avenues should be pursued to bring about the suspension of its negotiation and a fundamental reappraisal of its basic justification and rationale.**

In the event that the political momentum in the negotiations ultimately continues, we set out a series of detailed recommendations at the end of the study with respect to all of the important sections of the agreement and all the main actors, delineating the basic safeguards necessary for any concluded TTIP agreement to have the least possible negative effect on public health.

Some of the key recommendations in this regard are highlighted here.

Key Recommendations

It is recommended that, at the least, certain aspects of the current framework of the agreement be removed from the negotiations. These include the ISDS mechanism (in any form) and the Regulatory Cooperation Body. Both establish the new nature of TTIP among trade agreements as a so-called ‘living agreement’, allowing for the further extension of its disciplining effects on social and public interests well into the future, and in ways that cannot be predicted or foreseen. Given the broad range of threats to government regulatory autonomy and the democratic self-determination of peoples, this evolving aspect of TTIP, which may escape democratic control, should be rejected.

In any eventual agreement, the following minimum safeguards should be established:

- With regard to any dispute settlement system that may be included, there should be a provision requiring the prior exhaustion of domestic remedies, and the adjudication process should be fully judicialised in line with the structure of WTO dispute settlement, including full transparency, a rule of precedent, ethical guidelines on the conduct of adjudicators, criteria for appointment equal to that of domestic judges, and the establishment of an appellate body with full review powers;
- With respect to any Regulatory Cooperation Body (RCB) that may be included, there should be provision for a multi-stakeholder advisory committee, complete transparency, meaningful democratic oversight and accountability, with clear provision for approval from the European Parliament for any expansion in the regulatory agenda of the RCB and any adaptations to existing regulations and regulatory processes that may subsequently be incorporated into law;
- A clause should be included that legally establishes the State’s right to regulate in the public interest, incorporating the principles of the WTO Declaration on the TRIPS Agreement and Public Health, with application to TTIP in its entirety;
- A provision requiring the agreement to be interpreted and implemented in consistency with the obligations of States and the responsibilities of corporations and investors under international human rights law;

- A clause making clear that any regulatory harmonisation between the EU and the US must be in an upward direction to the level of the highest available standards of safety and security of the public interest;
- A general exception clause should be included that does not adopt a test of necessity but employs a lower standard of causal connection for the exception of government measures ‘related to’ or ‘reasonably understood as required for’ the stated public aims, also expressly excepting measures taken to fulfil States’ human rights obligations under international and domestic law.

The following recommendations are made with respect to the main actors addressed in this study.

The **European Commission** should:

- Conduct a fully independent human rights impact assessment of TTIP as a whole, in addition to social and environmental impact assessments, as soon as possible to guide and inform future negotiations;
- Provide complete transparency to the public in the conduct of negotiations, with respect to all documents and communications.

The **European Parliament** should:

- Take all available measures to exclude ISDS in any form from the agreement, reflecting the strong public opposition evident in the response to the Commission’s 2014 consultation;
- Ensure that any dispute settlement system in TTIP mandates the prior exhaustion of domestic remedies, as indicated by the Parliament’s own resolution of 8 July 2015 requiring that “the jurisdiction of courts of the EU and of the Member States is respected”.

The **Irish government** should:

- Conduct national human rights, social and environmental impact assessments of TTIP;
- Formulate a clear policy advocating exclusion of ISDS in any form from TTIP, given the country’s high risk of incurring serious costs from ISDS and its evident success in attracting US investment without taking this risk;
- Establish an inter-departmental committee to assess the coherence of government policy on TTIP with respect to impacts on health, social issues and the environment.

1. INTRODUCTION

1.1 –Overview and Objectives of the Study

The onset of negotiations between the EU and the US over a proposed Transatlantic Trade and Investment Partnership (TTIP) have coincided, for better or worse, with a period of deepening academic and public disillusionment regarding the economic and ideological underpinnings of such agreements. The aim, modalities and promises of trade liberalisation have now been subject to sustained criticism for nearly two decades, and more recently the investment liberalisation regime, which arguably has more extensive effects, has been similarly subjected to widespread dissent. A global financial and economic crisis on par with the Great Depression has deeply shaken faith in the Washington Consensus, neo-liberal free trade dogma and socially dis-embedded market-based paradigms of governance. Depressed economies, high unemployment and falling levels of social security, especially within the EU, have stoked public discontent with the dominant economic ideology and fanned popular frustrations. In a sense TTIP has found itself in a perfect storm, where even a liberalisation agreement between supposedly like-minded States of the global North is in danger of running aground.¹

The debate within the EU over the potential effects and implications of TTIP, especially with regard to the provision of public services and issues of social security broadly understood, has been fraught. There exists a high degree of uncertainty regarding facts, information and impacts at all levels; European institutions, national government, civil service, civil society, the public, the media, and the private sector. A large part of this stems from the lack of transparency in the European Commission's approach to the agreement and its negotiations, and the disproportionate influence with the corporate sector appears to have wielded over the process to date.

Widespread public concern, together with research and studies published to date, reflect the likelihood of distinct effects on public health in the EU from the advent of TTIP. Trade and investment agreements can have an impact on public health essentially because they exist to restrict the scope of government intervention in relation to specific areas of the economy. According to certain economic theories, this can be for good reasons – enabling freer economic activity across borders and inside domestic economies, which can lead to overall growth and higher living standards. Setting debates over economic theory and ideology aside, difficulties with the restriction of State economic action arise essentially because the idea of clear division between the economy as such and broader societal interests is ultimately a false construct. The two spheres are deeply interrelated and interdependent. Government action or inaction in one sphere will typically impact in multiple direct and indirect ways on the other. This situation is further complicated by the fact that the interests of the main actors in each sphere will often conflict.

¹ As noted by Sauvé and Soprana, the last significant multilateral liberalisation agreement instituting the WTO in 1994 “was quite clearly the byproduct of a peculiar, “end of history” moment. It is doubtful that such disciplines could easily be replicated today given the vastly more questioning attitudes that pervade public policy debates on trade and investment liberalization relative to those characterizing the heyday of the Washington Consensus.” Pierre Sauvé and Marta Soprana, ‘Learning by Not Doing: Subsidy Disciplines in Services Trade’, E15 Task Force on Rethinking International Subsidies Disciplines Think Piece, International Centre for Trade and Sustainable Development/ World Economic Forum, April 2015, p. 11.

What becomes important then is the ability of government to balance the spheres and the interests of the actors. Trade and investment agreements affect that ability. By placing restrictions on governments in the area of the economy they inevitably have repercussions on the broader society. This is often understood as the effect these agreements have on the government's 'right to regulate'. The right to regulate in what is referred to as the 'public interest' is a central tenet of democratic rule, and public health, in turn, is one of the most important aspects of the public interest.

This study seeks to build on and deepen the analysis of TTIP's implications, with a specific focus on the proposed agreement's implications on public health in Ireland. The majority of the research conducted to date on TTIP's implications within Europe has been at a more abstracted EU level. Where previous studies have differentiated between EU and Member State impacts of TTIP the analysis has been focused on differences in purely economic impacts and does not adequately account for divergences in social impacts. One review for the European Parliament notes that "the economic structure of the EU is so differentiated that the likely impact of the any transatlantic deal will not be the same in all Member States. Member States' starting positions are not the same."² In fact, the review notes that "all studies converge in forecasting unequal gains for individual countries – as well as greater gains for the US than for the EU."³ However, the 8 differentiated studies reviewed are all economic studies, which are of much value but do not provide the full picture, as social concerns are not properly accounted for. This is especially so in relation to the social value of regulations that are directly in TTIP's firing line. Most of these regulations exist in the public interest and many directly protect public health. Yet the removal or 'harmonisation' of regulations accounts for almost all of the projected economic gains that are claimed to arise from various levels of liberalisation; the more regulatory differences removed the greater the purported economic benefits. Without an analysis of the social risks and costs, there can be no accurate picture of the overall implications of TTIP.

The study is sensitive to Ireland's specific economic situation; that is, its economic model, current financial, regulatory and social situation, medium-term economic prospects and its current institutional and policy structure in regard to public health. Ireland is heavily reliant on foreign direct investment and other inflows of foreign capital. Its economy is based on a strong export orientation, yet a disproportionate amount of export income accrues to foreign interests in the Irish economy, and is therefore of marginal value to the social sphere given an extraordinarily low corporate tax rate and an even lower effective tax rate. Ireland's economic model is also based on high levels of openness to regional and global economies, and hence it is intimately affected by external shock or crisis as demonstrated in 2008. Furthermore, Ireland's ongoing systemic economic crisis, though apparently lessening, has left it in a precarious financial situation with a significant if not unsustainable debt burden that is rooted in the socialisation of private bank debt.

Perhaps more importantly, having implemented severe austerity measures that have significantly depressed social security and well-being, Ireland will now be under significant pressure to recover and expand social protections and public health provision in the future. In order to satisfy public demand, and to meet its international legal obligations to progressively realise the human right to health, peripheral European countries like Ireland will need a proportionately greater degree of policy space than core EU Member States which have not undergone structural adjustment programmes imposed by international lenders, and retain more robust public finances. Due to its dependence on external sources of capital, curtailed domestic finances, weak economic position and high susceptibility to external financial and economic fluctuations, Ireland will be more affected by the advent of TTIP in

² Roberto Bendini and Pasquale De Micco, 'The Expected Impact of the TTIP on EU Member States and Selected Third Countries', European Parliament, DG for External Policies, DG EXPO/B/PolDep/Note/2014_119, September 2014, p. 4.

³ Ibid, p. 21.

relative terms. As such, it is suggested that Ireland must pay particularly close attention to the potential social and financial costs of TTIP, as well as the special implications of lost policy space.

The study is also attendant to the ideological dimension of TTIP that may be its main driving force. There is a strong desire among those positively disposed to TTIP to believe, despite very little evidence, that TTIP can save the US and the EU from economic stagnation and catapult a new transatlantic economy into a higher gear. Without a foundation for such broad economic hopes, TTIP may ultimately lead only to deeper inequality, social division and political instability. At the very least, TTIP represents a large risk as a novel and far-reaching piece of international legislation. It may result in quite dramatic social changes in the EU and US, as well as further entrenching powerful interests in the global North to the detriment of socio-economic development in the global South. An international legislative step with such potentially profound economic and social consequences should not be taken in the absence of very clear indications of concrete and dependable benefits.

Finally, to a certain degree this study incorporates a perspective on public health systems and governance grounded in a human rights-based approach, but does not base its analysis solely on this approach. The study itself does not explicitly advocate for this or any other particular approach to public health, beyond one that is sufficiently inclusive, well-considered and evidence-based to properly encompass the social dimensions. Instead, the study utilises some rights-based perspectives and arguments to illuminate and highlight certain impacts that might otherwise be considered marginal, and easily, though wrongly, passed over. This is particularly useful in terms of broader structural issues and impacts. Following the Lisbon Treaty, the EU is under an obligation to ensure respect for human rights in its actions and policy-making, including the negotiation and implementation of international agreements. In addition, the EU Charter of Fundamental Rights is now binding on the EU. As such, a rights-based approach to government policy-making may now be considered mandatory, and the ability of Member States to exercise policy space in this regard should not be compromised. This must be taken into account in negotiations on international instruments such as TTIP that have a strong potential to impinge on the ability of States to meet their international legal obligations, specifically in relation to economic, social and cultural rights. If TTIP goes ahead as planned, this will become a more difficult and expensive exercise, as such policy space will be heavily contested by foreign investors and complicated by a process of regulatory harmonisation.

In this light, the study addresses the likely implications of TTIP on public health in Ireland under three categories:

- general or cross-cutting considerations on benefits and costs from both economic and social perspectives (Chapter 2);
- the impact of investment provisions (Chapter 3);
- the impact of trade provisions (Chapter 4).

Proportionately more space is devoted to the impact of investment provisions, due to the fact that investor protection and the investor-State dispute settlement (ISDS) system represents one of the areas that will have the most impact on public health, and is perhaps the most controversial. There is general consensus in the field of international economic law that, taken as a whole, the international investment law regime is even more restrictive of the policy space of governments to regulate in the public interest than the trade regime.⁴ Investment and ISDS is therefore dealt with in the greatest detail. The other area of greatest likely impact is regulatory cooperation, which is addressed within

⁴ Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' 36 *University of Pennsylvania Journal of International Law* (2014), p. 2.

the chapter on the impact of trade provisions. This analysis includes close attention to intellectual property, trade in services and, due to its direct relation to public health, the implications and lessons to be learned from the current challenges in the WTO to Australia's tobacco plain packaging legislation. The broader effects of TTIP on the future directions of government health policy are discussed in Chapter 2.

On the basis of this analysis, recommendations are formulated and directed to three categories of addressees; civil society, the Irish Government and relevant EU Institutions. The study is ultimately intended to provide an evidentiary and analytic framework that may better inform public engagement, advocacy strategy and government policy-making with respect to economic liberalisation and public health within Ireland and further afield.

1.2 – A Brief History of International Trade and Investment Regulation

Traditionally, the regulation of economic activity within a State's borders was subject mostly to the discretion of the government of the day. States retained a high degree of autonomy in the management of their domestic economies, which was subject almost entirely to domestic legal and political constraints alone, including with respect to foreign economic actors. Few limits in the form of international legal obligations existed to restrict what was a very significant scope of 'regulatory space', especially with respect to decision making on social or non-economic issues including those related to important public interests such as health, the environment and economic redistribution.

This situation began to change markedly with the establishment of new international institutions and legal regimes following the Second World War. In the late 1940s, efforts intensified to construct an international trade and investment regime that would have deep implications for State regulatory space. These efforts culminated in the form of the Havana Charter for an International Trade Organisation,⁵ which treated international trade and foreign investment collectively and sought to establish an international institution that would govern both. The organisation never came into being, primarily due to US reluctance and concerns over sovereignty, but the trade section of the agreement survived and became the General Agreement on Tariffs and Trade (GATT), which was widely adopted.

At this point the evolution of international trade and investment regulation was split in two. Trade regulation evolved through the framework of GATT, which set a legal and institutional framework that, although weak and amorphous and structurally biased in many respects, served to contain and to some extent mitigate fundamental divergences in the interests of developed and developing countries. This has resulted in the international trade law regime adopting balancing elements to account for national, public and social interests that may oppose the regime's primary goal of trade liberalisation. Because of its long institutionalisation and its multilateral nature, involving almost all States, the trade regime has had to reconcile many diverging viewpoints. Although far from perfect, it has succeeded in establishing some significant in-built mechanisms for weighing and adjudicating between competing national, social and economic goals.

The GATT was eventually replaced by the World Trade Organisation (WTO) in 1994, which solidified the institutional structure of the trade regime and added significantly to the scope of its regulation and the depth of its enforcement. The GATT itself covered both tariff and non-tariff barriers to trade

⁵ United Nations Conference on Trade and Employment, Havana, Cuba, 21 November 1947 – 27 March 1948, Final Act and Related Documents (Havana Charter), UN Doc. E/CONF.2/78, April 1948.

in goods, yet its implementation in practice was initially centred on tariffs and only later did States begin to focus on removing non-tariff barriers. With the advent of the WTO this trend accelerated, and ever more disputes are related to non-tariff or 'regulatory barriers' to trade, particularly in the areas of health and the environment. In response to pressure from the global North, the WTO also added rules and instruments in a number of other areas, including trade in services, intellectual property rights and trade-related investment measures. It also introduced a comprehensive enforcement mechanism in the form of the WTO Dispute Settlement system, consisting of panels that adjudicate disputes between States related to any of the WTO agreements, as well as an Appellate Body that is fully empowered to review the panel's decisions and uphold or discard them.

Following the establishment of the WTO, further multilateral trade liberalisation has become increasingly difficult for a number of reasons. These are mostly related to old themes involving a basic conflict between demand from global North members for greater liberalisation that by nature further reduces domestic regulatory space, and resistance from global South members in an effort to retain what control over their domestic economies they have. Developing countries as a whole have become increasingly burdened and dissatisfied with the system, while developed countries are increasingly frustrated with the resistance of the developing world to further trade liberalisation and the establishment of additional rules in new areas. North/South cleavages have widened over time and the latest Doha Round of negotiations, which is nominally devoted to the idea of development, has been effectively stalled for 15 years. From the North's point of view, this 'failure' at the multilateral level, enabled by the weight of numbers being on the side of the South, has been to some extent redeemable through a surge in establishing bilateral and regional trade agreements (which also include investment treaty components). The TTIP negotiations, as well as the Trans-Pacific Partnership (TPP) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA), are prime examples of this, aiming to extend further WTO-plus liberalisation in a piecemeal and uneven fashion.

It bears emphasising that while the evolution of trade agreements has led to a certain accommodation of social interests through a minimal recognition of the right to regulate, this is highly limited. In this regard it is worth paying attention to a passage from Krajewski and Kynast. Accordingly, all free trade agreements

perceive regulatory or quantitative restrictions on trade as trade barriers that must be dismantled. Free trade agreements are thus not oriented towards protecting certain quality standards or organisational models of public services or making them binding. Rather free trade agreements typically contain provisions that seek to restrict the scope of state regulation, including with regard to public services. This yields the important insight that elements of free trade agreements ostensibly aimed at protecting public services are structurally defensive instruments. They as a rule do not impose positive state obligations concerning the provision and regulation of public services, but contain definitions of derogations and justifications. This is an important point because derogation and justification clauses are generally interpreted strictly. If a state invokes them it bears the burden of demonstration and proof that the regulations in question are relevant and can be applied.⁶

On the other hand, investment regulation has developed in a very different manner. Of central significance is the fact that it has evolved, and continues to evolve, without the benefit of any

⁶ Markus Krajewski and *Britta Kynast*, 'Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Legal Framework for Public Services in Europe', Hans-Böckler-Stiftung, Friedrich-Alexander University Erlangen-Nürnberg, 1 October 2014, pp. 14-15.

multilateral institution. It is arguably for this central reason that it has not, as yet, reached the same level of balance and accommodation as the trade regime, especially with respect to potential divergence between investment liberalisation and the public interest, notably including health policy.

In short, the fundamental obstacles to both trade and investment liberalisation are at base linked to differences in interests between global North and South. These differences proved easier to overcome or circumvent in the trade context, and allowed the institution of a multilateral regime. However, even that is now widely believed to be under some threat.

In the investment context, the vastly diverging interests of traditional capital-importing and capital-exporting States could not be overcome at a global level. The fate of the Havana Charter was the first manifestation of this, and it was followed by a period where protections for foreign investors were relatively weak and largely limited to customary international law and diplomatic protection. Although disputed, again along North/South lines, the customary standard allows a wide latitude for domestic control over the activities of foreign investors, and has traditionally allowed States to implement a wide range of appropriate safeguards necessary to protect their national policies and priorities, short of outright expropriation without compensation. These minimal standards were confirmed in the 1960s and 70s through a series of United Nations General Assembly Resolutions aimed at the creation of a New International Economic Order,⁷ which were nonetheless opposed by most of the global North's capital-exporting States. Notably, these resolutions set out an understanding that any dispute between a foreign investor and the host State must be resolved in the domestic courts of that State.⁸

Again demonstrating deep disagreement over the desired shape of investment protection, a Draft Convention on the Protection of Foreign Property was produced by the Organisation for Economic Cooperation and Development (OECD) in 1967.⁹ However, the Convention did not get sufficient support within the OECD to be opened for signature. This is a significant point as it demonstrates the longstanding refusal of developed countries to enter into the constraints of investment treaties where developing countries are not similarly constrained. Nevertheless, the principles and structure of the Draft Convention went on to directly inform the basis of later BITs, explaining their current relative homogeneity.¹⁰

Another attempt at the multilateral level was made in the late 1990s, again under the auspices of the OECD, in the form of the Multilateral Agreement on Investment (MAI) which also ultimately ran aground. Once the negotiations and the text became public knowledge, an unprecedented wave of global popular opinion rose in opposition.¹¹ The UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities also expressed deep misgivings:

⁷ The Declaration on the Establishment of a New International Economic Order, UN Doc. A/Res/S-6/3201, 1 May 1974; Permanent Sovereignty over Natural Resources, UN Doc. A/5217, 14 December 1962; and the Charter of Economic Rights and Duties of States, UN Doc. A/Res/29/3281, 12 December 1974. Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes and Meier, New York, 1979).

⁸ Permanent Sovereignty over Natural Resources, UN Doc. A/5217, 14 December 1962, para 4.

⁹ Resolution of the OECD on the Draft Convention on the Protection of Foreign Property, OECD Publication No. 23081, 7 ILM 117, 12 October 1967. This convention was based on the Abs-Shawcross Draft Convention on Investments Abroad, named after its principle creators; Herman Joseph Abs was then Chairman of Deutsche Bank, and Lord Hartley Shawcross was then Director of the Shell Petroleum Company.

¹⁰ Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff, The Hague, 1995), p. 3.

¹¹ Encompassing many of the objections, one Canadian NGO, for example, took a court action aimed at stopping the Canadian government from being involved in negotiations on the MAI, arguing that the proposed agreement was contrary to the Canadian constitution. Michel Chossudovsky, 'Fighting MAIgalomania: Canadian Citizens Sue their Government' 29 *The Ecologist* 8 (1999), pp. 449-51.

particularly about the extent to which the Agreement might limit the capacity of States to take proactive steps to ensure the enjoyment of economic, social and cultural rights by all people, creating benefits for a small privileged minority at the expense of an increasingly disenfranchised majority.¹²

OECD members were unable to agree on certain fundamental issues, such as Canadian and French proposals of exceptions for cultural protection and German calls for “social and ecological compatibility.”¹³ One expert observes that:

the long years of negotiation of the MAI showed the developed states that the rules they seek to impose on the developing world may prove too onerous to bear when applied to themselves. They could not brook the loss of sovereignty that the MAI entailed.¹⁴

In addition, developing countries were also understandably uninterested in any possible future accession to a multilateral treaty which they had absolutely no part in formulating.

Following the failure of the MAI, the issue was taken up by global North States in the WTO.¹⁵ The WTO already contained some limited provisions on investment in the Agreement on Trade-Related Investment Measures (TRIMs), but a Working Group on Investment was set up in 1997 to push for further investment protections. Most developing countries, led by India, did not wish to negotiate further on investment within the WTO at all,¹⁶ and ultimately these plans have been stalled for the duration of the Doha Round.

In response to the ongoing struggle over the shape of protection for their investors and the difficulty of bypassing global South resistance in multilateral settings, global North States began to pursue concerted programmes in the mid-1980s to conclude a web of bilateral investment treaties (BITs) with developing countries. BIT programmes were designed as a strategy of the dominant developed countries “to change the dynamics of this struggle and protect the interests of their companies and investors.”¹⁷ This bilateral treaty programme was accelerated significantly in the 1990s. Central to the enhancement of protection for investors in developing countries was the construction of an ISDS regime whereby, in the event that their interests were adversely affected by host State policy or regulation, foreign investors could bypass the domestic legal system in the host State entirely and bring their claim before an international investment arbitration tribunal such as the International Centre for Settlement of Investment Disputes (ICSID) in Washington. The development of the international investment law regime and ISDS is outlined in further detail in Chapter 3.

This strategic shift by the global North to bilateralism and regionalism in the investment sphere has now been mirrored by a similar move in the trade context, as noted above. The two have begun to merge, and increasingly we are seeing the conclusion of bilateral, regional and plurilateral agreements containing provisions on both trade and investment together, led by the North American Free Trade Agreement (NAFTA) in 1994 and culminating now in the TPP, CETA and TTIP.

¹² Quoted in Christopher Harding, Uta Kohl and Naomi Salmon, *Human Rights in the Market Place: The Exploitation of Rights Protection by Economic Actors* (Ashgate, Aldershot, 2008), p. 195.

¹³ Aaron Cosbey (et al), ‘Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements’, International Institute for Sustainable Development, Winnipeg, 2004, p. 22.

¹⁴ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, Third Edition (Cambridge University Press, Cambridge, 2010), p. 261.

¹⁵ Aaron Cosbey (et al), ‘Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements’, International Institute for Sustainable Development, Winnipeg, 2004, pp.24-5.

¹⁶ Bhagirath Lal Das, ‘Comments on the Forthcoming Work on Investment in the WTO’ 6 *SEATINI Bulletin* 7 (2003).

¹⁷ Jeswald Salacuse, ‘The Treatification of International Investment Law’ 13 *Law & Business Review of the Americas* 1 (2007), p. 156.

This may be seen as demonstrating a rough ‘closing of the circle’ from the Havana Charter, but only to a very limited extent. The two regimes of trade and investment law have grown in very different directions, and the many ways in which they diverge will not be masked over simply by placing a BIT next to a free trade agreement. Besides the difference in balance mentioned above in relation to State’s regulatory space, there are also differences in the methods of enforcement, remedies, and between the basic uniformity of agreements in trade versus the high fragmentation in investment. And perhaps the most fundamental difference relates to the respective construction of legal subjects: world trade law remaining a State-centric field, while international investment law now directly elevates foreign investors and multinational corporations. Many see the root of this divergence in the vastly different modes of dispute settlement. Where the trade law regime employs a court-like structure of standing or permanent adjudicators and an appellate body, the investment law regime depends on a shifting system of ad hoc tribunals consisting of arbitrators newly chosen by the parties in every dispute, with no appellate body. In getting at the core of the current divergence in these regimes, academic commentators have suggested that while trade is about “overall welfare, efficiency, liberalization, state-to-state exchanges of market access, and trade opportunities”, investment is “about protection”.¹⁸ Yet despite their differences, “they both raise similar questions with respect to the amount of regulatory space that is accorded to domestic decision-makers.”¹⁹

In this context, global South resistance to the international investment law regime in particular, in both bilateral and multilateral settings, has increased due to greater awareness of the problematic nature of BITs and other international investment agreements, raised by the increasing number of claims being made by investors against States under these treaties in cases where important public interests such as health, the environment and human rights are at issue.²⁰ In addition, these countries have begun to reconsider the wisdom of surrendering sovereignty in this area in the face of a continued lack of solid evidence supporting their underlying promise, that entry into investment treaties results in greater inflows of foreign investment.²¹ Latin American countries in particular have begun to withdraw in recent years from bilateral investment treaties and the jurisdiction of ISDS mechanisms. The experience of the global South in this regard provides a cautionary tale in the context of TTIP, especially for the EU’s peripheral members.

1.3 – The TTIP Negotiations in Context

The question of democratic control is central to the debates and controversies over TTIP. Proponents argue that even if it entails a slight dilution of democratic control, on balance this can be justified in terms of economic gain. On both sides of the Atlantic, economic integration between the EU and US has been viewed for some time as highly desirable by powerful interests, albeit difficult to carry out in some respects given persistent points of difference amidst the general consensus. Regulatory harmonisation has been perhaps the most significant stumbling block. Deeper integration has been raised progressively higher on the agenda of transatlantic relations since the end of the Cold War, and

¹⁸ Nicholas Di Mascio and Joost Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ 102 *American Journal of International Law* (2008), pp. 54, 56.

¹⁹ Markus Wagner, ‘Regulatory Space in International Trade Law and International Investment Law’ 36 *University of Pennsylvania Journal of International Law* (2014), p. 14.

²⁰ Yash Tandon, ‘Negotiations on the Singapore Issues Should not Begin’ 6 *SEATINI Bulletin* 7 (2003).

²¹ The weight of evidence suggests that BITs do not increase investment inflows, and that their presence or absence does not significantly factor into executive investment decisions of multinationals or into calculations by political risk insurance companies. Jason Yackee, ‘Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence’ 51 *Virginia Journal of International Law* 2 (2011).

has come to take on particular significance in recent years given the rise of developing economies and a loss of influence in the WTO. The EU and the US have come to view closer economic relations and transatlantic regional development as an important counterweight to the growing influence of Asia in the global marketplace.

In 2007, the Transatlantic Economic Council was created, with the aim of intensifying cooperation in the areas of investment, trade, regulatory cooperation, intellectual property, technological innovation and financial markets. Following the global financial crisis, both sides of the Atlantic were preoccupied with fighting deep recessions and protectionist impulses, with little time or inclination towards cooperation beyond that necessary to stabilise financial systems and salvage national economies and financial institutions in freefall. In November 2011, the EU and US appointed a High-Level Working Group of senior government officials to reinvigorate cooperation and investigate the scope for a possible trade and investment pact. In 2013, with stability attained and new norms of economic malaise and creeping growth established, the EU and the US decided to begin negotiations to create a new transatlantic free trade area.

The EU's negotiating mandate states that the objective of TTIP:

is to increase trade and investment between the EU and the US by realising the untapped potential of a truly transatlantic market place, generating new economic opportunities for the creation of jobs and growth through increased market access and greater regulatory compatibility and setting the path for global standards.²²

Together the EU and the US account for more than 50% of the world's GDP, and the current transatlantic marketplace already generates 15 million jobs and US\$5.3 billion in commercial sales.²³ Tariffs on the transatlantic goods trade are already very low. The main gains from TTIP are expected to come from removing bureaucratic hurdles and better aligning product standards and other regulations. The market access that the EU mandate mentions mainly refers to the aims of the agreement to further open services and government procurement markets, but the advances in these areas are not expected to be overly large. Through the inclusion of investment provisions and ISDS, the hope is also to induce greater foreign investment through providing higher protections, although again this is not a particularly significant expected source of gains. It is believed that deeper economic integration will have an impact on global markets and provide greater gravity to the centralisation of world economic activity around the transatlantic axis, providing the EU and the US together with more influence over crucial standard setting procedures that could provide notable economic and status gains. This projection is highly speculative, however.

As such, the main focus of negotiations is on: 1) regulatory issues and bureaucratic alignment; 2) opening services and procurement markets; and 3) investment protection. On the trade side of TTIP, issues of regulatory cooperation and efforts to open services markets will have a large potential effect on the lives of EU citizens. Of perhaps greatest significance is the mooted creation of a new supra-national regulatory oversight body with an open-ended mandate. The potential long-term influence of this body would seem to be very large. On the investment side, the inclusion of the ISDS procedure would similarly entail significant long-term effects. And much as some proponents hope that advances in trade negotiations between the two parties outside the context of the WTO will catalyse a renewed

²² Council of the European Union, 'Directives for the negotiations on the Transatlantic Trade and Investment Partnership between the European Union and the United States', Brussels, 11103/13, 17 June 2013, <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

²³ Daniel Hamilton and Joseph Quinlan, 'The Transatlantic Economy 2013: Annual Survey of Jobs, Trade and Investment', Center for Transatlantic Relations, Johns Hopkins University, Paul H. Nitze School of Advanced International Studies, 2013.

vigour for further global trade liberalisation at the multilateral level, some also entertain the notion that advances in investment treaty making in TTIP will prompt much-needed reform of the international investment law regime. These presumed institutional advances reflect the idea TTIP as a so-called 'living agreement', extending its liberalisation agenda beyond the actual terms of the agreement itself.

This market liberalisation agenda in general has attracted significant criticism for its potential to undermine democracy and government agency.²⁴ In the public sphere, negotiations on TTIP have sparked widespread and numerous demonstrations, with scepticism proliferating among citizens and law-makers on both sides of the Atlantic as more information about the agreement and its likely impacts comes into the public domain and consciousness. Such scepticism has underpinned President Obama's difficulties in obtaining Trade Promotion Authority from the US legislative houses,²⁵ and the postponement of a crucial vote on TTIP in the European Parliament due to deep disagreement over the inclusion of ISDS.²⁶

It is important to note the extent to which TTIP would expand the reach of ISDS. There are over 3,000 BITs currently in existence, but which only cover approximately 16% coverage of total foreign investment around the world. This is because the vast majority of treaties are between one global North (investor) State and one global South (host) State, while the bulk of foreign investment flows in financial terms remains within the global North. To date, only relatively low levels of North-North flows are covered, because of the lack of bilateral investment agreements between Northern States. Only 15-20% of US outward foreign investment is currently covered by an investment agreement; TTIP would increase that coverage by an additional 50-60%.²⁷

ISDS is certainly the most controversial element in the debates within the EU around TTIP. Public opposition is particularly strong in Germany, and the German government may be leaning towards the view that ISDS is not necessary in an agreement between the US and the EU,²⁸ with many arguing that the protections afforded by domestic courts are sufficient. In response to such a level of concern, and in accord with its negotiating mandate,²⁹ the European Commission suspended negotiations on this element and initiated a public consultation in March 2014. The guiding question was essentially whether the EU's proposed approach to the inclusion of ISDS in TTIP would achieve a just balance between the aim of increased investor protection and the safeguarding of governmental ability to regulate in the public interest. The consultation drew the highest amount of responses of any previously held (almost 150,000), from a broad cross-section of stakeholders, the overwhelming

²⁴ Dani Rodrik, *The Globalisation Paradox: Why Global Markets, States and Democracy Can't Coexist* (Oxford University Press, Oxford, 2011)

²⁵ Ben Jacobs, 'Defeat for Obama on trade as Democrats vote against him', *The Guardian*, 12 June 2015; Dan Roberts and Paul Lewis, 'Obama's bid for 'fast track' negotiating authority survives key Senate vote', *The Guardian*, 23 June 2015

²⁶ Suzanne Lynch, 'European Parliament Postpones Transatlantic Trade Vote', *Irish Times*, 9 June 2015.

²⁷ Gus Van Harten, 'Comments on the European Commission's Approach to Investor-State Arbitration in TTIP and CETA', *Osgoode Hall Law School Legal Studies Research Paper No. 59, Volume 10, Issue 13, 2014*, pp. 30-31.

²⁸ Letter of Vice-Chancellor Sigmar Gabriel to Commissioner Karel de Gucht, dated 26 March 2014. However, it must be said that Germany's overall position on this question is somewhat ambiguous, as Gabriel has also commissioned a study by a prominent expert in international economic law, Professor Markus Krajewski, setting out a proposed investment chapter that includes ISDS; Markus Krajewski, 'Project No. 83/15 of the Federal Ministry for Economic Affairs and Energy, Model bilateral investment treaty with investor-state dispute settlement for industrial countries, giving consideration to the U.S.' There is some speculation over whether this proposal may inform a new German position. Nevertheless, there have been reports that Germany and France may be discussing a joint opposition to the inclusion of ISDS in the TTIP; Cécile Barbière, 'France and Germany to form united front against ISDS', *Euractiv.com*, 15 January 2015..

²⁹ "If the commission considers it necessary it may postpone the negotiation process after a hearing to engage in a more extensive consultation process." Council of the European Union, 'Directives for the Negotiation of a Comprehensive Trade and Investment Agreement, Called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America', Brussels, 17 June 2013, para 5.

majority of which advocated against the inclusion of ISDS. European Trade Commissioner, Cecilia Malmström, admitted that “[t]he consultation clearly shows that there is a huge scepticism against the ISDS instrument.”³⁰

The Commission’s Report on the consultation indicated that “[i]n general, many respondents recognise the EU’s efforts to improve the investment protection system, but consider for various reasons that the approach is insufficient. A significant number of trade unions and a large group of NGOs stress the need to strengthen the right to regulate in the public interest.”³¹ Within the business community, on the other hand, “despite overall support for a more inclusive and coherent ISDS system, characterised by transparency and ethics”, there were concerns that “this could make the EU less attractive to foreign investment.”³²

The Commission seems to view this consultation only as a first step, envisaging “further discussions” with the other EU institutions and stakeholders. The following four central areas were identified for special further improvement:

- the protection of the right to regulate;
- the supervision and functioning of arbitral tribunals;
- the relationship between ISDS arbitration and domestic remedies;
- the review of ISDS decisions for legal correctness through an appellate mechanism.

According to the Commission, “negotiations on investment in TTIP ... will only resume once the Commission has come to the assessment that its new proposals guarantee among other things that the jurisdiction of courts in the EU Member States will not be limited by special regimes for investor-to-state-disputes.”³³ On the surface, this would seem to be a very difficult guarantee to make unless an exhaustion of domestic remedies rule is put in place.

The difficulty lies in the fact that the very aim to restrict EU and Member State legal, regulatory and policy space is effectively the *raison d’être* of the TTIP and other such trade and investment liberalisation agreements. The idea is to limit State and EU intervention, entailing reduced regulatory capacity and national sovereignty. The question as such, especially if ISDS is to be included, is not whether EU and Member State law and policy will be restricted, but by how much it will be restricted.

In the meantime, there have been no formal adjustments to the mandate of the Commission, which remains under the expectation that it will continue to negotiate the inclusion of ISDS and to secure agreement on the outstanding issues. The ultimate decision on ISDS will be left until “the final phase of the negotiations.”³⁴

³⁰ Christian Oliver, ‘Public backlash threatens EU trade deal with the US’, *Financial Times*, 13 January 2015.

³¹ EU Commission, Report on the online consultation on investment protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership agreement, Memo/14/560, 13 January 2015, p. 3.

³² *Ibid*, p. 3.

³³ *Ibid*, p. 1.

³⁴ *Ibid*, p. 4.

1.4 – TTIP and Public Health

Despite a certain amount of privatisation of the health sector in many countries, health care in the EU is still seen as a fundamentally public service that is provided and regulated according to a social and ethical rationale, rather than a primarily market-based or economic enterprise. Public health is therefore inseparable from the idea of democratic autonomy exercised through representative government, free to develop and implement policy according to the changing health needs of the population and available scientific knowledge and technologies. The fact of changing needs is important. What may be required by sound public health policy in 10 years time may well differ in significant ways from that required today. Government freedom to respond to the evolving needs and wishes of the people is a critical attribute of government itself.

Two fundamental aspects of trade and investment agreements act to limit this freedom. In the first instance, the agreements are there for precisely that purpose - the whole idea is that these agreements are commitment devices, where the government of the day commits to bind the hands of future governments. To be clear, this is not necessarily a bad thing. Placing checks on State power can have great benefits in many areas, and indeed this is the rationale underpinning the socially progressive aspects of international law. However, the ultimate benefits of these commitments will depend on the nature of the areas at issue and the details of the rules created and flexibilities allowed.

Secondly, by nature these are liberalisation instruments that seek to open up previously government regulated or otherwise protected sections of the economy to the private sector and to foreign investment and market access. Extreme caution needs to be exercised here. While increased private and foreign economic activity may be beneficial in certain regards, it is also potentially highly detrimental in others. The interests of 'stakeholders' will vary significantly, especially in what are referred to in trade terms as 'sensitive sectors', such as the health sector. Public services may be transformed and eroded through the process of liberalisation and privatisation. In the absence of an international trade or investment agreement, this may be done domestically on a voluntary basis with the assent of the people, but it may also be easily reversed if that assent is withdrawn in the future. Binding international trade and investment agreements change that situation significantly, by acting to make it far more difficult to reverse course in response to popular wishes, new evidence, adverse experiences or even public emergencies. As noted by one prominent specialist in the field:

if regulatory frameworks are not developed or fully implemented before private companies begin supplying a particular service it may become difficult to introduce regulations and activity controls once private actors have started to operate on the market. This situation may also give rise to claims under standards of international economic law such as national treatment, fair and equitable treatment or market access.³⁵

Trade and investment agreements confer new rights and protections on the foreign economic actors that enter a liberalised sector if and when it is opened. The rights and protections are conferred directly on foreign investors by investment provisions, while trade provisions enable corporate actors to pressure host States through the advocacy of their case by their home State, which can also take legal action against the host on the corporate actor's behalf. The result is often referred to as the

³⁵ Markus Krajewski, 'Investment Law and Public Services', 1 April 2012, p. 5, <http://ssrn.com/abstract=2038514>.

'locking-in' effect of the trade and investment regimes,³⁶ or alternatively the 'disciplining' effect,³⁷ and it is demonstrated clearly in the case of Argentina. Here, the attempted State reversal of a decade of extensive trade and investment liberalisation measures in the 1990s, in response to the country's severe economic crisis from 1999, was successfully challenged by numerous foreign investors who were awarded large amounts of damages by ad-hoc international investment tribunals.³⁸

Public health has numerous elements, from health services and medicines, to the quality of food and water. Because of the broad scope of both public health and trade and investment agreements, there are many points of intersection. At each of these points the State's right to regulate becomes crucial in order to balance the competing interests involved. The international trade law regime has long been subject to critique on the basis that many of its provisions negatively affect this right, potentially leading to lower standards of public health and an erosion of the capacity of governments to implement the will of the people.

Reflecting the importance of health services, criticism has centred around the WTO's General Agreement on Trade in Services (GATS).³⁹ The liberalisation of services, which is facilitated by GATS and subsequent free trade agreements, can have consequences for the government's ability to control new entries into the marketplace for health services, depending on how open to foreign and private service providers that market is in the first place, and how carefully subsequent regulations are drawn up.⁴⁰ The substantive or binding provisions of these international agreements on services will ultimately affect the permissible shape of domestic regulations. Flexibilities and exclusionary mechanisms exist to protect certain sectors and regulatory space, but much depends on the details, and clauses need to be worded and positioned precisely to allow proper protection of the State's capacity to regulate in the interests of public health.

Public health policy may also be affected by sections in trade agreements establishing rules in the areas of intellectual property and, perhaps most importantly, regulatory cooperation. These are addressed in detail in Chapter 4. Intellectual property provisions have an effect on the price and availability of medicines, the activities of pharmaceutical companies and the freedom of information necessary to produce the goods needed to improve public health standards. Rules on sanitary methods have obvious effects on public health through setting or relaxing standards for the supply of food and beverages on the market. And rules on regulatory cooperation, alignment and harmonisation will have extensive and direct effects on the State's right to regulate.

As noted, however, trade agreements typically do have a number of built-in flexibilities, through exclusionary and exception devices with respect to substantive rules, which help to protect the State's regulatory discretion in certain circumstances. The right to regulate is expressly mentioned in trade agreements, albeit in a negative fashion as something to be preserved, not actively progressively

³⁶ Jagdish Bhagwati, 'US Trade Policy: The Infatuation with FTAs', Columbia University, Discussion Paper Series No. 726, April 1995, pp. 8-9.

³⁷ Stephen Gill, 'Globalization, Market Civilization and Disciplinary Neoliberalism' 24 *Millennium* 3 (1995); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press, Cambridge, 2008).

³⁸ Miguel Solanes and Andrei Jouravlev, *Revisiting Privatization, Foreign Investment, International Arbitration, and Water* (United Nations, Santiago, 2007).

³⁹ Markus Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law International, The Hague, 2003); Rudolf Adlung, 'Public Services and the GATS' 9 *Journal of International Economic Law* (2006); Amedeo Arena, 'The GATS Notion of Public Services as an Instance of Intergovernmental Agnosticism: Comparative Insights from the EU Supranational Dialectic' 45 *Journal of World Trade* (2011).

⁴⁰ Markus Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework' 6 *Journal of International Economic Law* (2003).

enforced. Investment agreements, on the other hand, do not tend to contain such exception clauses or specifically mention the State's right to regulate. While this may be changing slowly,⁴¹ existing investment agreements are fundamentally unbalanced in the sense that on the one hand they place only duties on States but do not confer rights, while on the other hand they confer only rights on foreign investors but do not impose any specific duties (other than assumed duties already existing under domestic law). Under these unbalanced conditions, it is not difficult to see how trade and investment agreements, and disputes thereunder, could easily compromise the State's right to regulate in the interests of public health.⁴²

The most problematic clauses in these agreements have related to the 'minimum standards of treatment', specifically the requirement that the government accord 'fair and equitable treatment' to foreign investors, and the clause on expropriation, particularly the notion of 'indirect' or 'creeping' expropriation. These phrases provide broad protections for foreign investors that have been widened even further by expansive interpretations of ad-hoc arbitral tribunals. Claims have been brought challenging government regulation on the location of hazardous waste dumps, municipal water concessions, environmental regulations, and the patenting of medicines, on the basis of investor protection. There are indeed a myriad of ways in which investment agreements may affect public health, and there is reason to believe that the many ISDS claims already seen are merely tip of the iceberg. This fundamental challenge to regulatory activity provides the backdrop against which TTIP is being negotiated.

⁴¹ Catharine Titi, *The Right to Regulate in International Investment Law* (Hart, Oxford, 2014).

⁴² Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Routledge, Abingdon, 2013).

2. GENERAL IMPACTS OF TTIP ON PUBLIC HEALTH POLICY IN IRELAND

According to the general theory, the benefits of TTIP are expected to materialise primarily in the form of increased profitability, economic opportunities, market sales and revenues for EU multinationals and investors in the US and US investors in the EU. Benefits for domestic exporters will arise from reductions or eliminations of tariffs. However, as mentioned, the relevant tariffs are already quite low therefore gains for domestic exporters will not be especially significant. There are other subsidiary benefits that are claimed to arise from trade and investment agreements, for example in the form of greater efficiency of domestic businesses through increased competition, general improvements in government management and the rule of law, and purported gains in the quality of democratic governance and respect for human rights. However, these theoretical subsidiary benefits are posited mostly in relation to the action of these agreements in developing countries, and are in any case disputed. Both the EU and US economies have been liberalised and democratic for long enough that these subsidiary gains are not expected to be significant from TTIP. On the contrary, as this study shows, there are substantial reasons to conclude that TTIP may lead to a deterioration in democratic governance and management, and a potentially decreased respect for human rights.

The main benefits to the people of the EU and Ireland are therefore economic or financial. Theoretically these will accrue through a trickle-down process whereby the direct financial and other benefits to multinationals and investors are transmitted downwards. This may occur in many ways. Most directly it may happen through increased employment if new investors are enticed to cross the Atlantic and start new businesses, creating increased employment opportunities. Alternatively, already established investors may reinvest their extra earnings in local job creation. In another scenario trickle-down may occur through increased tax revenue to the State from the extra financial gains and economic activity of investors, which may then be spent on social services and public projects. The final major form of trickle-down is potentially through linkages between foreign owned businesses and local companies that supply them with goods and services or otherwise benefit from their presence. The general idea is that governments should minimise their intervention in, and regulation of, this process, and let the markets and efficient market actors distribute the benefits naturally.

It must be noted that an *automatic* trickle-down theory of economics, upon which the bulk of benefits from TTIP ultimately depend in the above theory, has been thoroughly rejected by many of the world's most prominent economists and even by IMF research.⁴³ If a trickle down does occur the key factor is government intervention and management, to actively steer some of the gains accruing to multinationals into productive benefits for local industry, labour and the broader society.⁴⁴ This requires the maintenance of government capacity to act and regulate, not just to protect non-economic social interests but also to correct for market failures, and in some circumstances this may require the actual extension of such government capacity to intervene and regulate.

⁴³ Joseph Stiglitz, *The Great Divide: Unequal Societies and What We Can Do About Them* (WW Norton, New York, 2015); Era Dabla-Norris (et al), 'Causes and Consequences of Income Inequality: A Global Perspective', International Monetary Fund, IMF Staff Discussion Note, SDN/15/13, June 2015.

⁴⁴ Rajneesh Narula and Sajaya Lall (eds.), *Understanding FDI Assisted Economic Development* (Routledge, Abingdon, 2006).

It is here that TTIP's 'double-bind' comes into clear view: On the one hand the government will need to regulate to ensure the equitable and productive distribution of any benefits that may accrue from the agreement; and on the other hand TTIP proponents argue that there will be no benefits unless government regulations are removed, harmonised or otherwise restricted in accordance with the core thrust of the agreement. However, this double-bind only arises if there are clear potential economic benefits from the agreement in the first place. If there are not, then reduced government capacity is traded for no reason.

TTIP also has the potential to lead to economic and financial losses. The two main ways this could occur are through trade and investment diversion and the financial liability of governments represented by the ISDS mechanism. Within the EU, even if overall trade and investment to the region as a whole increases through TTIP this may still involve substantial changes in its precise national destination. It could be the case that if the attractiveness of some countries rises more substantially as a result of TTIP than others then investors could relocate from one to the other. Alternatively, investors previously committed to investing in one country may subsequently chose another. This situation is complicated by the probability of added trade and investment diversion effects between EU Member States. Thus TTIP will almost inevitably involve diversion and shifts in the relative economic benefits to each EU Member State.

Secondly, the ISDS mechanism would open national governments to new sources of liability that did not previously exist in the form of financial awards for damages that foreign investors incur due to government actions, regulations and policies. Both of these factors could represent very significant financial losses to EU Member States, particularly those presently enjoying a highly favoured status in the eyes of US investors, such as Ireland, and in those which are host to high volumes of US investment relative to their GDP, again Ireland being one such example. The next two sections of this chapter address the economic and financial benefits and costs of TTIP from this viewpoint.

TTIP is not widely expected to provide any direct social benefits. Social benefits will possibly accrue only indirectly through the trickle-down mechanisms described above, involving mainly higher living standards from greater employment opportunities and higher levels of social protection through increased revenue from taxation. However, there may also be social costs. These are represented mostly by threats to social security and public health from the ISDS mechanism and challenges to government action in this area that may dissuade or 'chill' progressive social and environmental policy, as well as regulatory harmonisation and other specific aspects of the trade section of TTIP. In addition, TTIP may involve a threat to the fulfilment of the human rights of the Irish people, specifically the progressive fulfilment of the right to health. The broad impact of TTIP in terms of these potential social costs is attended to in the last two sections and a more detailed appraisal is delved into in the subsequent chapters of this study.

2.1 – Net Economic Benefits and Fundamental Rationale of TTIP

The launch of negotiations on TTIP in 2013 was accompanied by a series of studies that predicted potentially positive economic gains from the agreement. Chief among these was a study by the Centre for Economic Policy Research (CEPR),⁴⁵ which was based on modelling aggregate effects for the EU as

⁴⁵ Centre for Economic Policy Research, 'Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment', Final Project Report Prepared under implementing Framework Contract TRADE10/A2/A16 for the European Commission, London, March 2013.

a whole and did not provide information on the divergent effects on the Member States. Taking its most positive liberalisation scenario, the study predicted that TTIP could result in a 0.5% increase in GDP for the EU as a whole, or € 120 billion annually, once it became fully operational.⁴⁶ The report recognises that these are the most optimistic figures, yet they are heavily relied upon by the European Commission in justifying TTIP. This scenario is widely regarded as most unlikely, as it would require the final text of TTIP to reflect the most ambitious levels of liberalisation. This would mean the complete removal of tariffs, many of which, such as those in the agriculture sector, are politically sensitive.

It would also mean what is termed ‘full integration’, meaning the highest level of regulatory harmonisation and removal of non-tariff barriers. The greatest benefits (80%) would come from regulatory harmonisation, which the EU and US have been attempting for many years with unimpressive results. Nevertheless, the CEPR’s self-titled ‘ambitious scenario’ assumes that 50% of the existing non-tariff barriers that can possibly be removed will be removed. The low likelihood of this scenario is acknowledged: “It should be stressed that in contrast to reducing tariffs, the removal of NTBs is not as straightforward. In fact, it is unlikely that all areas of regulatory divergence identified actually can be addressed.”⁴⁷ While the predictions of other studies vary, this conclusion on roughly 80% of any benefits coming from the removal of non-tariff barriers is shared by all of them.⁴⁸

However, the fine print specifies that this is the high point on a possible range that starts with half the most ambitious gains: “Under a comprehensive agreement, GDP is estimated to increase by between 68.2 and 119.2 billion euros for the EU”.⁴⁹ The € 68 billion figure may be taken as more likely, yet it would still require a 25% reduction in those non-tariff barriers that could be removed (so-called ‘actionable’ non-tariff barriers). Many who have watched the slow progress of regulatory convergence over the last 20-30 years would see this as still quite optimistic. In any case, this more likely scenario would represent a 0.27% GDP increase. As has been pointed out elsewhere, this amounts to € 2.60 per European per week, or an extra cup of coffee every 7 days.⁵⁰ On its most conservative estimates and assumptions, where there is no removal of non-tariff barriers, the CEPR states that gains would be insignificant, ranging from 0.02% GDP to 0.10% GDP.

Importantly, CEPR note that “non-tariff barriers are the highest for food and beverage products ... [and with respect to] services, financial services are one of the sectors with the highest estimated NTBs”.⁵¹ This is in fact critical from the viewpoint of the social benefits of regulations, which the CEPR study does not account for. The regulations that the study relies on removing here relate to two sectors that have a very high potential to negatively affect the public interest. Food and beverage regulations are critical to public health and, as the last global financial crisis demonstrated, financial regulation is critical to almost everything, beginning with the entire economy of nations States. The CEPR study in no way allows for the very serious social consequences of removing these seemingly innocuous ‘NTBs’. It would

⁴⁶ Ibid, p. vii.

⁴⁷ Ibid, p. 19.

⁴⁸ Roberto Bendini and Pasquale De Micco, ‘The Expected Impact of the TTIP on EU Member States and Selected Third Countries’, European Parliament, DG for External Policies, DG EXPO/B/PolDep/Note/2014_119, September 2014, p. 6.

⁴⁹ Centre for Economic Policy Research, ‘Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment’, Final Project Report Prepared under implementing Framework Contract TRADE10/A2/A16 for the European Commission, London, March 2013. p. 2.

⁵⁰ Martin Mynant and Ronan O’Brien, ‘The TTIP’s Impact: Bringing in the Missing Issue’, European Trade Union Institute, Working Paper 2015.01, Brussels 2015, p. 5.

⁵¹ Centre for Economic Policy Research, ‘Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment’, Final Project Report Prepared under implementing Framework Contract TRADE10/A2/A16 for the European Commission, London, March 2013. p. 19.

seem evidently highly likely however, that the weak economic gains predicted from their removal would far outweighed by the likely social costs.⁵²

The CEPR also predicts that in the most ambitious scenario there would be minimal job displacement, although it must be noted that this is based on a very questionable assumption that unemployment rates would remain unchanged. This makes a conclusion of minimal job displacement all but an assumption itself. As one contrary study notes,

[o]ne need only look at the experience of Europe in the last decade to see that full employment does not re-establish itself even if job seekers are willing to work informally and at relatively low pay.⁵³

In another major study by the Bertelsmann Stiftung two scenarios were tested, limited and deep trade liberalisation.⁵⁴ In the first scenario their model predicted a 0.27% GDP increase for the whole of the EU. This was based only on tariff reduction and did not assume any removal of regulatory barriers. In the deep trade liberalisation scenario there is a projected 4.95% GDP gain for the EU as a whole, however, this scenario involves “removal of tariffs as well as non-tariff barriers” and would seem to employ a very broad definition of a ‘removable trade barrier’.⁵⁵ In any case, the predictions would seem to rely on the removal of them all, which accounts for the high results, but also makes them extremely unlikely. This study is widely viewed as an outlier.

Another study by the Centre d’études prospectives et d’informations internationales (CEPII) also relies on a scenario that entails an “across-the-board 25% cut” in non-tariff barriers, which would equate to the 50% reduction of actionable non-tariff barriers in the CEPR scenario, that is their most optimistic scenario.⁵⁶ In this ‘reference scenario’ the CEPII predict a GDP gain of 0.3% for the EU. Even greater reduction of these barriers would deliver up to 0.5% extra GDP, but more realistic scenarios only deliver 0.1 or 0.2% GDP gains. Somewhat tautologically, the analysts conclude that “negotiating countries will reap the largest benefits from the most difficult negotiations”.⁵⁷

Finally, an ECORYS study from 2009 is also widely referenced.⁵⁸ This study also applies a 25% overall reduction in non-tariff barriers and a 100% reduction in tariffs, and is therefore also highly optimistic. In this scenario ECORYS predicts a 0.13 - 0.28% gain in GDP for the EU. This again amounts to the same extra cup of coffee per week, at best.

What is also obscured in these headline growth estimates is that the figures refer to growth forecasts over a ten year period.⁵⁹ A generous average of the upward estimates in these studies would put extra GDP gains at 0.3%, but this is on the assumption that an ambitious TTIP has been in operation for 10 years. That means that the studies actually predict only an additional 0.03% in GDP per year, or 1.43%

⁵² Werner Raza (et al), ‘ASSESS_TTIP: Assessing the Claimed Benefits of the Transatlantic Trade and Investment Partnership (TTIP)’, Final Report, Austrian Foundation of Development Research, Vienna, 31 March 2014, p. iv.

⁵³ Jeronim Capaldo, ‘The Trans-Atlantic Trade and Investment Partnership: European Disintegration, Unemployment and Instability’, Global Development and Environment Institute Working Paper No. 14-03, Tufts University, October 2014, p. 6.

⁵⁴ GED/Bertelsmann Stiftung, ‘Transatlantic Trade and Investment Partnership (TTIP) - Who benefits from a free trade deal? Part 1: Macroeconomic Effects’ (2013)

⁵⁵ Werner Raza (et al), ‘ASSESS_TTIP: Assessing the Claimed Benefits of the Transatlantic Trade and Investment Partnership (TTIP)’, Final Report, Austrian Foundation of Development Research, Vienna, 31 March 2014, p. 45.

⁵⁶ Lionel Fontagné, Julien Gourdon and Sébastien Jean, ‘Transatlantic Trade: Whither Partnership, Which Economic Consequences?’, CEPII, 2013.

⁵⁷ Ibid, CEPII, 2013, p. 11.

⁵⁸ Berden, Francois, Thelle, Wymenga, Tamminen, ‘Non-tariff measures in EU-US trade and investment – An economic analysis’, ECORYS, Study for the European Commission, Directorate-General for Trade, 2009.

⁵⁹ Werner Raza, Lance Taylor, Bernhard Tröster, and Rudi von Arnim, ‘TTIP – A Good Deal?’, Schwartz Center for Economic Policy Analysis, The New School, Policy Note, December 2014, p. 3.

instead of the 1.40% growth recorded for the EU in 2014.⁶⁰ The concrete gains are therefore extremely small, even on the optimistic estimates. To put this another way, the extra cup of coffee for every European every week only materialises after 10 years. In the meanwhile there would be a gain more along the lines of an extra apple a week.

Most of these studies rely on a process called Computable General Equilibrium (CGE) modelling, which is heavily criticised and widely viewed as unreliable within the economics profession.⁶¹ The main problems lie in the assumptions that underpin the data inputs into the models to generate the predictions cited. Some of these questionable assumptions have already been mentioned, such as the stable rate of unemployment, and, more importantly, the inflated expectations regarding reductions in regulatory barriers. Others involve what are called ‘price elasticities’, or estimates of the efficiency by which fluctuation in prices will transmit gains through the economy, which are set quite high in these modelling scenarios. Typically in the studies above they are assumed to be “double the size compared to the macroeconomic literature.”⁶² The unreasonableness of price elasticity estimates in the studies has a significant effect, driving up the associated estimated gains by a significant margin. In addition, the maintenance of balanced budgets is assumed, which is also not very likely in light of historical evidence. Furthermore, the modelling takes a long run perspective of 10 years, therefore all of these assumptions have to hold for that long. No account is taken of the probably existence of unforeseen or adverse effects in the short to medium term.

In addition, these studies have attracted widespread criticism on numerous other less technical grounds. A report from the Austrian Foundation of Development Research (AFDR) sets out the main themes of this criticism. Firstly there are the costs of macroeconomic adjustment, which are either not accounted for or significantly downplayed in the studies. These costs arise from the likely effects of TTIP on national current account balances, losses to public revenues due to lower tariffs and more lax regulations, and changes in the level of unemployment. Ireland should pay particular heed to the following passage from the AFDR report, which states:

If, for instance, imports rise disproportionately vis-à-vis exports immediately after trade liberalization, a trade deficit might emerge. Strong FDI inflows might lead to a structural drain on the current account due to profit repatriation. Short-term speculative capital in- and outflows might lead to balance of payments problems. While for the EU *in toto* this will arguably present no major problem, for individual member states such occurrences might prove problematic.⁶³

Ireland’s economy is particularly susceptible to speculative and large flows of capital, as detailed further below, which can have large negative effects on a nation’s macroeconomic balance. This has further effects regarding its credit-worthiness, liquidity and ability to loan on international capital markets, amongst various other downsides.⁶⁴ In some cases these effects can precipitate economic crises.⁶⁵ In

⁶⁰ Eurostat, ‘Flash estimate for the fourth quarter of 2014: GDP up by 0.3% in the euro area and by 0.4% in the EU28’, News Release Euroindicators, 13 February 2015.

⁶¹ Amr Hosny, ‘Survey of recent literature on CGE trade models: with special reference to the case of Egypt’ 2 *Journal of World Economic Research* (2013); Frank Ackerman and Kevin Gallagher, ‘The Shrinking Gains from Global Trade Liberalization in Computable General Equilibrium Models A Critical Assessment’ 37 *International Journal of Political Economy* (2008); Lance Taylor and Rudiger Von Armin, ‘Modelling the Impact of Trade Liberalisation, A Critique of Computable General Equilibrium Models’, Oxfam International Research Report, 2007.

⁶² Werner Raza (et al), ‘ASSESS_TTIP: Assessing the Claimed Benefits of the Transatlantic Trade and Investment Partnership (TTIP)’, Final Report, Austrian Foundation of Development Research, Vienna, 31 March 2014, p. vii.

⁶³ *Ibid*, p. v.

⁶⁴ Ha Joon Chang, ‘Regulation of Foreign Investment in Historical Perspective’, in Rajneesh Narula and Sanjaya Lall (eds.), *Understanding FDI-Assisted Economic Development* (Routledge, Abingdon, 2006).

⁶⁵ David Woodward, *The Next Crisis: Direct and Equity Investment in Developing Countries* (Zed Books, London, 2001).

addition, one economic study of the impact of TTIP on Ireland predicts that imports will rise more than exports, resulting in an overall trade 'deficit' from TTIP.⁶⁶ These unaccounted factors would certainly have sizeable effects on the Irish economy.

Losses to public revenue from tariffs and other effects of TTIP should not be underestimated either. The AFDR consider these to be in the order of € 20 billion over 10 years. In addition, they challenge the assumption of full employment, highlighting the unreasonableness of an expectation that all those who lose work due to TTIP will immediately be re-hired in a new job that TTIP is presumed to create in another area or sector. The AFDR estimate the costs to the EU of job dislocation, from financial support in transition periods that may extend to the medium or long term and the loss of taxation revenue, to be between € 9 – 24 billion.⁶⁷ This does not include costs for the necessary re-training of workers.

However, the major cost identified by the AFDR report, echoing the analysis above, is the highly likely, but unaccounted, social cost. As will be noted repeatedly throughout the present study, the main economic gains from TTIP are set to be at the expense primarily of government regulatory control in areas crucial to public wellbeing, areas such as public health, and consumer and environmental safety. The analysis in the studies above completely ignores this fact and treats all non-tariff barriers as functionally identical and equally objectionable. There is no analysis or mechanism for distinguishing between barriers that are insignificant from a public welfare standpoint and those that are not. The only distinction is between 'actionable' and 'non-actionable' barriers, which refers to the political probability of their removal. In an indirect way 'non-actionable' may imply the existence of a public interest in relation to the particular regulatory barrier at issue, but it certainly does not delineate this distinction in any adequate sense. Many barriers considered actionable, or politically viable, may have very negative social consequences, but be actionable nonetheless due to low public understanding of the issues, government or industry obfuscation, or lack of scientific knowledge and general ignorance.

The AFDR study concludes that the above studies, and any other analogous econometric methodologies,

have largely neglected a careful analysis of adjustment costs and the social costs of regulatory change. ... The social costs of regulatory change are by their very nature difficult, if not impossible to quantify. Nevertheless, they can be very large and thus require careful analysis, in particular in those areas where they relate to public security & health as well as environmental safety.⁶⁸

Furthermore, it is probably not surprising to note that prior estimations of the economic benefits of trade agreements have historically been overly optimistic. For example, the AFDR highlight the fact that while prior estimates of the effects of NAFTA "projected net gains for all NAFTA parties, but particularly for Mexico and Canada with real GDP increases up to 11 %, employment gains of up to 11 %, and real wages increases of up to 16 %", these impact projections were later found to be "substantially overestimated".⁶⁹ In fact, for the US, subsequent impact assessments after the implementation of NAFTA have demonstrated only negligible benefits. In the case of Mexico, many subsequent studies have demonstrated negative effects on GDP, wages and the distribution of income, and those that do find gains make actual estimations that are far below the prior optimistic estimates. While Mexico

⁶⁶ Martin Thelle, 'Economic Impacts of TTIP in Ireland', Copenhagen Economics, Powerpoint presented at Dublin Castle, Dublin, 20 June 2014.

⁶⁷ Werner Raza (et al), 'ASSESS_TTIP: Assessing the Claimed Benefits of the Transatlantic Trade and Investment Partnership (TTIP)', Final Report, Austrian Foundation of Development Research, Vienna, 31 March 2014, p. vi.

⁶⁸ Ibid, p. 22.

⁶⁹ Ibid, p. vii.

experienced some gains in manufacturing employment it suffered large losses in agriculture, most notably in the area of corn production where approximately 1 million jobs were lost in the first 10 years of NAFTA.⁷⁰ These considerations should again temper actual expectations from TTIP regardless of headline economic gains that are nevertheless already very small.

Whatever economic gains may accrue from TTIP will also be lessened in another significant way. TTIP will have negative effects on many other third countries due to the phenomenon of trade diversion, whereby access to EU and US markets currently enjoyed by many countries will be displaced to a certain extent, in many cases resulting in large trade losses for some countries. This applies particularly to Mexico, Canada and Australia who will take large losses in the US market, and Turkey, Norway and sub-Saharan countries with respect to the EU market.⁷¹ In anticipation of this well-established fact, these countries have already applied to the US and the EU for compensation. Any agreement to provide compensation to these injured third countries, which will be politically difficult to refuse, will be a drain on the possible economic benefits from TTIP.

Conflicting directly with the main studies relied on by the European Commission, a report from Tufts University written by a staff member of the UN International Labour Organisation concludes that TTIP will have significantly negative economic effects.⁷² The Tufts study employs a different modelling system that was developed at the UN Department of Economic and Social Affairs to avoid some of the pitfalls of CGE modelling. It utilises “more sensible assumptions on macroeconomic adjustment, employment dynamics, and global trade”.⁷³ As such it does not assume full employment, makes more reasonable assumptions regarding price elasticities, and pays closer attention to the effects of lowered demand in the economy due to job losses. It concludes that TTIP will lead to export losses, lower GDP growth rates (on average a drop in GDP growth rates of -0.26%), a loss of 600,000 jobs across the EU, increased financial instability, and lower overall government revenues.

The study warns that the current pressures of austerity, high unemployment and low growth in the EU will be heightened under increased competition with the US under TTIP, which will place even further downward pressure on wages. This will have further negative effects in terms of reduced demand in the economy and intensify the likelihood of another downward spiral, which would be even worse than the current stagnation. It also states that increased integration with the US will make all EU Member States more vulnerable to possible financial crisis through increased transmission mechanisms and the threat of lower regulation in the financial industry. This should be of major concern not just to the EU as a whole but specifically to Ireland given its recent experience of extreme vulnerability to external economic fluctuations.

As the Tufts study concludes, “[a]t a minimum, this shows that official studies do not offer a solid basis for an informed decision on TTIP”.⁷⁴ This conclusion is supported by a review of the methodologies of the major positive studies commissioned by the European Parliament, which states that modelling a trade and investment agreement with such complex effects, as would be attached to TTIP, may in the end simply amount to “sophisticated guesswork.”⁷⁵

⁷⁰ Ibid, p. vii.

⁷¹ Roberto Bendini and Pasquale De Micco, ‘The Expected Impact of the TTIP on EU Member States and Selected Third Countries’, European Parliament, DG for External Policies, DG EXPO/B/PolDep/Note/2014_119, September 2014, p. 22.

⁷² Jeronim Capaldo, ‘The Trans-Atlantic Trade and Investment Partnership: European Disintegration, Unemployment and Instability’, Global Development and Environment Institute Working Paper No. 14-03, Tufts University, October 2014.

⁷³ Ibid, p. 1.

⁷⁴ Ibid, p. 1.

⁷⁵ Jacques Pelkmans, Arjan Lejour, Lorna Schrefler, Federica Mustilli and Jacopo Timini, ‘The Impact of TTIP The underlying economic model and comparisons’, CEPS Special Report No. 93, October 2014, p. 46.

With respect to projected economic benefits for Ireland in particular, some studies that differentiate between the EU Member States suggest that gains may be larger for the Northern peripheral countries of Europe such as the UK, Sweden and Ireland. On the only realistic scenario employed by the Bertelsman Stiftung study Ireland was predicted to make a 0.22% GDP gain,⁷⁶ which is actually in line with the average for the EU in the studies above, and still insignificant. However, there are suggestions in the literature that

[s]maller countries that are more involved in the international division of labour and that gain greater benefits from lower trade costs tend to gain more than larger countries. Those Member States that are more export oriented or that already benefit from privileged trade relations with the US also obtain relatively higher gains.⁷⁷

This would sound positive for Ireland, yet, as mentioned, the one dedicated study for Ireland that the authors could find concluded that there would be an ultimate trade deficit from TTIP. This study, from Copenhagen Economics, nevertheless predicts an overall 1.1% GDP increase.⁷⁸ However, this study replicates the methodology of the CEPR study above, and so is subject to all of the same criticisms already enumerated. As such, because the estimate is over a 10 year period the actual increase in GDP per year would be 0.11% per year. Ireland's reported 4.8% GDP growth in 2014 would have been 4.9% with TTIP.⁷⁹ This is hardly a headline. In addition the warning above, regarding the negative affect on Ireland's balance of payments and overall economic stability, should not be disregarded.

From a social viewpoint it is also essential to note that the economic benefits predicted are always aggregate benefits for the EU as a whole, or Ireland as a whole. They do not say anything about distribution, leaving the high possibility, given past experience with liberalisation, that the vast majority will flow to the richest top percentage of the population. This will most likely leave the middle and lower classes either stagnant in the positive scenario, or overall losers. Little more can be done but to point to the wealth of evidence compiled by the economists,⁸⁰ sociologists⁸¹ and anthropologists⁸² on this fact already. Distribution is an issue for government. Markets have been clearly demonstrated as incapable of equitable distribution. Therefore the structural interference of TTIP with the capacities of government, which extends deeply into areas integral to an aim of equitable social distribution, and which extends ever more deeply according to the extent of economic gains sought, are of grave concern.

Taking average overall GDP increases on face value does not give an accurate picture of the net benefits to the Irish people. The vast majority of the benefits will accrue to foreign investors in Ireland because of their dominance of the Irish economy. The gains to the Irish people will be mostly indirect, through

⁷⁶ GED/Bertelsmann Stiftung, 'Transatlantic Trade and Investment Partnership (TTIP) - Who benefits from a free trade deal? Part 1: Macroeconomic Effects' (2013), p. 22.

⁷⁷ Roberto Bendini and Pasquale De Micco, 'The Expected Impact of the TTIP on EU Member States and Selected Third Countries', European Parliament, DG for External Policies, DG EXPO/B/PolDep/Note/2014_119, September 2014, p. 7.

⁷⁸ Martin Thelle, 'Economic Impacts of TTIP in Ireland', Copenhagen Economics, Powerpoint presented at Dublin Castle, Dublin, 20 June 2014.

⁷⁹ Arthur Beesley, 'Irish economy surges ahead with 4.8% growth in 2014', The Irish Times, 12 March 2015.

⁸⁰ Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press, Cambridge Mass., 2013); Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (WW Norton, New York, 2013); Joseph Stiglitz, *The Great Divide: Unequal Societies and What We Can Do About Them* (WW Norton, New York, 2015); Era Dabla-Norris (et al), 'Causes and Consequences of Income Inequality: A Global Perspective', International Monetary Fund, IMF Staff Discussion Note, SDN/15/13, June 2015; Dani Rodrik, *The Globalisation Paradox: Why Global Markets, States and Democracy Can't Coexist* (Oxford University Press, Oxford, 2011); Steve Keen, *Debunking Economics: The Naked Emperor Dethroned?* (Zed Books, London, 2011).

⁸¹ Margaret Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (Cambridge University Press, Cambridge, 2008).

⁸² David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, Oxford, 2007).

employment and corporate taxation. Employment cannot be denied as a large positive factor for the Irish people. Foreign investors provide a reasonable percentage of jobs, and by all accounts fairly good conditions and remuneration. However, the benefits through tax are not likely to be as significant. Ireland has a very low corporate tax rate of 12.5%. This compares to the average in Europe of more than double this level at 26%.⁸³ What is more, the effective tax rate, or the average rate of actually paid tax is around 7%.⁸⁴ Foreign investors also have access to significant tax benefits beside this low rate, such as tax holidays, exemptions for fixed costs and development costs, and a number of other concessions.

As such, the greatest benefits predicted, if they materialise, will lie in job creation. There will be opportunities for the export industries, however, these again are dominated by foreign firms, particularly in the pharmaceutical industry, which makes up the vast majority of Ireland's exports. This would indicate that in terms of benefits for the Irish people specifically, we are back to the capability of the government to redistribute the benefits directly accrued by foreign investors. Other indirect financial benefits to the Irish people are highly questionable and likely to be quite low. Much of the increase in GDP predicted by these models will be siphoned out of the country and back to the parent companies of the Irish subsidiaries, often through well-recognised tax havens outside of Ireland thereby significantly reducing the ultimate tax take for *any* public authority.⁸⁵

In sum, with respect to the economic benefits of TTIP, the projections and predictions would seem to vary substantially, reflecting the complexity of guessing at the underlying assumptions that must be made in order to make any prediction at all. However, this amounts essentially to the "management of fictional expectations",⁸⁶ whereby a simulated model might tell a person whatever they want to hear. To take a position for the sake of overall analysis we would accept that, at best, there is a potential for slight economic benefits from TTIP but the most likely outcome from the evidence is no change at all.

On the basis of this evidence it is worth revisiting the danger expressed above, of concluding TTIP in a psychological environment of hope that it will save the EU economy and significantly boost growth. This is a very understandable desire shared not just by the business community that clearly stands to gain directly and primarily from the agreement, but also extends to governments and large sections of the public for whom potential gains are only indirect and far less likely. As the study shows, on the available economic evidence it is only sensible to conclude that however understandable this desire is, it makes many people highly susceptible to a belief that lacks foundation.⁸⁷ TTIP is most likely not going to deliver on many of the hopes that are being placed in it, even if negotiations fulfil the optimistic assumptions and predictions of maximum ambition.

It is necessary to consider the long-term risks of further extending and deepening the reach of international trade and investment law under conditions where the evidence suggests that, at best, any gains will be unnoticeable in the short-term and very little will concretely change in the long-term. But at worst this could all be 'achieved' at a far greater social cost. Against this background, expectations

⁸³ <http://www.tradingeconomics.com/euro-area/corporate-tax-rate>.

⁸⁴ This is calculated as an average of the range found in a recent review of previous estimates, of effective rates from 2.2% to 15.5%. Irish Department of Finance, 'Effective Rates of Corporation Tax in Ireland', Technical Paper, April 2014.

⁸⁵ Maekus Hehn, 'Tax Havens and the Taxation of Transnational Corporations', Friedrich Ebert Stiftung, International Policy Analysis, June 2013; Ruud de Mooij and Sjeef Ederveen, 'Taxation and Foreign Direct Investment: A Synthesis of Empirical Research' 10 *International Tax and Public Finance* (2003).

⁸⁶ Ferdi De Ville and Gabriel Siles-Brügge, 'The Transatlantic Trade and Investment Partnership and the Role of Computable General Equilibrium Modelling: An Exercise in 'Managing Fictional Expectations'', Paper Presented at the 44th Annual UACES Conference, Cork, Ireland, 1-3 September, 2014.

⁸⁷ Sabine Stephan, 'TTIP – The Growth and Employment Engine that Couldn't', Friedrich Ebert Stiftung Perspective, November 2014.

of a boost of confidence in financial and other markets from TTIP, leading to a hopeful spurt of economic activity and growth, are highly speculative and overly optimistic. The actors in these markets are not gullible. They are not likely to be impressed with the predicted gains of TTIP. They most likely will not see them as particularly credible either, and as such, they are unlikely to significantly change their behaviour. If they are slow to invest in the EU now, then TTIP is not going to change this.

In this context the cost of foregone opportunities, or 'opportunity cost' as economists call it, should be dwelt on. TTIP is very likely to incur a large number of opportunity costs, particularly from the standpoint of possible alternative forms of economic and social management, or what economists refer to as 'heterodox' economic approaches. Other lost alternatives may relate to the ability of governments both to realise their human rights obligations, particularly in the area of socio-economic rights, and to organise their economies in ways that enable these rights to be taken seriously. These considerations relate directly to issues of public health governance. The possible loss of such opportunities and alternative models, or the increased difficulty and decreased likelihood of their implementation, should also be counted as impacts of TTIP, and are considered further below.

2.2 – US Foreign Investment in Ireland

In 2012 the total US investment in Ireland (FDI Stock) stood at €258 billion, having increased impressively over the previous year by 15% or €33 billion.⁸⁸ 44% of the total stock is invested in the financial intermediation sector.⁸⁹ Despite the small size of its economy Ireland is the fourth largest destination for US FDI in the EU.⁹⁰ There are 700 US companies based in Ireland, which now employ 130,000 people.⁹¹

The overall potential costs and benefits of ISDS in TTIP are addressed in detail in the next chapter, however, it is necessary to make some introductory points. Whatever benefits may arise from an investment chapter in TTIP in terms of increased investment flows, the possibility of significant cost is instituted by the inclusion of the ISDS mechanism. This system enables foreign investors to bring States to international arbitration for allegedly violating the terms of investment protections set out in the agreement. If a violation is found the tribunal has the power to order an award of monetary compensation for any damage incurred. These awards are enforceable under international law and the domestic law of most States. The ISDS mechanism therefore represents a potential economic cost to EU Member States under TTIP that would not exist in its absence. The cost would not be limited to the award of compensation but includes substantial costs related to the litigation and the operation of the tribunals. Awards are regularly made in the hundreds of millions of US dollars, and awards of billions are becoming more regular. In addition, average costs of litigating one case are around US\$ 8 million per claim per disputant, and have been as high as US\$ 30 million (or €7.3 and €27.3 million respectively).

This section provides an estimation of Ireland's prospective liability under an ISDS mechanism in TTIP. To be clear, this is a rough and qualitative estimation, however, it is a highly indicative one.

⁸⁸ US Department of State, Investment Climate Statement 2014 – Ireland, p. 17, at <http://www.state.gov/e/eb/rls/othr/ics/2014/227208.htm>.

⁸⁹ Ibid. "Currently, there are approximately 700 U.S. subsidiaries in Ireland operating primarily in the following sectors: chemicals; bio-pharmaceuticals and medical devices; computer hardware and software; electronics; and financial services."

⁹⁰ After the Netherlands, UK and Luxembourg. US Department of State, Investment Climate Statement 2014 – European Union, at <http://www.state.gov/e/eb/rls/othr/ics/2014/231435.htm>.

⁹¹ Charlie Taylor, Ireland the main beneficiary of US foreign direct investment, Irish Times, 5 March 2015.

Estimating a country's liability under the ISDS regime is complex and there is no established methodology, however, the literature on investment arbitration is unanimous in assuming that the more foreign investment in a country that is covered by the ISDS system then the greater is the likelihood of investment claims against the government, and therefore the greater the likelihood of financial losses. We make the same assumption and on this basis compile and compare the 'stocks', or gross amounts, in US\$ terms, of US investment in each EU Member State. This gives an idea of which States are more at risk of adverse awards under ISDS in TTIP than others.

However, to clarify the risk in terms of the likely relative drain on the resources of each State we add one extra dimension to the estimation of liability risk by comparing the amount of US foreign investment in each country with the country's GDP. The idea is that while the total stock of US investment is a proxy for the likelihood of claims and awards, a country's GDP is a proxy for its ability to pay those awards, or the severity of the potential impact on public budgets.

The second measure is then related to the degree of overall financial difficulty the State would incur because of potential payments of compensation to US investors. As such, the ratio of stocks of US investment to a country's GDP provides a clearer idea of the overall financial risk to the country concerned. This also enables a comparison not just of risk per se, but of the 'quality' of financial risk to each Member State.

GDP values are taken from the World Bank,⁹² and values on stocks of US foreign investment from the US State Department.⁹³ The data is in US\$ from the most recent year available. It is important to note that there are high variations in both measures (GDP and stocks of foreign investment) when diverse sources of statistics are compared. The following is then to be taken only as a rough indicative estimate. It is widely accepted that due to varied methods of data collection and analysis "FDI statistics have to be interpreted with caution".⁹⁴ Furthermore, only US 'FDI' is considered, which does not include US portfolio investments. These investments would also be covered if current investment treaty practice is followed, meaning that the actual levels of US investment creating potential liability would in fact be much higher. This is especially so as Ireland is often considered as one of Europe's 'tax havens', therefore attracting higher than average quantities of portfolio capital.

The results are set out in the table and figure below.

⁹² <http://data.worldbank.org/country> .

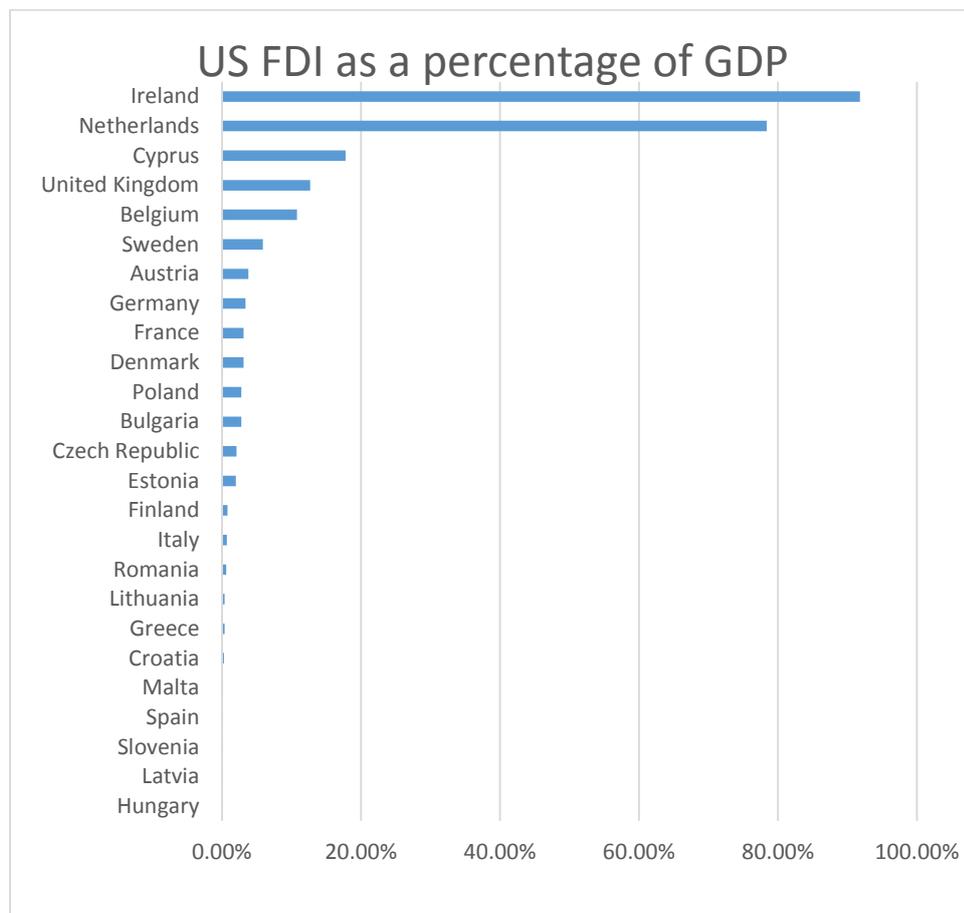
⁹³ <http://www.state.gov/e/eb/rls/othr/ics/2014/index.htm>. Note that satisfactory data could not be found from this source for Lithuania, Latvia, Luxembourg, Spain, Slovenia, Slovakia, Romania, and Portugal. Estimates for these countries are based on national data sources, except for Luxembourg, Slovakia, Portugal and Romania which has been excluded from the calculations.

⁹⁴ Lauge Poulsen, Jonathan Bonnitcha and Jason Webb Yackee, 'Costs and Benefits of EU-USA Investment Protection Treaty', Study for the UK Department for Business, Innovation and Skills, LSE Enterprise, April 2013, p. 1.

Table 1 – Estimation of the comparative financial risk for selected EU Member States from the establishment of ISDS through TTIP.

Country/Region	Year	GDP (in US-\$)	US FDI Stock (in US-\$)	US FDI as a percentage of GDP (in %)
EU	2013	17,960 billion	2,350 billion	13.1
Ireland	2012	222 billion	203.8 billion	91.8
United Kingdom	2012	2,615 billion	331 billion	12.7
Italy	2012	2,092 billion	15.3 billion	0.7
Germany	2012	3,533 billion	121.2 billion	3.4
France	2012	2,687 billion	82.6 billion	3.1
Greece	2012	250 billion	1 billion	0.4
Austria	2012	408 billion	15.6 billion	3.8
Belgium	2012	499 billion	53.8 billion	10.8
Bulgaria	2012	53 billion	1.5 billion	2.8
Croatia	2012	56 billion	0.15 billion	0.27
Cyprus	2012	23 billion	4.1 billion	17.8
Czech Republic	2012	207 billion	4.4 billion	2.1
Denmark	2012	322 billion	10 billion	3.1
Estonia	2012	23 billion	0.46 billion	2
Finland	2012	256 billion	2 billion	0.8
Hungary	2012	127 billion	0.006 billion	0.005
Latvia	2012	28 billion	0.013 billion	0.05
Lithuania	2012	42 billion	0.17 billion	0.4
Malta	2013	9.6 billion	0.012 billion	0.1
Netherlands	2012	823 billion	645 billion	78.4
Poland	2012	496 billion	14 billion	2.2
Romania	2013	190 billion	1.2 billion	0.6
Slovenia	2012	46 billion	0.041 billion	0.09
Spain	2013	1,393 billion	1.3 billion	0.09
Sweden	2012	544 billion	32 billion	5.9

Figure 1. – Estimation of the comparative financial risk for selected EU Member States from the establishment of ISDS through TTIP.



The general point, which emerges very clearly, is that there are disproportionately high levels of US investment in Ireland relative to other EU member States, making Ireland particularly liable under an ISDS mechanism in TTIP. However, this risk is significantly heightened again in ‘quality’ due to Ireland’s relatively low GDP. Figure 1 could be taken as offering a comparative indicator of the risk of ISDS in TTIP for each Member State of the EU. As such, for Ireland this financial risk is roughly 7 times higher than the EU average, 13%, which is represented roughly by the UK. The risk for Ireland is therefore also 7 times higher than its immediate neighbour, 26 times higher than Germany, and 126 times higher than Italy. The only EU Member State that compares is the Netherlands.

This also confirms how extraordinarily dependent Ireland is on US investment, perhaps explaining a desire to include ISDS in TTIP to encourage more. At the same time it also demonstrates that Ireland obviously does not need TTIP or an investment chapter to attract US investment, as it is attracting very large quantities without such possible liabilities. It quite evidently does not need to push for ISDS in TTIP to encourage more investment from the US. This is confirmed by the very favourable assessment of the ‘investment climate’ for US investors in Ireland made, and advertised, by the US State Department.⁹⁵

⁹⁵ US Department of State, ‘Investment Climate Statements 2015’, <http://www.state.gov/e/eb/rls/othr/ics/>.

It is important to note that Ireland does not have one single BIT in force. It is currently almost free from the international investment regime and claims from foreign investors, with the exception of the Energy Charter Treaty. Ireland has not had a claim against it under this treaty to date. Therefore the jump to having all of its US investment covered by the ISDS system would expose Ireland to a significant potential legal liability.

From a methodological perspective, the authors recognise that this calculation is a rudimentary measure and does not attend to a number of other variables that would have an effect on Member States' liability. For example, the quality of a country's judicial institutions is not accounted for. As such, the high rating Ireland would get with respect to the quality of its courts would reduce the risk factor, and conversely a lower rating for another country would raise its risk factor. Other important variables such as political risk and immobility of assets are also not accounted for. This estimate of liability from ISDS in TTIP could be characterised as a crude indication, or a 'rule of thumb'. However, it serves to make a very important point in the case of Ireland, which unless concrete evidence is presented to the contrary appears significant and meaningful even allowing for statistical adjustments based on the aforementioned factors.

These results should be borne in mind throughout the discussion in the next chapter.

2.3 – Public Health and the Right to Health in Ireland

This section is intended to provide a general overview of the state of public health in Ireland that takes a perspective from the obligations of the Irish government under international human rights law. This body of international law has long been considered to be in tension with the constraints placed on States by trade and investment agreements. Since the large-scale protests in Seattle against the WTO in 1999 the trade regime has been a focus of human rights proponents in academia,⁹⁶ civil society⁹⁷ and intergovernmental organisations.⁹⁸ Many conclude that trade agreements and their associated dispute resolution systems are currently failing to accommodate or facilitate human rights,⁹⁹ or are otherwise actively opposed to their protection and fulfilment.¹⁰⁰ More recently, the international investment regime has come under similar scrutiny,¹⁰¹ and here the conclusions are often more closely aligned with

⁹⁶ Janet Dine, *Companies, International Trade and Human Rights* (Cambridge University Press, Cambridge, 2005); Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi (eds.), *Human Rights and International Trade* (Oxford University Press, Oxford, 2005).

⁹⁷ Armin Paasch, 'Human Rights in EU Trade Policy: Between Ambition and Reality', An Ecofair Trade Dialogue Discussion Paper, Misereor, Aachen, December 2011.

⁹⁸ United Nations Development Program, *Human Development Report 2005: International Cooperation at a Crossroads – Aid, Trade and Security in an Unequal World* (UNDP, New York, 2005); United Nations Office of the High Commissioner for Human Rights, *Human Rights and Trade*, 5th WTO Ministerial Conference, Cancun, Mexico, 10-14 September 2003.

⁹⁹ Ernst Ulrich Petersmann, 'The WTO Constitution and Human Rights' 3 *Journal of International Economic Law* (2000); Robert Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' 13 *European Journal of International Law* (2002).

¹⁰⁰ Frank Garcia, 'The Global Market and Human Rights: Trading Away the Human Rights Principle' 25 *Brooklyn Journal of International Law* (1999).

¹⁰¹ Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford, 2009).

a theory of structural opposition.¹⁰² To a number of commentators the current investment regime “seems to be leaning toward separation of human rights and investors’ rights like oil and water.”¹⁰³

Although human rights are not the primary focus of this study it is important to note this structural opposition. Any further institution of the trade and investment regimes that does not account for human rights, or their underlying social protection purpose, will deepen an already significant gulf between the potentially competing obligations of States under these divergent legal regimes. A perspective from the human right to health also provides a concise method for analysing the specific potential social costs of TTIP in the area of public health. However, it must be borne in mind that the notion of ‘public health’ is broader than the ‘human right to health’.¹⁰⁴

The right to health is not directly protected under the Irish Constitution, however the government is directed to ensure a certain level of distributional equity,¹⁰⁵ and is pledged to

safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.¹⁰⁶

In addition, the European Charter of Fundamental Rights protects public health through provisions on health care, access to services of general economic interest and consumer protection.¹⁰⁷ The right to health is also protected in Ireland under the International Covenant on Economic, Social and Cultural Rights. The Covenant establishes a right to the “the highest attainable standard of physical and mental health.”¹⁰⁸ This has been interpreted to oblige governments to ensure “a variety of facilities, goods, services and conditions” necessary to realize the health of the population, including access to health care, medical services and essential medicines.¹⁰⁹ The right pertains to the provision of adequate and affordable access to water and sanitation, food, housing, and good workplace conditions. It also includes the right to meaningful participation in health-related decision-making at all levels of government.

In the present discussion the most important element of the right to health is that it places an obligation on the government to realise this right progressively. Within reason the government must do all it can to ensure that the quality of health enjoyed by the population, as well as its equitable distribution, increases in line with general national capacity. This implies that governments will need to maintain an ability to intervene in the economy to such a degree as is necessary to realise this progressive obligation. In some circumstances it will require that the government’s ability to do so is not simply maintained but is substantially increased. This is so especially following an economic crisis, where significant social reconstruction is needed, which is not possible without extensive and coordinated government action. The right to health is then intrinsically connected to the right to regulate.

¹⁰² Sarah Schadendorf, ‘Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations’ *Transnational Dispute Management* (2013).

¹⁰³ Mehmet Toral and Thomas Schultz, ‘The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations’, in Michael Waibel (et al eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, The Netherlands, 2010), p. 589.

¹⁰⁴ Brigit Toebes, ‘Human Rights and Public Health: Towards a Balanced Relationship’ 19 *International Journal of Human Rights* (2015).

¹⁰⁵ Bunreacht na hÉireann (Constitution of Ireland), Enacted by the People, 1st July 1937, Directive Principles of Social Policy, Article 45 (2)(ii).

¹⁰⁶ *Ibid*, Article 45 (4)(i).

¹⁰⁷ Charter of Fundamental Rights of the European Union, Articles 35, 36 and 38.

¹⁰⁸ Article 12.

¹⁰⁹ UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health’, UN Doc E/C.12/2000/4, 11 August 2000, para 9.

Circumstances that erode the State's right to regulate will be highly likely to also erode the people's right to health.

Conversely, any government measures taken for whatever reason that lowers health levels must be subject to strict justification, and there is a strong presumption that such measures are contrary to the right to health. States are under a general onus not to allow health levels in the population to regress. Yet since the onset of the economic crisis in Ireland many studies of Irish health have found that this is precisely what has occurred. This regression has accelerated following the bank bail-outs and the imposition of traditional structural adjustment measures by Ireland's creditors, demanded as conditions on loans intended to stem the worst effects of the 2008-9 crisis and help lift the country out of its subsequent recession.¹¹⁰ The government's obligation to ensure progressive realisation of the right to health within its means and the concomitant presumption of non-retrogression in levels of public health provision are highly important in an assessment of the costs and benefits of TTIP.

Despite an economic boom in the years previous to the crisis and average levels of government health expenditure relative to other European States, Ireland's public health system was underperforming.¹¹¹ Poorly developed primary and community health services, and increasing inequity in access to services and benefits, were the effects of an inadequately developed and implemented social 'partnership' during the years of the boom years.¹¹² Therefore, the sub-standard and steadily deteriorating nature of Irish public health care, operating under a two-tier system, was widely considered as unfair, unequal and inefficient even before the crisis. Particular groups in society were significantly marginalised and in relatively poor health such as the Traveller community.¹¹³ This situation prompted various debates and proposals but induced no concrete government action.

To address this situation, the most recent government plan to overhaul the organisation of health care in Ireland has suggested replacing it with a single-tier system "via a multi-payer model of universal health insurance (UHI)", "based on need, not income", and consisting of competing private health insurers and a State-owned provider.¹¹⁴ This system is modelled on that of the Netherlands, and is intended to be implemented gradually, potentially to be fully operational by 2019, although it has run into early uncertainty with projected insurance costs appearing to be vastly higher than initial government assumptions.

The crisis that hit in 2008 led to a fall in GDP over the next 3 years of nearly 20%,¹¹⁵ leading to sharp increases in public debt, unemployment and outward migration. The decision of the government of the day to institute a blanket guarantee for all bank depositors significantly worsened the country's public financial position and ultimately led to the necessity of a bail-out for the country itself. This came in the form of a loan from the 'Troika' (coordinated by the European Central Bank, European Commission and the International Monetary Fund). The loan came with conditions aimed to ensure prompt repayment,

¹¹⁰ Sarah Thomson, Matthew Jowett and Philipa Mladovsky (eds.), 'Health System Responses to Financial Pressures in Ireland: Policy Options in an International Context', Final Report, World Health Organisation and European Observatory of Health Systems and Policies, 16 november 2012.

¹¹¹ Elliot Bidgood, 'Healthcare Systems: Ireland & 'Universal Health Insurance' –an emerging model for the UK?', CIVITAS, London, 17 December 2013, p. 1.

¹¹² Kieran Allen, *The Celtic Tiger: The Myth of Social Partnership in Ireland* (Manchester University Press, Manchester, 2000); Peadar Kirby, *The Celtic Tiger in Distress: Growth with Inequality in Ireland* (Palgrave Macmillan, Houndmills, 2002); Tony Fahey (et al eds.), *Best of Times? The Social Impact of the Celtic Tiger* (Dublin, Institute of Public Administration, Dublin, 2007); Peadar Kirby and Mary Murphy, *Towards a Second Republic: Irish Politics after the Celtic Tiger* (Pluto Press, London, 2011); Peadar Kirby, *Celtic Tiger in Collapse: Explaining the Weaknesses of the Irish Model* (Palgrave Macmillan, Houndsmills, 2010).

¹¹³ Amnesty International Ireland, 'Healthcare Guaranteed? The Right to Health in Ireland', June 2011, p. 8.

¹¹⁴ Government of Ireland, 'The Path to Universal Healthcare: White Paper on Universal Health Insurance', April 2014, pp. 5, 3.

¹¹⁵ CSO, 'National Income and Expenditure (Annual Results for 2010)', Central Statistics Office Dublin, 2011.

including severe budget cuts to social spending. Ireland's public health system has suffered significantly as a result of these cuts and other austerity measures imposed on the country by its creditors.

Government spending on health has fallen by 22% since 2008.¹¹⁶ Ireland was second only to Greece in terms of the scale and speed of cuts to health budgets in the EU following the crisis. This has deepened a theme that was extant well before the crisis. The long-term underfunding of Irish health care has always been a well-known problem.¹¹⁷ In 2014 it was reported that there had been an overall reduction of € 3.3 billion in health spending since 2008 and that the Irish government planned to cut a further € 619 million in that year.¹¹⁸

Ireland now seems to be in a trap where further cuts are only make things worse and showing only losses in efficiency and quality of service. In short, there is no 'fat' left to trim. In 2014, the country stood near the bottom of the Euro Health Consumer Index, at number 22.¹¹⁹ One study concludes that, "[o]verall, international standing, health outcomes, accountability, equitable access, underfunding, rationing and waiting times are all clear problems in the current Irish system."¹²⁰

At the same time as there has been less money to spend on health, the number of people that need to be covered has risen. In contrast to most of Europe, population growth in Ireland has risen despite the crisis and recession, going up by an average of 1% since 2008.¹²¹ Compounding this, the number of people in the over 65 bracket has risen by 3%. Given the growing population and spending cuts required by international creditors, one study estimates that the result between 2015 and 2016 will be a reduction in health spending per capita of between 16-24% overall, and 32% for the population aged over 65.¹²² As such, population growth is not being matched by the capacity of the public health system in Ireland.

It is then no surprise that there have been significant increases in waiting times and lengthening waiting lists for those in need of care. This is in addition to the fact that waiting times have long been a concern in Ireland in comparison to other European countries. In 2010 more than 20,000 patients at public hospitals were forced to wait for longer than the stipulated 3 months, which was an 11% increase on 2009.¹²³ This is exacerbated by the two-tier system, whereby many people on lower incomes struggle to access the care they need while people with private voluntary health insurance get preferential treatment in State hospitals or directly exclusive access to the higher-quality care in private hospitals. The inequities in the Irish case are borne out by an EU survey of income and living conditions in Ireland, stating that 47% of those living under persistent poverty have a chronic illness compared with 23% in the general populace.¹²⁴

In this regard it is important to stress that the current government shift to a nominally 'one-tier' universal health insurance model may in the end result in the same inequities. What will make the

¹¹⁶ Health Service Executive, 'National Service Plan 2014', HSE, Dublin, 2014.

¹¹⁷ Elliot Bidgood, 'Healthcare Systems: Ireland & 'Universal Health Insurance' –an emerging model for the UK?', CIVITAS, London, 17 December 2013, p. 13.

¹¹⁸ Health Service Executive, 'National Service Plan 2014', HSE, Dublin, 2014.

¹¹⁹ Paul Cullen, 'Ireland falls in international health service rankings', Irish Times, 27 January 2014.

¹²⁰ Elliot Bidgood, 'Healthcare Systems: Ireland & 'Universal Health Insurance' –an emerging model for the UK?', CIVITAS, London, 17 December 2013, p. 19.

¹²¹ Sarah Thomson, Matthew Jowett and Philipa Mladovsky (eds.), 'Health System Responses to Financial Pressures in Ireland: Policy Options in an International Context', Final Report, World Health Organisation and European Observatory of Health Systems and Policies, 16 November 2012, p. 10.

¹²² Ibid, p. 11.

¹²³ Elliot Bidgood, 'Healthcare Systems: Ireland & 'Universal Health Insurance' –an emerging model for the UK?', CIVITAS, London, 17 December 2013, p. 11.

¹²⁴ Richard Layte, Annie Nolan, and Brian Nolan, 'Poor Prescriptions: Poverty and Access to Community Health Services', Combat Poverty Agency, Dublin, April 2007, p. xxi.

difference is *close government oversight and regulation of the system*, not so much the nature of the system itself. It is therefore necessary that the government's right to regulate is not abridged in this area. As is explained in more detail below, there are a number of aspects of TTIP that raise concerns in this regard with respect to public health, specifically relating to provisions on services, intellectual property and the process of regulatory harmonisation.

Further complicating the financial squeeze is the fact that health care costs have increased at a faster rate than other comparable goods and services in the Irish economy. While general inflation between 2005 and 2011 was around 10%, the increase in the price of health care was 20%.¹²⁵ This is an anomaly because in most countries the prices of general goods and services increase faster than health care. Inflation has been driven mostly by large increases in hospital charges, outpatient fees, doctors' fees and dental fees. Additionally, this has been the highest rate of health cost inflation in the EU, except for the Netherlands. As such it may be somewhat worrying that the Netherlands provides the model for the future of Ireland. Again, the main way inflation can be brought down is through judicious government regulatory action.

Currently, 61% of the population in Ireland must pay to visit a General Practitioner (GP), who acts as the gateway to the health care system.¹²⁶ They have to pay 'out-of-the-pocket' directly to the GP. Consultation fees range from €35 – €70. The other 39% are covered by a GP card or a Medical Card, which is provided by the State for those below a certain income level. This system has been found to be unique in the developed world, where most people who do not hold medical cards still have their GP visits subsidised to some extent.¹²⁷ This results in a situation where those just above the threshold level are severely penalised, and will often choose not to go to the GP when they are ill because of their inability to pay, as many studies have demonstrated.¹²⁸ Between January and April 2014 a review to check that GP cards were actually only held by those sufficiently poor to obtain one resulted in the confiscation of 97,000 cards. This provoked such an outcry due to the very significant and discriminatory health impact that the government was forced to stop the review and return some of the cards based on medical need.¹²⁹

Of importance to the discussion below on intellectual property rights provisions in TTIP, public expenditure on drugs and medicines is high in Ireland. In comparison to New Zealand, a similar sized country, medicines in Ireland are considerably more costly, and can be up to 24 times more expensive for certain products.¹³⁰ There was a very large increase in the cost of medicines since the 2000s, which could be linked to the massive increase in the establishment of a major pharmaceutical industry in Ireland before and during that time, consisting mainly of foreign companies. In recent years the prices have come down, but only through direct government action. This has occurred through measures to introduce a system of reference pricing and generic substitution (or the enabling of cheap copies to be sold on the market), which have lowered the factory price of many products. It has also occurred through direct negotiations with manufacturers to enable lower prices. These are common measures

¹²⁵ Sarah Thomson, Matthew Jowett and Philipa Mladovsky (eds.), 'Health System Responses to Financial Pressures in Ireland: Policy Options in an International Context', Final Report, World Health Organisation and European Observatory of Health Systems and Policies, 16 November 2012, p. 15.

¹²⁶ Amnesty International Ireland, 'Healthcare Guaranteed? The Right to Health in Ireland', June 2011, p. 16.

¹²⁷ Expert Group on Resource Allocation and Financing in the Health Sector, 'Report of the Expert Group on Resource Allocation and Financing in the Health Sector', Dublin, 2010.

¹²⁸ Amnesty International Ireland, 'Healthcare Guaranteed? The Right to Health in Ireland', June 2011, p. 18.

¹²⁹ FLAC, 'Our Voice, Our Rights', A parallel report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights, November 2014, p. 83.

¹³⁰ Sarah Thomson, Matthew Jowett and Philipa Mladovsky (eds.), 'Health System Responses to Financial Pressures in Ireland: Policy Options in an International Context', Final Report, World Health Organisation and European Observatory of Health Systems and Policies, 16 November 2012, p. 20.

taken by governments to regulate the pharmaceutical industry in the interests of public health. However, as detailed below, they may be challenged by investors under the investment provisions of agreements such as TTIP, and may also be undermined through rules on intellectual property. In the context of a government proposal to lower prices, a pharmaceutical company will have far less motivation to negotiate a decrease in price if it knows that it can eventually sue the government for a failure to treat it fairly should that government force the issue.

The government's response to the financial pressures on the health system has largely been to restrict recruitment, place ceilings on staffing, and intensify redundancy schemes and incentivised early retirement. From 2008 to 2011 this resulted in 6,000 job losses in the health sector, and there were projected to be another 6,000 lost between 2013 and 2015.¹³¹ Major financial savings were also made through cuts to pensions and public service pay cuts.

Health care user-charges have also been increased, thereby shifting some of the cost burden from government to the public and placing a particular burden on those with the lowest incomes.¹³² This is a serious issue from the viewpoint of the right to health because it directly and negatively effects equitable access to health services. The higher and broader the user charges, the greater restrictions to health care access. This has a far greater impact on the poor and already marginalised and is therefore a discriminatory measure. Not only access, but equality of access is harmed by user fees and is generally understood to result in a regression in the right to health. Furthermore, given the framework of financial and population pressures the government is under and the way it has chosen to manage them, it is not easy to see how it can implement its ambitious plan for the overhaul of public health care in Ireland without at least maintaining, if not increasing user fees.¹³³ Further cuts in pay, staffing, pensions and other areas would not seem to be possible. Therefore to meet the growing shortfall it is fair to suspect that the health 'consumer' will have to bear more and more of the financial burden.¹³⁴

In terms of issue areas, particular problems have been identified in regards to gender inequities in the Irish health care system,¹³⁵ the mental health of the population¹³⁶ especially young males,¹³⁷ the

¹³¹ Ibid, p. 20.

¹³² Age Action Ireland (et al), 'Report on the right to health and the right to housing', Submission to the Office of the High Commissioner for Human Rights On the occasion of Ireland's examination Under the 12th session of the Universal Periodic Review, March 2011, p. 2.

¹³³ Sara Burke, Steve Thomas, Sarah Barry, Conor Keegan, 'Measuring, Mapping and Making Sense of Irish Health System Performance in the Recession', A Working Paper from the Resilience project in the Centre for Health Policy and Management, School of Medicine, Trinity College Dublin, March 2014.

¹³⁴ Ibid, p. 22.

¹³⁵ National Women's Council of Ireland, 'Women's Health in Ireland: Meeting International Standards', NWCI, Dublin, September 2006.

¹³⁶ Health Service Executive, 'The Efficiency and Effectiveness of Long-Stay Residential Care for Adults within the Mental Health Services', Evaluation report prepared under the Value for Money and Policy Review Initiative, 21 December 2008.

¹³⁷ 'Government gets E grade over adolescent mental health services', Irish Examiner, 25 February 2014; Helen Coughlan, 'Youth Mental Health: making the vision a reality in Ireland', Paper prepared on behalf of the ACAMH Special Interest Group on Youth Mental Health in Ireland, January 2013.

disabled,¹³⁸ and the Traveller population already mentioned.¹³⁹ In addition, there are serious concerns about access to health care amongst the migrant population,¹⁴⁰ and the wellbeing of older people.¹⁴¹

The universal health insurance model that is being implemented by the government would seem to be moving in the direction of greater competition and more private actors in the ‘health market’. This will not necessarily lead to either better or worse health outcomes for the population. It could do either. However, there are two points to stress. The degree to which more competition and private provision raises health standards will depend highly on the close regulatory oversight that is necessary from government to ensure fairness and equity. As a former Irish Minister for Health has stated; “What matters most is how resources are used, not how resources are raised from the public”.¹⁴² In short it will depend on continuing overall government control. This has been mentioned above. The government is under an obligation to ensure the right to health equitably, such that cost is not a barrier to access to health care. The government may ensure this in whatever way possible, within a degree of latitude. Nevertheless, to fulfil its obligation it must have the necessary latitude to act in the first place.

In addition, while movements in the direction of greater privately funded and operated activity in the health sector are in line with trade and investment agreements, movements in the opposite direction are not. This is complicated in the Irish case where a substantial amount of private health care takes place *within* the publically-funded hospital infrastructure.¹⁴³ This is not to say that reversing a trend towards the private is impossible, however, there are significant barriers set up to make such a move costly in a number of respects. Structurally speaking, trade and investment agreements reduce government control over the economy. This is their intent. However, unless very close attention is paid to the wording of the agreements and the use of the possible flexibilities in negotiation and in implementation, more control can easily be lost than is intended.

What is clear from this brief appraisal is that extensive work needs to be done on the public health system in Ireland. The government is well aware of this and has plans in place. But these plans will not make a tangible difference to fundamental inequities in Irish health, and will not contribute to the progressive realisation of the right to health, unless they are managed closely by the government in response to the will of the people. To exercise this regulatory management effectively the government will need sufficient policy space. From the scale of the problem, it would seem to need quite a large range of policy space.

Yet restricting this policy space is likely to be the biggest effect that TTIP will have, far outweighing the expected economic benefits. Ireland, *far more than most in the EU*, has been hit very hard by the economic crisis, especially in the area of public health. It has instituted a number of structural adjustment measures and deep austerity. Ireland’s fall from the grace of its ‘Celtic Tiger’ days has exposed the precarious nature of its development model, based on extreme openness to the global economy, export orientation, low corporate taxation, a heavy dependence on foreign investment, and

¹³⁸ Maureen D’Eath, Jane Sixsmith, Roseanne Cannon and Louise Kelly, ‘The Experience of People with Disabilities in Accessing Health Services in Ireland: Do inequalities exist?’, Report to the National Disability Authority, Centre for Health Promotion Studies, Department of Health Promotion, National University of Ireland, Galway, May 2005.

¹³⁹ All Ireland Traveller Health Study Team, ‘All Ireland Traveller Health Study: Our Geels’, School of Public Health, Physiotherapy and Population Science, University College Dublin, Dublin, September 2010.

¹⁴⁰ Immigrant Council of Ireland, ‘Submission to the Special Rapporteur on the Human Rights of Migrants on access to economic and social rights by migrants – particularly the enjoyment of the right to adequate standard of living (Article 11 of ICESCR) and right to health (Art. 12 ICESCR) for undocumented immigrants in Ireland’, 2010.

¹⁴¹ FLAC, ‘Our Voice, Our Rights’, A parallel report in response to Ireland’s Third Report under the International Covenant on Economic, Social and Cultural Rights, November 2014, p. 86.

¹⁴² Elliot Bidgood, ‘Healthcare Systems: Ireland & ‘Universal Health Insurance’ –an emerging model for the UK?’, CIVITAS, London, 17 December 2013, p. 28.

¹⁴³ Amnesty International Ireland, ‘Healthcare Guaranteed? The Right to Health in Ireland’, June 2011, p. 10.

a weak social contract. The pitfalls of this model are now amply evident and it will require significant changes if public health is to be better secured and the right to health of the Irish people is to be realised.

There is very good reason to believe that making such changes will be more difficult under TTIP. The next two chapters explore this assertion in further detail. However, at this point it is clear that necessary government spending and regulatory control will be rendered far more difficult if already intensely strained budgets are depleted by significant amounts of compensation for US investors under ISDS. And they will be far more difficult if government intervention and 'anti-competitive' measures with respect to the health sector are hampered by rules on trade in services or intellectual property, for example. Furthermore, alternative economic arrangements necessary to fully and progressively realise the right to health may also be made harder by the institution of a trade and investment regime that is in tension with human rights aims and standards.

2.4 – Social Costs and General Impact on Public Health

This chapter was intended to give an overview and general weighting of the main costs and benefits from TTIP, as a backdrop or prelude to a more detailed assessment in the next chapters. From the overview it may be concluded that for the EU as a whole the economic benefits of TTIP are most likely to be either very small or non-existent. On the other hand, the risk of economic cost, primarily in the form of possible adverse awards for compensation through the ISDS mechanism, is not insignificant, as detailed in the next chapter. In particular, the risk for Ireland of financial loss through the ISDS mechanism is very high.

On the social side of the ledger, the social benefits of TTIP are primarily dependent on a trickle down from the economic benefits. As such, because these are likely to be small to non-existent, the indirect social benefits may be assumed to be virtually nil. This encompasses any possible benefits for public health, either in the EU as a whole or in Ireland specifically. On the other hand the social costs are likely to be high, particularly in terms of the loss of regulatory capacity necessary to secure public health. This is especially so for Ireland due to the severity of the financial and public health challenges it currently faces.

The general conclusion then is that for the EU, on average, the likely costs of TTIP outweigh the gains. Yet for Ireland in particular the prognosis is far worse than the EU average. For Ireland the likely social costs and potential economic costs are significantly higher than in other EU Member States.

3. INVESTMENT IMPACTS

3.1 – Explaining the Investment Law Regime and ISDS

From the mid-1980s annual global flows of foreign investment began to rise markedly,¹⁴⁴ with a dramatic increase between 1994 and 2000, from US\$256 billion to US\$1.4 trillion annually. By 2007, flows reached a height of almost US\$2 trillion. In 2014, flows stood at US\$1.45 trillion, the large majority of which both originating from and being invested in developed countries. It is important to note that while flows have risen and fallen, overall stocks of FDI have continuously accumulated, rising roughly seven-fold since 1995 to a total of US\$20.4 trillion by 2013.¹⁴⁵

The international legal framework on foreign investment is constituted essentially by a network of thousands of bilaterally negotiated investment treaties (BITs). The first bilateral investment treaty was signed between Germany and Pakistan in 1959, and currently some 3,200 BITs are now in force worldwide. The provisions of BITs have been broadly copied into increasingly numerous preferential free trade and investment agreements (PTIAs), some bilateral and others multilateral. While the conclusion of BITs is on the decline, the number of PTIAs such as the TTIP and TPP being negotiated is increasing, marking a trend towards a regionalisation of investment rule-making.¹⁴⁶ In 2013 there were 334 PTIAs in place globally. BITs and investment chapters in PTIAs will be referred to collectively as (international) investment agreements. It must be stressed that Ireland is at present almost entirely uninvolved in this system as it has no BITs in force and is only subject in this context to the Energy Charter Treaty, an international agreement between some 50 States, which protects only investors in the energy sector and does not presently include the US. The consequences of investment inclusion in the TTIP for Ireland are therefore more far-reaching than for many EU Member States who are already far more exposed to investment claims through sometimes extensive BIT networks. Germany, for example, is a Party to over 100 BITs, while a number of central and eastern European members of the EU already have individual BITs with the US.

For a number of reasons the current investment law regime is “becoming increasingly controversial and politically sensitive.”¹⁴⁷ As the real world consequences of the extensive protection issued to investors and the power of arbitrators instituted in the ISDS procedure increasingly come to light, a deep imbalance is becoming obvious to governments and civil society alike. In the words of one commentator:

Over the coming years, governments and users of investment arbitration will re-evaluate their priorities. This shift could have profound implications for the foreign investment regime. The

¹⁴⁴ Measurements of FDI can vary according to definition and methodology, as between the IMF, UNCTAD and the OECD for instance. The statistics that follow are taken from UNCTAD data. See UNCTAD, FDI Statistics Table, at http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx?sRF_ActivePath=P,5,27&sRF_Expanded=P,5,27.

¹⁴⁵ UNCTAD, *World Investment Report 2014* (UN, Geneva, 2014), p. xiii.

¹⁴⁶ Stephen Woolcock, ‘Making Multi-Level Rules Work: Trade and Investment Rules in Regional and Bilateral Agreements’, in Philippe de Lombaerde (ed.) *Multilateralism, Regionalism and Bilateralism in Trade and Investment* (Springer, Dordrecht, 2007).

¹⁴⁷ UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (United Nations, Geneva, 2012), p. xx.

current crisis might turn a minority's critique into the mainstream, and catalyze change that has long been in the offing.¹⁴⁸

While there are multiple differing viewpoints on the severity of this legitimacy crisis and on what to do about it, it is clear that the field of international investment law has become a site of serious political contestation, and is likely to remain so for the foreseeable future.

Of particular note, investment agreements are in a sense inherently unbalanced in that they confer substantial and powerful rights on foreign investors yet do not bind them to any substantive obligations. Investors must observe certain minimal procedural obligations, such as waiting a set period of time before suing a government (usually around six months), and are under a general expectation to establish and conduct their activities in accordance with the domestic law of the host State. However, contravention of the law is not necessarily a bar to having their rights vindicated by an international tribunal. In the case of *Occidental Petroleum Corporation v. Ecuador*, the oil company was awarded US\$1.77 billion in damages despite a finding that the company had clearly violated Ecuadorian law, because the government's response was adjudged "disproportionate".

3.1(a) – Substantive Provisions of International Investment Agreements

Investment agreements essentially contain provisions on most favoured nation treatment (MFN), national treatment, full compensation in event of expropriation (direct and indirect), minimum standards of treatment, i.e. 'fair and equitable treatment' (FET) and 'full protection and security', the repatriation of profits and other related finances, and the prohibition on performance requirements.¹⁴⁹

National treatment mandates that foreign investors must be treated the same as nationals of the host State. This provision can cause problems with certain forms of positive discrimination legislation aimed at redressing societal imbalances, attending to human rights, protecting domestic industry, and correcting the legacies of previously unjust regimes.¹⁵⁰

Investment agreements mandate that expropriation must fulfil three criteria: it must be for a public purpose, non-discriminatory and enacted through the due process of law. This includes indirect expropriation, in the form of 'creeping expropriation'¹⁵¹ or 'regulatory takings'.¹⁵² The extent of the concept of indirect expropriation is unclear, yet has been read very broadly in some arbitral awards to require compensation for negative effects on foreign investors that are a result of non-discriminatory *bona fide* government actions in the public interest. Some tribunals have employed a

¹⁴⁸ Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin, 'The Backlash against Investment Arbitration: Perceptions and Reality', in Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds.) *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, The Netherlands, 2010), p. 1.

¹⁴⁹ See generally, Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, Third Edition (Cambridge University Press, Cambridge, 2010), pp. 172-235.

¹⁵⁰ Report of the High Commissioner for Human Rights, Human Rights, Trade and Investment, UN Doc. E/CN.4/Sub.2/2003/9, 2 July 2003, para 31(b).

¹⁵¹ Creeping expropriation is defined as the use of a series of measures in order to achieve a direct or indirect expropriation over time. In this case, no individual measure in itself would amount to an expropriation but the sum of the measures could.

¹⁵² Regulatory takings refers to the process whereby a regulation can amount to an expropriation obliging compensation by the sole fault of having a significant negative impact on an investment's economic value, even if it is, by nature, a due process of law, is non-discriminatory and is for a public purpose.

so-called ‘sole effects’ doctrine, whereby in the determination of expropriation the purpose of the government action is irrelevant and the economic impact is the essential criteria.¹⁵³

As a safety net, minimum standards of treatment are applied, which must be determined in the event of a dispute on the merits of each case. The fair and equitable treatment standard that is included under this rubric is notoriously vague and subjective. There is seemingly strong agreement among arbitrators that it provides a high standard of investor protection,¹⁵⁴ despite ongoing controversy. Arbitrators have included in this standard an obligation not to violate an investor’s ‘legitimate expectations’; again, there is no general agreement on the content of the phrase, how far this concept extends, or what type of expectations should be taken as legitimate or not. The enthusiasm of arbitrators in over-interpreting and thus effectively creating new substantive rights and protections for investors has led to some governments amending their model BITs to nominally limit these standards of protection to the understanding found in customary law.¹⁵⁵ This has not often had the intended result, however.

Particularly emblematic of the nature of investment arbitration is the recent extension of the fair and equitable treatment (FET) standard to include ‘creeping unfair treatment’. The tribunal in *El Paso v. Argentina* decided that:

in the same way as one can speak of creeping expropriation, there can also be creeping violations of the FET standard. ... [which] could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.¹⁵⁶

The State was ultimately ordered to pay US\$43 million in damages. It is important to note that even before such sweeping expansion, the fair and equitable treatment standard per se has been described by a leading authority as a standard that has “no consolidated or conventional meaning”, the normative content of which “is contested, hardly substantiated by State practice, and impossible to narrow down by traditional means of interpretive syllogism.”¹⁵⁷ The *El Paso* decision creates a new grey area of State liability under the investment regime that will have the same chilling consequences on government regulation as the doctrine of ‘creeping expropriation’ from which it was borrowed, and will create another new playground for investors’ claims and arbitral interpretation. It also begs the question of whether all concrete provisions and standards in BITs might ultimately be subject to such ‘creeping’ interpretation.

Investment treaty provisions on repatriation of profits and funds typically allow for the unimpeded entry and removal of finances from the host State. This also applies to any compensation paid to a foreign investor in the event of a positive award as a result of a dispute settlement, and to any debts

¹⁵³ Ben Mostafa, ‘The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law’ 15 *Australian International Law Journal* 1 (2008). For an example see, *Pope & Talbot v. Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2, 10 April 2001.

¹⁵⁴ ‘Fair and equitable’ has been determined by one tribunal to mean a duty “for the host state to act in a consistent manner, free from ambiguity, and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investments and comply with such regulations.” *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para 154 (emphasis added). See further, Catherine Yannaca-Small, *Fair and Equitable Treatment Standard in International Law*, OECD Directorate for Financial and Enterprise Affairs, Working Papers on International Investment No. 2004/3, September 2004.

¹⁵⁵ See for example, 2012 US Model Bilateral Investment Treaty, Article 5(2). Canadian BITs also follow this approach; Article 5 of the 2004 Canadian Model Foreign Investment Promotion and Protection Agreement.

¹⁵⁶ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para 517.

¹⁵⁷ Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, Cambridge, 2009), p. 263.

owed to an affiliate by local interests. Restrictions on host State use of capital controls, and forced financial liberalisation generally, can easily precipitate and/or worsen financial crises, as was demonstrated in the case of the Asian financial crisis of the late 1990s.

Restrictions on performance requirements preclude the host State from placing certain demands on investors that would have the effect of limiting their economic and profit-making freedom in the interests of facilitating host State development. These requirements can take a wide range of forms and are usually precluded in US and Canadian investment agreements through use of a positive list approach.¹⁵⁸

3.1(b) – Procedural Provisions of International Investment Agreements

Almost all BITs contain provisions establishing investor-State dispute settlement. Consequently, foreign investors have recourse to take the host State directly to arbitration, generally without requiring any previous attempt to resolve the dispute within the domestic legal system. The final award of an arbitration tribunal is binding. It can only be contested under exceptional circumstances and no fully operative appeal mechanism is provided for. The ISDS procedure is a serious incursion into State sovereignty, as well as the general principle of subsidiarity that governs almost all other forms of international treaties involving State and non-State actors and is of particular importance regarding human rights treaties.¹⁵⁹ The significance of the removal of the local remedies rule cannot be overstated. It is a customary rule of international law and lies at the core of State sovereignty. The rejection of this rule in the modern system of investment arbitration is of profound concern from the point of view of democratic determination of national public policy and economic development. Nor does it augur well for the long-term stability of the current international investment law regime.¹⁶⁰

Investors can take issue with any kind of host government action taken at any level that is claimed to have breached any provision of the investment agreement, or, in many instances, of an underlying investor-State contract. This encompasses the full range of government measures, laws or policy changes (executive, judicial or legislative). In the event of a dispute, a tribunal is formed of three arbitrators – one chosen by the investor, one by the host State, and a third agreed by the first two arbitrators or appointed by a supervisory body. One practicing arbitrator notes the remarkable submission of states to such broad review:

When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all [...] Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament.¹⁶¹

¹⁵⁸ See for example, 2012 US Model Bilateral Investment Treaty, Article 8; NAFTA, Article 1106; 2004 Canadian Model Foreign Investment Protection Agreement, Article 7.

¹⁵⁹ Andreas Follesdal, 'The Principle of Subsidiarity as a Constitutional Principle in International Law' 2 *Global Constitutionalism* 1 (2013); Paolo Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' 97 *American Journal of International Law* 1 (2003). The Charter of Fundamental Rights of the European Union, in its Preamble, reaffirms the rights therein "with due regard for ... the principle of subsidiarity". Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, C 364/01, 18 December 2000.

¹⁶⁰ Muthucumaraswamy Sornarajah, 'The Neo-Liberal Agenda in Investment Arbitration', in Wehua Shan, Penelope Simons and Dalvinder Singh (eds.), *Redefining Sovereignty in International Economic Law* (Hart, Oxford, 2008), pp. 221-222.

¹⁶¹ Quoted in Thomas McDonagh, 'Unfair, Unsustainable and Under the Radar: How Corporations Use Global Investment Rules to Undermine a Sustainable Future', The Democracy Center, San Francisco, 2013, p. 7.

These *ad hoc* tribunals are not bound by any rule of precedent and are given scant textual direction with regard to interpreting the content of investor's rights. Each tribunal has considerable latitude in deciding the extent of any particular provision.¹⁶² Furthermore, the formal international legal rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties are regularly either ignored or only very loosely applied by tribunals. This situation has proved particularly problematic with regard to disputes over indirect expropriation and the extent of minimum standards of treatment.

The issues of transparency and participation have long been central points of critique. The default setting for investor-State disputes is closed hearings, making it very difficult for proceedings of ongoing cases to become public, even if one of the parties would greatly desire public knowledge and discussion on the subject of the dispute. The rules are limited and highly conditional with regard to permitting amicus briefs and allowing standing to interested third parties, and are, in other respects, problematic from the perspective of transparency. Participation of non-parties extends only to the submission of written briefs by particular actors under particular circumstances. Presence at oral hearings has so far been strictly limited to the parties concerned and their direct counsel (with the exception of arbitrations under the Central American Free Trade Agreement). Due to a bias towards confidentiality, an *amicus curiae*, where one is permitted, would generally not be allowed knowledge of specific arguments by the parties and would have to structure a brief independently and in the dark, reducing the likelihood of its effectiveness.

Many, if not most, arbitrators come from a background in commercial arbitration and arguably are heavily influenced by the interests and viewpoint of investors. In the opinion of one of the leading commentators in the field, "their concern for the values of the international community is weaker than their concern for contractual sanctity and the securing of their next appointment to a tribunal on the basis of their display of commercial probity and their loyalty to the values of multinational business."¹⁶³ Judges in standing courts are stringently vetted for suitability and are subject to strict rules regarding qualification, conduct, impartiality and conflict of interest. Such processes and rules do not currently apply to arbitrators. Consequently, opportunities are rife for persons simultaneously acting as counsel and arbitrator to shape the interpretation of substantive provisions in the interests of their clients.

The literature widely acknowledges a clear tendency of arbitrators to interpret the provisions of investment agreements broadly in favour of investors.¹⁶⁴ Ultimately the institution and business of investment arbitration is entirely dependent on investor perception of its utility, as only investors' claims give it life. The clear substantive preference toward investor protection within the law itself has provided fertile ground for this business to grow into a veritable arbitration industry, existing primarily for the service of foreign investors.

A recent report from Corporate Observatory Europe and the Transnational Institute provides evidence that the major players in the arbitration industry are highly active in vigorous defence of the investment regime as such, and are powerful lobbyists against reform.¹⁶⁵ These actors are not just

¹⁶² See, *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para 189.

¹⁶³ Muthucumaraswamy Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment: The Simon Reisman Lecture in International Trade Policy' 10 *Canadian Foreign Policy* 2 (2003).

¹⁶⁴ Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration', CLPE Research Paper No. 41/2012, Osgoode Hall Law School, 19 April 2012. In his study, Van Harten also finds evidence of systemic bias in favour of investors from Northern capital-exporting states over investors from other states.

¹⁶⁵ Pia Eberhardt and Cecilia Olivet, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom', Corporate Europe Observatory and the Transnational Institute, Brussels, 2012, p. 7.

limited to arbitrators themselves, but include a relatively small coterie of global North-based law firms, academics and, increasingly, hedge funds and other financiers. The report demonstrates a host of fundamental concerns: a revolving door between law firms and government departments tasked with investment policy-making, a dominance over academic discourse on investment law and arbitration, the existence of specialised departments within law firms dedicated to seeking opportunities for litigation and encouraging suits against governments in crisis, and an increasing integration between the arbitral system and the speculative financial world.¹⁶⁶ Due to its genesis in commercial arbitration, the rules on conflict of interest in investor-State arbitration are widely noted as lenient and, unsurprisingly, disqualification motions rarely succeed.

3.1(c) – The Backlash against ISDS

The vicissitudes of investment arbitration are undoubtedly the primary reason for a range of measures recently taken by States attempting either to exit the system, or to modify it in such a way that arbitral excesses are less likely. This observed backlash is motivated by what is seen as an unwarranted expansion in the frame of protection offered to investors by tribunals; protection that some States feel has gone well beyond the intention of drafters of the underlying treaties. The institution of investment arbitration has escaped their control, and they now seek ways to bring it back into line. It remains to be seen whether this can be done without starting again from scratch. One influential commentator and lawyer who regularly represents States at international arbitration argues that the dispute resolution system could well be viewed as systemically ‘broken’.¹⁶⁷ Many thus believe that the excesses of the system will ultimately bring about its own downfall.

References in the literature to a legitimacy crisis and backlash are numerous,¹⁶⁸ and the consequences of an over-expanded investor’s agenda promulgated through capricious interpretation is increasingly evident in the recent reactions of host States in the global South. In 2007, Bolivia became the first country to notify the ICSID Secretariat of its withdrawal from the ICSID Convention. Ecuador followed suit in 2009, as did Venezuela in 2012. Elsewhere, South Africa has cancelled BITs with Germany, Luxembourg, Belgium and Spain, and it appears that all of South Africa’s ‘old generation’ BITs are set for termination.¹⁶⁹ India has formulated a new draft model BIT that dramatically reduces the scope of investor protection, the range of actors covered by the definition of ‘investor’, and the leeway for arbitral interpretation, as well as removing the most favoured nation clause and instituting the exhaustion of domestic remedies, investor obligations, and mandatory home State remedies for victims of extraterritorial misconduct by their investors.¹⁷⁰

¹⁶⁶ Ibid, pp. 8-9.

¹⁶⁷ “It is my personal experience and that of many of my colleagues ... that leads me to say that what is needed, and what seems further away now than ever, is a complete overhaul of investor-state arbitration, top to bottom, beginning to end.” George Kahale, ‘Is Investor-State Arbitration Broken?’ *Transnational Dispute Management* 7 (2012), pp. 1-2.

¹⁶⁸ See, for example, Susan Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ 73 *Fordham Law Review* (2005); Charles Brower and Stephan Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ 9 *Chinese Journal of International Law* 1 (2008-2009); Ari Afilalo, ‘Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis’ 17 *Georgetown International Environmental Law Review* 1 (2004-2005)..

¹⁶⁹ Leandi Kolver, ‘SA Proceeds with Termination of Bilateral Investment Treaties’, *Engineering News*, 21 October 2013.

¹⁷⁰ The model BIT also restricts the definition of unfair treatment to “egregious”, “manifestly abusive” and “outrageous” government conduct. See 2015 Indian Model BIT. It remains unsure how many of these new provisions will survive to be found in India’s actual treaties. For commentary see Luke Peterson, ‘Analysis: India Invites Comments on Draft Model Investment Treaty; Text Offers Radical Departure, and Calls to Mind Norway’s Past Efforts at Revision’ *IA Reporter*, 25 March 2015.

Significantly, such reactions are not limited to developing countries. Many States in the global North have also re-modelled their investment treaty templates to reduce the latitude of tribunals in their interpretive capacity. Australia provides a prominent example, where the government recently decided to exclude the investor-State dispute settlement mechanism from some of its future investment agreements.¹⁷¹ The decision was taken on the basis of a 2010 report by the Australian Productivity Commission, which found a range of concerns regarding the institution of investor-State arbitration.¹⁷² Important additional concerns not yet noted, but dealt with further below, include the issue of ‘regulatory chill’, the granting of rights to foreign investment not shared by domestic investors, the undermining of the democratic process, inconsistency of decisions, and the costs incurred by the parties to the disputes. Australia refused to include ISDS in the US-Australia Free Trade Agreement, and is considering opposing its inclusion in the TPP.

Within Europe, sensitivity to some of the widespread criticism of BITs has been displayed by the European Parliament, which has called on the Commission to ensure that the EU Investment Policy includes obligations not only on host States but also on investors, noting that “for investment agreements to further benefit countries, they should also be based on investor obligations in terms of compliance with human rights and anti-corruption standards”, and that agreements “should better address the right to protect the public capacity to regulate.”¹⁷³ As detailed below, the current proposals of the European Commission clearly acknowledge many of the existing problems with the investment regime and ISDS and make certain efforts to address most of them in the context of the current negotiations. The question is whether the Commission’s proposals are adequate or not.

3.2 – Investment Liberalisation and Social Policy

The intensification of the turn to market principles of economic and social organisation worldwide over the last 30 years has constituted the greater part of what is generally referred to as globalisation. Together with a general reduction of State intervention in the economy and a decline in public funding for social programmes and economic assistance both nationally and internationally, liberalisation has led to an increasing dependence of States on foreign investment and trade opportunities to underwrite growth and living standards. While such dependence is most pronounced in the developing world, it has also become highly prominent in the States of the global North, with Ireland being a prime example. Despite a significant influx of public funds from Europe after Ireland joined the European Economic Community in 1973, the country has based its development on attractiveness to foreign investment and high export volumes. This has led to constant pressure on social and environmental protections, which have often been compromised in the name of maintaining and increasing incentives for foreign investors. Overall, this approach has brought mixed results at best, with the downsides of such dependence cruelly exposed in the wake of 2008 global financial crisis. In the response to the crisis in Ireland, social protections have been further eroded, and future generations will now be heavily burdened with the fall-out from hugely significant decisions made in an attempt to maintain attractiveness for foreign investment and the favour of global capital markets.

¹⁷¹ Australian Government, Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity, 14 April 2011.

¹⁷² Australian Government Productivity Commission, *Bilateral and Regional Trade Agreements*, Research Report, Canberra, 13 December 2010, pp. 271-274. See further, Jürgen Kurtz, ‘Australia’s Rejection of Investor-State Arbitration: Causation, Omission and Implication’ 27 *ICSID Review* 1 (2012).

¹⁷³ European Parliament Resolution on the Future European International Investment Policy, 2010/2203(INI), 6 April 2011.

By any measure—economic, fiscal or social—Ireland’s approach to development and liberalisation would not seem to be sustainable. It is a core contention of this report that the further liberalisation of TTIP and the added pressure on social protections resulting therefrom is ultimately unsustainable. The social fabric of the country will not long support further strain on a model already defined by relatively low tax and low spending on public services. A new approach to economic development and social welfare will almost inevitably become both necessary and demanded by the electorate, and this new approach is likely to conflict with the thrust of TTIP. As such, further liberalisation of trade and investment that is to be locked in by international law must be scrutinised extremely closely with a view to its social value.

The trade liberalisation aspects of TTIP will be addressed in the next chapter. With respect to investment liberalisation, it may well be argued that TTIP could make little difference as foreign investment is already almost completely liberalised on the majority of EU States with US companies enjoying virtually total market access as a matter of domestic law. This is certainly the case for Ireland. However, TTIP could make a difference in several important respects.

Firstly, it could *mandate* full liberalisation of foreign investment as a binding obligation under international law. This is significantly different from the present situation of virtually full liberalisation as a policy choice of each EU Member State that could be reversed, adjusted or applied to particular sectors, in accordance with national and social prerogatives. In Ireland’s case at present this can be achieved simply through the national legislature with no consequences under international law. By contrast, an investment chapter in TTIP could liberalise foreign investment entry regimes in both the EU and US by requiring pre-establishment national treatment. This would grant US investors a *right* of access to EU economies and a right to be treated equally alongside any EU or domestic company in a Member State at the point of entry. This has long been common practice in US and Canadian investment treaties. Market access and liberalisation norms were also included in CETA, which has led some to note that TTIP may be superfluous to a certain extent, as most US investors in the EU would be covered already through their subsidiaries in Canada.¹⁷⁴

Secondly, unless it is otherwise specifically ruled out in the text, this right of establishment could be enforceable through the ISDS mechanism. These two factors combined have the potential to make it impossible to reverse or adjust the access of US investors in certain areas of the economy once opened up in this way, thus removing a very significant amount of governmental policy space. Currently it is not clear if an investment chapter in TTIP would include a right to establishment, whether it would enable carve-outs for particular sectors, or whether it would be enforceable through dispute resolution. However, if it is excluded it would be a prominent departure from CETA. Given the present de facto openness of the EU to US investment it is difficult to estimate a specific cost on mandatory full liberalisation. The cost is a structural one, and a crucial one at that, and is dealt with further in chapter 4. CETA is in fact a substantial deviation in EU practice as the Member States have not included market access provisions in their BITs previously. Nevertheless, in TTIP, and in line with US and Canadian practice, the EU mandate would seem to be fairly straightforward in its demand for pre-establishment rights.¹⁷⁵ From the point of view of Member State policy space it would be undoubtedly

¹⁷⁴ The majority of US subsidiaries in Canada would have sufficiently significant operations to get around any denial of benefits clause, and the specific clause in the current CETA text is particularly weak in any case.

¹⁷⁵ Council of the European Union, ‘Directives for the negotiations on the Transatlantic Trade and Investment Partnership between the European Union and the United States’, Brussels, 11103/13, 17 June 2013, <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>, para 16. “The Parties should agree to grant treatment no less favourable for the establishment in their territory of companies, subsidiaries or branches of the other Party than that accorded to their own companies, subsidiaries or branches, taking due account of the sensitive nature of certain specific sectors.”

beneficial to exclude pre-establishment national treatment, or, even if it is included, to carve these rights out from enforcement through ISDS. However, this would set up an internal contradiction between the investment chapter and that on trade in services, which will no doubt seek further, if not full, liberalisation in this sector.

Thirdly, it is also common practice for the US and Canada to include prohibitions on performance requirements. These are policy tools commonly used by governments to help ensure a net positive benefit from foreign investment and are usually imposed on foreign investors at the time of entry and establishment in the host economy. They may take forms such as mandatory reinvestment in the host country, transfer of technology, and employment of local workers and managers. Performance requirements are a crucial aspect of a government's regulatory capacity and have long been thought of as highly important in efforts to ensure that foreign investment has a net positive impact on the society and economy of the host State.¹⁷⁶ However, these capacities of Member States could be severely restricted if not eliminated through investment provisions and ISDS, and are further affected by the trade in services chapter addressed below. According to paragraph 23 of the EU's negotiating mandate, "market access commitments may include, when necessary, rules prohibiting performance requirements."

3.3 – ISDS and Public Health

3.3(a) – General Considerations on Public Health and International Investment Law

One may reasonably assume that, compared to chemical manufacturers, elected local and national governments would be better placed to judge the health effects of certain chemicals and the levels of risk that are acceptable to the population. However, in 2009, Dow Inc., one of the largest chemical companies in the world, based its investment claim against the Canadian government on the assumption that it knew best. The company claimed that a Quebec ban on pesticides containing a chemical named 2,4-D violated clauses on fair and equitable treatment and expropriation under NAFTA. Although the government based the ban clearly on the health risk, Dow believed that "there was no evidence that 2,4-D posed a health or safety risk to humans". It also believed that Quebec's "stated reliance on an interpretation of the precautionary approach was motivated by political considerations, rather than any legitimate scientific concerns."¹⁷⁷ This raises fundamental questions of how a precautionary approach should be implemented in the area of public health, how much science is needed, how much public sentiment can factor in, what the relationship is between the precautionary approach and democratic governance, and who should ultimately decide on its legitimacy according to what criteria.

The Dow case was settled in the end, limiting its utility in answering many of these questions. According to the settlement agreement, the company received no compensation and the ban remained in place. However, the Quebec government was forced to make a statement that "products containing 2,4-D do not pose an unacceptable risk to human health or the environment, provided that

¹⁷⁶ Ha-Joon Chang, 'Foreign Investment Regulation in Historical Perspective', in Rajneesh Narula and Sanjaya Lall (eds.) *Understanding FDI-Assisted Economic Development* (Routledge, Abingdon, 2006); Rajneesh Narula, *Globalisation and Technology* (Polity Press, Cambridge, 2003).

¹⁷⁷ *Dow AgroSciences LLC v. Government of Canada*, NAFTA/UNCITRAL, Notice of Arbitration 1147-53 (Mar. 31, 2009), paras 25, 20.

the instructions on their label are followed.”¹⁷⁸ Despite the fact that Quebec’s ban remained in place, this result has fuelled perceptions of regulatory chill as the authorities’ admission could be used against any subsequent decisions of other local authorities considering a ban.¹⁷⁹

Trade and investment liberalisation has granted investors a range of new legal tools that can be used to influence public and democratic processes in host States to their advantage. The intensification of competition due to the same process of liberalisation has structurally reinforced these newly acquired powers. Through extensive protection of investor rights, international investment governance runs a high risk of undermining fundamental national goals to provide for the highest levels of public health. In theory it can be argued that investment protections and public health interests may be reconciled; whether this occurs in practice depends heavily on the interpretations given to treaty texts. In the context of investment treaties, history has shown that there is only so much States can do in formulating investor rights and qualifying language in such a way as to try and ensure a consistent or determined outcome.

Once the matter is set down in an international treaty and placed in front of a series of ad hoc investment tribunals there is little that can be done. In their decisions, much will boil down to questions of ‘reasonableness’, ‘arbitrariness’ and ‘necessity’. There is arguably some scope for allowance of bona fide government regulation. However, there is also ample textual opportunity for tribunals to narrow that scope to a minimum or even effectively preclude it in certain circumstances, which may or may not be objectively justified. In the end, given the unsettled opinions of arbitrators on these matters and the vagueness of terminology in BITs, their determination will essentially be a matter for each arbitrator’s judgment. Again, the issue boils down to a simple question: is it worth the risk?

In the tobacco plain packaging cases addressed below, much will depend on the tribunal’s weighing of competing international legal obligations that States are under to uphold the public interest and social rights. Specifically at issue are obligations under the Framework Convention on Tobacco Control and human rights treaties that protect the right to health. However, the track record of investment tribunals demonstrates a very clear reluctance to even acknowledge such competing obligations, let alone give them due weight. This is especially so when it comes to international human rights law.

The UN Special Rapporteur on the Right to Health has recently made some strong statements in this regard: international investment agreements “allow transnational corporations to reduce States’ policy space and have been instrumental in increasing the influence of transnational corporations on States’ ability to institute public health policies”; inequities “in access to information can enable corporations to influence the content of an international investment agreement in their favour”; and “[s]uch agreements perpetuate and exacerbate an asymmetrical relationship between investors and States.”¹⁸⁰ More specifically, he argues that investment treaties “may affect States’ power to introduce health laws in the public interest. States may have to modify their laws to accommodate investors’ rights, even though such modifications may increase the risk of violating individuals’ right to health.”¹⁸¹ Although investment treaties may involve language seeking to limit investor’s rights in the public

¹⁷⁸ Settlement Agreement between Dow Agrosciences and Her Majesty the Queen in Right of Canada, 25 May 2011.

¹⁷⁹ The Council of Canadians, ‘Dow Agrosciences used and abused NAFTA in pesticide spat, says Council of Canadians’, Media Release, 27 May 2011.

¹⁸⁰ ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover’, UN Doc A/69/299, 11 August 2014, paras 48-59.

¹⁸¹ *Ibid*, para 53.

interest it is nevertheless the case that “investor rights may trump them.”¹⁸² The Special Rapporteur also notes the following, which is of special relevance to the issue of interpretation:

The current system of investor-State dispute settlement also suffers from bias and conflicts of interest. The dispute settlement is controlled by a small clique of arbitrators and lawyers, and the same person may be counsel, arbitrator and adviser to an investor or State at different times. Many arbitrators share close links with business communities and may be inclined towards protecting investors’ profits. This can affect the independence and neutrality of arbitrators, is contrary to the principle of fairness and further compromises the integrity of arbitration under international investment agreements.¹⁸³

Another UN official, Professor Alfred De Zayas, Independent Expert to the UN Secretary-General on the promotion of a democratic and equitable international order, has also recently warned of the threat to human rights posed by investment treaties and the lack of transparency in negotiations over TTIP.¹⁸⁴

We illustrate these concerns by outlining a few of the cases in point below.¹⁸⁵

3.3(b) – Plain Packaging for Tobacco Products

Ireland has recently passed legislation on the plain packaging of cigarettes with the President signing the legislation into law on March 10th 2015. Ireland was the second country in the world to do so, after Australia, and now followed by the UK. This has occurred in reaction to numerous studies indicating that substantial benefits for public health will ensue, and amid threatened legal action by a number of tobacco firms. Because Ireland is not currently part of the investment treaty network such challenges would have to be pursued through the domestic courts. However, TTIP could change this situation dramatically.

The issue of tobacco regulation and plain cigarette packaging is of special relevance here as actions challenging government regulation in this area have encompassed both the international trade and investment law regimes. Claims have been brought by States on behalf of the tobacco industry before the WTO’s dispute settlement mechanism (see chapter 4), and have also been launched directly by tobacco multinational Philip Morris in two investment arbitrations, which are of concern here.

Following years of open public inquiry and cost benefit calculation, the Australian government introduced legislation in 2011 mandating the plain packaging of all tobacco products. Soon after, Philip Morris initiated litigation under the Hong Kong-Australia BIT, claiming a violation of the FET and expropriation clauses, infringements on its intellectual property rights and a diminished value in its trademark. The Australian government argues that the litigation is abusive and spurious as the legislation is non-discriminatory, clearly in the public interest, and in accord with due legal process.¹⁸⁶

¹⁸² Ibid, para 54.

¹⁸³ Ibid, para 62. See further Cecilia Olivet and Pia Eberhardt, *Profiting From Injustice* (Amsterdam/Brussels, Transnational Institute and Corporate Europe Observatory, November 2012).

¹⁸⁴ UN Office of the High Commissioner for Human Rights, ‘Press Release: Secret negotiations on trade treaties, a threat to human rights – UN expert’, 23 April 2015.

¹⁸⁵ For an in-depth discussion of further cases and the issue in general see Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Routledge, Abingdon, 2012).

¹⁸⁶ Luke Peterson, ‘Analysis: Australian Defence Strategy Puts Spotlight on Timing of Philip Morris’ Corporate Restructuring Moves, Claims Abuse of Investment Treaty’, IA Reporter, 31 December 2011.

Philip Morris also blocked Australia's request for open hearings in the dispute.¹⁸⁷ A previous challenge to the legislation was brought in the High Court of Australia by Philip Morris and three other foreign tobacco multinationals.¹⁸⁸ The Court rejected the challenge, noting that the arguments made by the foreign investors were "delusive", "unreal and synthetic", and fatally defective in logic and reasoning.¹⁸⁹ The initiation of the international BIT claim aims to effectively override the High Court's decision and seeks an award of "billions of dollars in damages".¹⁹⁰

Australia also argues that the legislation is aligned with the spirit and obligations inherent in the World Health Organisation's (WHO) Framework Convention on Tobacco Control (FTCT), under which the contracting parties are mandated "to give priority to their right to protect public health." It would furthermore seem that Philip Morris deliberately restructured its corporate holdings of the Australian subsidiary through Hong-Kong deliberately to ensure that it would be able to initiate the dispute under the relevant BIT, and is accordingly accused by Australia of an abuse of its rights. Philip Morris also carried out its restructuring of its investments long after Australia had publically announced the intention of enacting plain packaging legislation and the underlying dispute with Philip Morris had begun. The investor claims that the dispute arose only when the plain packaging laws were actually passed in November 2011; however, it lodged its 'notice of claim', which is the first necessary step in the litigation, in June 2011, compromising the claim that there was in fact no dispute at that time. Australia holds that the claim is an "abusive manipulation of the system of investment protection", warning that that the longer it takes to resolve the dispute, "the longer every other state that is considering a similar plain packaging regulatory measure (including the 177 parties to the WHO Framework Convention on Tobacco Control) will be prevented from enacting such measures."¹⁹¹ This has been confirmed by the statements of the New Zealand government and others.

Notably, with respect to the verification of the regulatory chill argument, Australia itself refers to the fact of regulatory chill in one of its submissions to the tribunal. As part of an argument to deal with jurisdictional issues separately, the government argues that this would speed up the process and therefore be in the public interest, not just of Australians but of people worldwide, as "many countries are now awaiting the results of the litigation in order to decide on their own legislative proposals on plain packaging." Australia in fact states that Philip Morris' litigation has "produced and is producing a deep and profound regulatory chill across the globe".¹⁹²

In a closely related case Philip Morris has also sued Uruguay regarding its plain packaging legislation enacted in 2008 and 2009. This will be an interesting test, as the relevant BIT between Switzerland and Uruguay contains a clause reaffirming the right to regulate, stating that; "The Contracting Parties recognise each other's right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors."

Although this is not worded the same as an exceptions clause the interpretation by the tribunal will give some indication of how such a clause will be applied. The investor does not directly deny a right to promote and protect public health, yet it claims that the government "cannot abuse that right and

¹⁸⁷ Luke Peterson, 'Philip Morris Vetoes Open Arbitration Hearings in Australia Case, But Filings May be Released and Tribunal Decisions will be Published', IA Reporter, 10 January 2013.

¹⁸⁸ *JT International SA v. Commonwealth of Australia, British American Tobacco Australasia Limited v. The Commonwealth of Australia*, High Court of Australia, [2012] HCA 43, Judgement, 5 October 2012.

¹⁸⁹ *Ibid*, paras 44, 47, 124.

¹⁹⁰ Philip Morris Asia Ltd v. Commonwealth of Australia, Notice of Arbitration (Nov. 21, 2011), para 8.3.

¹⁹¹ Jarrod Hepburn, 'Philip Morris v. Australia: New ruling explains why jurisdictional questions to be reviewed first; umbrella clause is no longer being used to import WTO law', IA Reporter, 30 June 2014.

¹⁹² *Ibid*.

invoke it as a pretext for disregarding the Claimant's legal rights.”¹⁹³ Philip Morris claims that the mandatory graphic warnings are “offensive” and “operate so as to denigrate [the claimants'] products”, affecting the goodwill associated with PMI trademarks”, “thereby depriving them of their commercial value” and is an abuse of the company’s trademark.¹⁹⁴ Reportedly, Uruguay President Jose Mujica almost settled the claim early on under pressure from the company, due to the fact the investor claims US\$2 billion in damages, or 3.6% of its US\$55 billion GDP.¹⁹⁵ In comparison, Philip Morris International’s annual sales total US\$66 billion, more than the GDP of 130 developing countries.¹⁹⁶ The WHO has successfully applied to make an intervention in this case, stating that it will “stand shoulder to shoulder with all countries who are defending their tobacco control policies to fully implement the WHO FCTC.”¹⁹⁷

In both cases, the investor challenges the government’s measures as ‘arbitrary’ and ‘unreasonable’, even though these standards will be difficult to prove. With respect to Australia, Philip Morris argues that there is insufficient evidence that plain packaging legislation will have the desired effect of protecting human health, despite numerous studies and public consultations entered into by the government before the adoption of legislation.

Both cases are currently pending so it remains unclear how plain packaging regulations will fare under the investment law regime. There is little doubt that the cases will set a form of precedent that could be adopted by subsequent tribunals and possibly even national courts. What is clear for now is the regulatory chill factor; even though undecided, the cases are nevertheless having an active effect on the regulatory autonomy of governments in an area of great significance to public health. As such, it appears reasonable to surmise that Ireland has felt safe enough to go ahead with the regulation as it is not bound by international investment treaties in this regard, whereas New Zealand has felt constrained due to its obligations to foreign investors. It should be added that in the 1990s Philip Morris placed pressure on a Canadian government contemplating plain packaging, threatening investment treaty claims and at the very least contributing significantly to the plans being shelved at the time. The threat of NAFTA claims “is widely believed to have deterred the government from taking legislative action on plain packaging.”¹⁹⁸ Canada subsequently inscribed more restrictive language in its model BIT. Similar concerns have long surrounded US proposals to legislate, and both British American Tobacco and Philip Morris are currently suing the UK in its domestic courts over the government’s recent introduction of plain packaging laws, creating a potential liability of billions of pounds.¹⁹⁹

In another case involving US legislation mandating payment by cigarette manufacturers into a special account of a certain amount per cigarette sold to offset State costs for treating smoking-related illnesses, the tribunal held against the investor and affirmed the State’s right to regulate.²⁰⁰ The case of *Grand River Enterprises* was notable in denying that the measures amounted to indirect

¹⁹³ *FTR Holding S.A. (Switz.), Philip Morris Products S.A. (Switz.) and Abal Hermanos S.A. (Uru.) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Request for Arbitration, 19 February 2010, para 7.

¹⁹⁴ *Ibid*, paras 4 and 48.

¹⁹⁵ Robert Stumberg, ‘Safeguards for Tobacco Control: Options for the TPPA’, 39 *American Journal of Law and Medicine* (2013).

¹⁹⁶ Tsai-yu Lin, ‘Preventing Tobacco Companies’ Interference with Tobacco Control through Investor-State Dispute Settlement under the TPP’ 8 *Asian Journal of WTO and International Health Law and Policy* 2 (2013), p. 575.

¹⁹⁷ Luke Peterson, ‘Latest developments in the Philip Morris arbitrations against Australia and Uruguay’, IA Reporter, 12 February 2015.

¹⁹⁸ Valentina Vadi, ‘Global Health Governance at a Crossroads’: Trademark Protection v. Tobacco Control in International Investment Law’ 48 *Stanford Journal of International Law* (2012), p. 105.

¹⁹⁹ John Bingham, ‘Tobacco companies prepare multi-billion compensation claims over UK plain packaging’, Telegraph, 21 May 2015.

²⁰⁰ *Grand River Enterprises Six Nations Ltd. et al. v. United States*, NAFTA, UNCITRAL, 12 January 2011.

expropriation, stating that “trade in tobacco products has historically been the subject of close and extensive regulation by U.S. states”, and that the investor could not have a legitimate expectation of freedom from further measures.²⁰¹ The tribunal also held that expropriation required “a complete or very substantial deprivation of owners’ rights in the totality of the investment”,²⁰² and as the investment remained profitable there could be no negative finding against the State.

However, another tribunal in *Marvin Roy Feldman Karpa v. United Mexican States*, in a case involving the taxation of cigarettes for export, has held that “if there is a finding of expropriation, compensation is required, *even if* the taking is for a public purpose, non-discriminatory and in accordance with due process of law”.²⁰³ This approach would seem to confirm the ‘sole effects’ doctrine that is highly restrictive of government regulatory space, and would have been sufficient to find against the US in the *Grand River Enterprises* case.

These cases serve to highlight the controversy regarding the nature and extent of the standards applied, which leads many to advocate the simple exclusion of tobacco control measures from the scope of any future BITs and investment chapter that may be included in future trade agreements.²⁰⁴

An interesting comparator is a case decided by the European Court of Human Rights. The European Convention on Human Rights protects the right to property, and as such the Court was asked to find a violation of tobacco companies’ intellectual property rights due to an EU Directive requiring the printing of the levels of toxins on packages and larger health warnings. In the *Tobacco Products Judgement* the Court noted that the right to property is not absolute and that “[i]ts exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest ... and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.”²⁰⁵ The Court found that the Directive did not compromise the essence of companies’ trademarks, but was instead a proportionate restriction on their use in the interests of public health. In addition, the European Court of Justice has declined to find in favour of two companies that argued that UK and German legislation preventing the marketing of tobacco for oral use contravened their rights.²⁰⁶ The Court held that such government measures were clearly aligned with EU obligations to pursue a high level of public health and health protection.

Although there is some overlap between the jurisprudence of the European courts and the decisions of investment tribunals it is clear that very divergent approaches are taken. It is unlikely that investment tribunals will begin to adopt the same restrictive interpretation of property rights as the Courts, which operate in an entirely different contextual milieu, having a forced regard for a much broader range of rights and interests. This raises the distinct possibility of a clash between the application of investment provisions under TTIP on the one hand, and EU law and European human rights law on the other. The implementation of an ISDS mechanism that allows investors to circumvent domestic and regional judicial processes will be detrimental to the protection of public health, in the contexts of tobacco regulation and more broadly.

²⁰¹ Ibid, paras 144-145.

²⁰² Ibid, para 148.

²⁰³ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB/99/1, Award, 16 December 2002, para 98.

²⁰⁴ Tsai-yu Lin, ‘Preventing Tobacco Companies’ Interference with Tobacco Control through Investor-State Dispute Settlement under the TPP’, 8 *Asian Journal of WTO and International Health Law and Policy* 2 (2013).

²⁰⁵ Case C-491/01, *The Queen v. Secretary of State for Health ex parte British American Tobacco Investments Ltd. & Imperial Tobacco Ltd.*, 2002 E.C.R. 1-11453, 149.

²⁰⁶ Case C-210/03, *Swedish Match AB*, 1 73.

3.3(c) – Secondary Health Impacts

Many claims brought by investors directly challenge environmental regulations or measures that nevertheless have a significant effect on public health. In fact, the vast majority of disputes nominally framed as environmental are at heart concerned with the secondary effects of environmental degradation on human health. Although most often grouped under the heading of ‘environmental cases’ *Tecmed vs. Mexico*,²⁰⁷ for example, is essentially a public health case. The *Tecmed* case concerned a dispute over the expropriatory effect of the refusal to reissue an operating permit to the foreign operator of a hazardous waste processing facility in Mexico. Subsequent to Tecmed’s purchase of the relevant landfill, the government enacted more stringent environmental and health legislation requiring the relocation of the landfill further away from a neighbouring urban centre. Confronted with a refusal to renew its operating permit on health and safety grounds, the foreign investor, Tecmed, initiated arbitration claiming expropriation and unfair treatment. The tribunal found in favour of Tecmed and directed Mexico to pay US\$5.5 million in compensation. The verdict was based on the conclusion that, despite denouncing clear code violations, the Ministry of the Environment had failed to identify said violations explicitly as public health hazards.²⁰⁸ Perversely, the denial of the permit as a response to community concerns regarding health and safety was seen as an improper basis for a decision by a governmental body.²⁰⁹ The tribunal ruled that, to avoid the burden of compensation, States must provide investors with:

treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment ... to act in a consistent manner, free from ambiguity and totally transparently ... [such that the investor] may know beforehand any and all rules and regulations that will govern its investments.²¹⁰

This passage has been seminal in the development of the doctrine of ‘legitimate expectations’.²¹¹ This is, nevertheless, an impossible standard for any State to manage, developing or developed.²¹² It effectively means that the BIT would act like a contractual stabilisation or economic equilibrium clause, freezing legislation at the investor’s point of entry and requiring all subsequent legislation to be equally, or more, protective of the investment. Any subsequent regulation, including necessarily progressive human rights measures, that reduced investor protection, would simply not apply to that investment. This could potentially stall human rights realisation and public interest legislation at the time of entry of foreign investment.

In relation to the *Tecmed* dispute, it is important to note that a State may be violating its competing obligation under human rights law to safeguard public health if it fails to “regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others,” or “to enact or enforce laws to prevent the pollution of water, air and soil by extractive and

²⁰⁷ *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.

²⁰⁸ *Ibid*, para 124.

²⁰⁹ *Ibid*, para 130.

²¹⁰ *Ibid*, para 154.

²¹¹ Campbell McLachlan, ‘Investment Treaties and General International Law’ 57 *International and Comparative Law Quarterly* 2 (2008), p. 376.

²¹² “The *Tecmed* ‘standard’ is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain. But in the aftermath of the tribunal’s correct finding of liability in *Tecmed*, the quoted obiter dictum in that award, unsupported by any authority, is now frequently cited by tribunals as the only and therefore definitive authority for the requirements of fair and equitable treatment.” Zachary Douglas, ‘Nothing if not Critical for Investment Treaty Arbitration: *Occidental, Eureka and Methanex*’ 22 *Arbitration International* 1 (2006), p. 28.

manufacturing industries.”²¹³ The potential conflicts between human rights norms and international investment protection are thus manifest, but ISDS tribunals are clearly mandated to adhere to the latter rather than the former.

Of particular relevance to the Irish context, where licenses for fracking are causing deep public concern, US oil and gas company Lone Pine is now suing Canada over its environmental and health policies with respect to fracking operations in Quebec.²¹⁴ Amid serious issues of possible water pollution and human health consequences, the Quebec National Assembly placed a moratorium on the fracking of shale gas until the uncertain environmental and health impacts could be assessed. The measure also revokes existing permits pertaining to oil and gas within a specified region close to a major river. Lone Pine claims that the government “acted too hastily” in its actions, questions the validity of the environmental impact assessments relied upon, and characterises the decision-making process as irrational and politicised.²¹⁵ This occurs in the broader global context of controversy over the effects of fracking that have led to public authorities placing similar moratoriums on the practice in various parts of the world. In this context, the Lone Pine dispute has the hallmarks of another case of regulatory chill.

Another example of the exposure of States to arbitration come from a dispute over gold mining in El Salvador, where the multinational Pacific Rim has brought a claim under the US-El Salvador BIT. The El-Salvador government had concerns over an environmental impact assessment submitted by the company, which it suspected did not attend properly to possibilities of cyanide, mercury and arsenic poisoning of the groundwater. Local wells had also allegedly dried up due to Pacific Rim’s activities. The company applied for an exploitation concession and was left waiting by the government while it considered the situation amid huge public controversy. Pacific Rim alleges violations of national treatment, expropriation and minimum treatment standards, and has raised its damages claim to US\$301 million, which amounts to 2% of El Salvador’s GDP.²¹⁶

²¹³ CESCR, General Comment 14, The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4, 11 August 2000, para 51.

²¹⁴ *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2.

²¹⁵ Jarrod Hepburn, ‘In new pleading, Lone Pine questions “environmental” bona fides of decision to cancel fracking exploration permit, and offers a DCF valuation of its losses’, IA Reporter, 7 May 2015.

²¹⁶ Manuel Pérez-Rocha, ‘When Corporations Sue Governments’, New York Times, 3 December 2014.

3.3(d) – Health Insurance

The Slovak Republic has faced three claims in recent years from foreign investors impacted by the government's decision to amend its policy on health insurance.²¹⁷ In 2007, Slovakia enacted a law obliging insurers to operate on a not-for-profit basis and to re-invest surplus revenues, rather than distribute them as dividends to shareholders. This reversed an earlier policy adopted at the behest of the World Bank as part of a 'reform' of the public health system in the context of a national debt crisis, seeking to encourage foreign investment in the relevant sector and permitting operations for profit. One claimant sought over US\$1 billion in damages. While the Slovakian Constitutional Court overturned the law in 2011, one investment tribunal made it clear that it would have found the government fully liable under the terms of the relevant BIT either way, as the very concept of an investment should imply a right to "enjoy the possibility of a return on the investment, if it proves profitable."²¹⁸ Even under this temporary ban that was 'corrected' by the domestic courts, the tribunal found a violation of the FET standard had taken place in the interim, and awarded compensation. Slovakia repeatedly asserted its right to regulate on fundamental matters of health care reform, but the tribunal was of the opinion that while the investment law regime is not "hostile" to any particular policies on the provision of health care, it does control "the manner in which policies may be changed and implemented".²¹⁹

The Slovakian cases do nothing to dispel deep concerns that investment treaties act to effectively 'lock in' market oriented policies favourable to foreign investors and their profit margins at the expense of localised democratic control and public accountability. At least it is clear that these treaties will often make the reversal of these policies prohibitively expensive, especially for small countries undergoing prolonged external debt difficulties, not unlike the situation of Ireland. Because the reversal law was struck down by the Constitutional Court, and was therefore only temporary, the tribunal did not have to decide on the claim of the investors for compensation for decades of future lost profits. If the Constitutional Court had not decided in this way then Slovakia may have been forced to strike the law down in any case for purely monetary reasons, given its poor public financial situation.

A Commission established by the Canadian government in 2004 to enquire into the extension of non-profit public health insurance, to cover extra treatments such as prescription medicine and dental care, warned that this may not be feasible due to damage claims under investment treaties.²²⁰ Reportedly, in 2006 the threat of investment claims factored into the eventual decision of the Czech government not to re-establish a number of hospitals as non-profit organisations.²²¹ In short, extensive privatisations may become effectively irreversible due to the possible effects of investment treaties.

²¹⁷ Luke Peterson, 'Third BIT claim arises after health policy reversal; Slovak state rebuffed in proposal to publish earlier award under same treaty', IA Reporter, 9 April 2010.

²¹⁸ Joel Dahlquist and Luke Eric Peterson, 'In *Achmea v. Slovakia I* award, liability centers on two temporary measures that fall short of expropriation, but breach fair treatment standard', IA Reporter, 18 January 2015.

²¹⁹ *Ibid.*

²²⁰ Luke Peterson, 'Third BIT claim arises after health policy reversal; Slovak state rebuffed in proposal to publish earlier award under same treaty', IA Reporter, 9 April 2010.

²²¹ "Klaus vetoes bill on non-profit hospitals", CTK News Agency, May 5, 2006; "Czech lawmakers vote for non-profit hospitals", Agence France Presse May 23, 2006; "Chamber passes law on non-profit hospitals", CTK News Agency, May 23, 2006.

3.4 – Assessing the Case For Investor Protection and ISDS in TTIP

It is essential to address the fundamental question of whether the inclusion of ISDS and investment protection generally within the TTIP is warranted in the first place. This basic question is not taken up directly by the European Commission and was not included in the call for public comment in the course of its March 2014 consultation on ISDS. This has significantly narrowed the terms of the debate and an attempt must be made to open it back up. As things stand, it is our view that ISDS should not be included in TTIP. For it to be enacted, there would need to be an expectation that an overall public benefit would be delivered that would outweigh the evident costs of granting of such powerful rights to corporations. “Otherwise, the Commission would be proceeding with a major expansion of investor-state arbitration – extending its coverage of international FDI flows by about 300% of its current coverage based on existing treaties – without a careful review of the significant risks to public funds and regulatory capacity; to the principle of a level playing field for European and extra-European companies; and to established structures of public accountability, regulatory flexibility, and judicial independence.”²²²

The same reasoning underlies the unanimous vote of the European Parliament (with the exception of those MEPs who rejected ISDS outright) in May 2013 that future EU investment agreements should include ISDS only “[i]n the cases where it is justifiable”.²²³ The question of whether ISDS is justified is still a very live issue in the European Parliament. In June 2015, a report containing a series of new recommendations on TTIP negotiations from the Parliament to the Commission was tabled, which still includes a mandate to continue negotiating an investment chapter with a reformed ISDS system.²²⁴ A plenary vote was planned for 10 June 2015 on the adoption of these recommendations, but was abandoned due to strong and persistent calls for the exclusion of ISDS in total and widespread concern over ‘weak language’²²⁵ in the recommendations and the appropriate way forward in the negotiations.²²⁶ Notably, 6 of the European Parliament’s 14 committees (those on Economic and Monetary Affairs, Legal Affairs, Employment, Environment, Petitions and Constitutional Affairs) have all taken positions calling for the rejection of ISDS due to various concerns including regulatory chill.²²⁷

In October 2014 the ministers of 14 EU Member States, including the UK, sent a letter to Commissioner Malmström stating their support for an investment chapter in TTIP.²²⁸ Germany, France, Italy and the Netherlands were notably absent. Given that 14 Member States chose *not* to voice a favour for ISDS, the EU could be effectively split down the middle on the issue in terms of numbers, but *may* be pushed to lean towards the qualification or exclusion of ISDS in terms of political and economic weight. The

²²² Gus Van Harten, ‘Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA’, Osgoode Legal Studies Research Paper No. 59, Vol. 10/ Issue. 13/ (2014), pp. 1-2.

²²³ Resolution of the European Parliament, ‘Amendment 3 to the Commission’s proposal for a regulation of the European Parliament and the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party’, (COM(2012)0335), voted on 23 May 2013, P7_TA-PROV(2013)0219.

²²⁴ European Parliament, ‘Report, containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), (2014/2228(INI)), Committee on International Trade, A8-0175/2015, 1 June 2015.

²²⁵ Oliver Moore, ‘Weak Draft TTIP Resolution Adopted’, Agricultural and Rural Convention 2020, 1 June 2015.

²²⁶ Laura Puccio, ‘EU-US negotiations on TTIP: A survey of current issues’, European Parliamentary Research Service, 16 June 2015.

²²⁷ Cécile Barbière, ‘Parliament’s opposition to TTIP arbitration on the rise’, EurActiv.com, 17 April 2015.

²²⁸ Letter by the ministers of Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Malta, Portugal, Spain, Sweden and the UK to Commissioner-designate Cecilia Malmström, 21 October 2014.

small and medium sized businesses that are the foundation of the German economy, for example, are highly sceptical if not opposed.

The case for ISDS generally rests on one or both of two distinct grounds. The first is a claim that it depoliticises disputes and overcomes deficient domestic legal systems, thereby giving aggrieved foreign investors a fair hearing and contributing to the development of an international rule of law.²²⁹ The second is a claim that it is necessary to give meaning to international legal protections afforded to foreign investors in treaties that would otherwise be empty words and therefore provide no encouragement for investors to invest in a host State, hopefully spurring its economic development.²³⁰ The first claim is thus based on on a particular conception of justice, and the second on the promise of economic benefit. Both claims are quite shaky to say the least, even in the context of investment between developed and developing countries, and arguably collapse entirely when applied to the context of an EU-US agreement.

There is a third claim, which is particular to the context of TTIP. Those making this third claim acknowledge that there are problems with both the extent of the rights granted to foreign investors and the system of dispute resolution, but argue that the problems can be fixed, and that the negotiations over TTIP provide a prime and crucial opportunity to do so. As such, it is held that systemic reforms may be catalysed through their enactment in TTIP, which may be of significant benefit to the investment law system itself, and its survival and evolution. This last claim is ultimately based on the value of the international investment protection system in itself, and therefore is dependent on an evaluation of the first two claims. Yet the third claim also rests on the notion of a gamble. It is therefore important to assess what level of cost is going to be incurred for the chance of an improved investment system that may still fail to serve its alleged purposes, in order to properly appreciate the size of the gamble. Integral to a clear picture is an assessment of the proposed reforms against the likelihood of their success.

3.4(a) – The First Claim: Legal Certainty for Investors

With regard to the first claim, resting on an idea of justice for foreign investors, it must first be noted that ISDS was nominally instituted in reaction to a perceived lack of predictability, independence and quality in the domestic courts of specifically *developing* countries. The system was allegedly designed to manage political and judicial risk for global North-based investors in the global South. Such perceptions suggested racialised and neo-colonial undercurrents; until now Northern capital-

²²⁹ “The purpose of ISDS is to provide foreign investors with a means of challenging a host state’s actions outside of the politically-fraught and often inefficient system of diplomatic protection. ISDS is also intended to provide a forum for dispute settlement separate from the host state’s domestic legal system.” Christian Tietje and Freya Baetens, ‘The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership’, Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 24 June 2014, p. 8. “ISDS as a concept can be prescribed as one of the most effective tools to manage political risk and to promote the international rule of law ... and contributes towards a de-politicisation of investment disputes”. Steffen Hindelang, ‘Study on Investor-State Dispute Settlement (‘ISDS’) and Alternatives of Dispute Resolution in International Investment Law’, in Pieter Jan Kuijper et al, ‘Investor-State Dispute Settlement (ISDS) Provisions in the EU’s International Investment Agreements: Volume 2-Studies’, Directorate-General for External Policies of the Union, European Parliament, EXPO/B/INTA/2014/08-09-10, September 2014, p. 51.

²³⁰ “By largely replacing state-driven enforcement mechanisms ISDS renders substantive commitments in investment instruments more credible ... Developing states in particular have signed up to international investment instruments with the expectation it would facilitate attracting foreign investment”. Steffen Hindelang, ‘Study on Investor-State Dispute Settlement (‘ISDS’) and Alternatives of Dispute Resolution in International Investment Law’, in Pieter Jan Kuijper et al, ‘Investor-State Dispute Settlement (ISDS) Provisions in the EU’s International Investment Agreements: Volume 2-Studies’, Directorate-General for External Policies of the Union, European Parliament, EXPO/B/INTA/2014/08-09-10, September 2014, p. 51.

exporting States have not denigrated their own domestic courts in the same manner. The ECT and NAFTA cannot be properly understood as an exception to this rule as these agreements envelop developing countries and remain primarily of benefit to Northern investors. Setting aside the questionable validity of the cultural superiority and imperialism underlying the initial creation of the ISDS mechanism, it is evident that *by design* the investment law regime is not applicable to economic relations between global North States. This fact is reflected in the Australian position, whereby the country rejected ISDS in its bilateral Free Trade Agreement with the US based on “the fact that both countries have robust, developed legal systems for resolving disputes between foreign investors and government”.²³¹ Therefore, there was no need to risk the obvious costs of the investment arbitration regime by altering the status quo ante. Evidently the Australian government also deemed the possible economic benefits of ISDS in terms of increased US investment to be of such limited likelihood or minimal value as to also fail as a justification for the risk of its inclusion.

In a related vein, it is sometimes claimed that, in comparison to domestic judges, international investment arbitrators are somehow more efficient in resolving investment disputes as they possess some form of special expertise in gauging the meaning and application of the vague terms of investment agreements. This notion is highly debateable, arguably ridiculous, given that such supposed special expertise has failed to resolve numerous and deep conflicts between these arbitrators over very basic questions of interpretation, especially regarding the extent of the FET and indirect expropriations standards, the operation of MFN and umbrella clauses, the admission of mass claims and the definition of protected investments, among other fundamental legal points. There is little reason to believe that domestic judges would do worse, and because of the interpretative and professional strictures they work under, there is very good reason to believe they would do far better. In addition, as this report seeks to emphasise, there are competing legal obligations at hand in many disputes than the simplified and vague investor protections established by investment agreements, which are routinely ignored by many investment tribunals. Where these broader legal questions relate to the wider socio-economic setting of the investment concerned, it is likely that domestic judges will be better placed to make appropriate decisions, and will have far more holistic expertise. Domestic courts are in important respects more knowledgeable and logically located to provide an appropriate balance, accounting for the compromises struck nationally and locally between public and private interests. They have greater awareness of domestic rules and mores, including the ability and requirement to gauge disputes against the underlying constitutional framework.

The US and the EU both maintain very high levels of protection for foreign investors, non-existent if not very low barriers to establishment, and deep commitment to private property rights and commercial freedoms as central to the rule of law. Yet some still argue that international legal protections and enforcement through ISDS is nevertheless necessary to reassure foreign investors and thereby increase investment flows. Primarily on the basis of two investment claims brought against the US government for alleged denial of justice in its domestic courts, the EU Commission has argued that ISDS is needed to adequately protect EU investors. However, the cases relied upon by the Commission are extreme outliers. In one case, *Mondev*, the investment tribunal itself stated that there had been no judicial impropriety involved in the domestic litigation, and in any case found that it could not find for the investor as its rights in international law had not been violated. In the other case, *Loewen*, while the conduct of the domestic jury trial was indeed compromised, the US immediately initiated significant reform of the local courts in Mississippi.²³² The *Loewen* case is in fact notorious for

²³¹ Australian Government Department of Foreign Affairs and Trade, ‘Australia-United States Free Trade Agreement: Fact Sheets – Investment’, http://www.dfat.gov.au/fta/ausfta/outcomes/09_investment.html.

²³² For further discussion on these cases and why they do not prove the Commission’s point see, Jan Kleinheisterkamp, ‘Note: European Policy Space in International Investment Law’ 27 *ICSID Review* 2 (2012), and Lauge Poulsen, Jonathan Bonnitcha and

the faulty reasoning of the investment tribunal itself and for its own possible misconduct. One of the arbitrators has admitted that prior to his appointment he met with US officials who warned him that, “if we lose this case we could lose NAFTA”; to which he replied, “Well, if you want to put pressure on me, then that does it.”²³³ If anything, these cases themselves, rather than supporting the Commission’s arguments about the need to protect EU investors from an incompetent US court system actually add weight to the ongoing and far more relevant critique of bias, and ideological and political influence, within investor-State arbitration itself.

It must also be remembered that whatever the possible benefits for EU investors in the US, the flipside of the mechanism is increased protection for US investors in EU Member States. Some argue that this formal bi-directionality could favour US investors,²³⁴ who, when considered by nationality, bring considerably more arbitration claims than those of any other State. UNCTAD data shows that of a total 568 ISDS cases, US investors have initiated 22%, or 127 cases, followed by Dutch investors (61 cases), the UK (43), Germany (39), Canada (32), France (31), and Italy (26).²³⁵ These statistics reflect the higher volumes of US foreign investment relative to other States, with some believing that they also reflect the heightened litigiousness of US investors. Tietje and Baetens, on the other hand, point out that “in aggregate, investors from EU Member States have brought more claims in the past 30 years than investors from the United States”,²³⁶ although a sizeable percentage of these EU cases are intra-EU and therefore not relevant to the present comparison.

The only direct comparison currently possible is through the nine existing US BITs with (peripheral) EU member States. There have been no cases from EU investors against the US under these BITs, while US investors have initiated litigation in nine instances (4 cases against Poland, 3 against Romania, 1 against the Czech Republic and 1 against Estonia, representing 7% of total claims filed by US investors).²³⁷ These BITs only cover 1% of the existing stock of US FDI in the EU. If US investors are this actively litigious in regard to 1% of their investments, there would seem to be very good reason to expect a very significant number of claims arising from an ISDS mechanism covering the entire EU. According to Gus Van Harten, “[a]pproximately 54% of the total compensation awarded (about \$5.1 billion) in the 38 known investment treaty awards of over \$10 million up to June 2, 2014 was awarded to U.S. companies. ... The U.S. share of total compensation in these cases rises to about 59% after accounting for apparent forum-shopping.”²³⁸

The main point here is that grouping the diverse EU Member States and ‘EU investors’ together as singular comparators is artificial and consistently veils important details. The most crucial consequence is an analytic avoidance of the fact that the costs and benefits of various aspects of TTIP will be unevenly distributed across the 28 States. The costs of State liability through ISDS to core Member States of the EU, such as the Netherlands, Germany, France and others, will be offset to a greater degree as their investors are more likely to utilise its protections. This is not to say that the

Jason Yackee, ‘Transatlantic Investment Treaty Protection’, Paper No. 3 in the CEPS-CTR Project on “TTIP in the Balance” and CEPS Special Report No. 102, March 2015, pp. 11-13.

²³³ Jan Kleinheisterkamp, ‘Note: European Policy Space in International Investment Law’ 27 *ICSID Review* 2 (2012).

²³⁴ Lauge Poulsen, Jonathan Bonnitcha and Jason Yackee, ‘Transatlantic Investment Treaty Protection’, Paper No. 3 in the CEPS-CTR Project on “TTIP in the Balance” and CEPS Special Report No. 102 / March 2015, pp. 17-18.

²³⁵ UNCTAD, ‘Recent Developments in Investor-State Dispute Settlement (ISDS)’, IIA Issues Note No. 1, April 2014, p. 8.

²³⁶ Christian Tietje and Freya Baetens, ‘The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership’, Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 24 June 2014, p. 26.

²³⁷ UNCTAD, ‘Investor-State Dispute Settlement: An Information Note on the United States and the European Union’, IIA Issue Note No. 2, June 2014, pp. 1-2.

²³⁸ Gus Van Harten, ‘Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA’, Osgoode Hall Law School Legal Studies Research Paper No. 59, Volume 10, Issue 13, 2014, p. 3.

costs will be balanced off overall for these States. We think that unlikely. However, ISDS will be of significantly lesser value to the peripheral Member States, whose liability is likely to be far greater and whose investors will not benefit to the same degree, as clearly indicated by the operation of the existing BITs between the US and peripheral EU Member States. This highlights an important aspect of the significantly divergent cost/benefit ratio from TTIP across the Member States of the EU, from the core to the periphery.

Turning to the issue of de-politicisation, it should be noted at the outset that ISDS may in fact escalate disputes and increase politicisation. The case of *Yukos* is instructive. In this case, a domestic political dispute in Russia between President Putin and one of his main rivals, Mikhail Khodorkovsky, spread to encompass a commercial dispute over Khodorkovsky's giant oil company, Yukos, leading to charges of government mistreatment and expropriation. The case was internationalised by foreign shareholders of the company through a series of conjoined investment claims under the Energy Charter Treaty, whereby the tribunal found Russia in violation and awarded damages of US\$50 billion. As part of an effort to enforce the award, a holding company acting for the shareholders has persuaded France, Belgium and Austria to freeze certain Russian bank accounts.²³⁹ The Russian Foreign Ministry has warned Belgium's ambassador that Moscow would retaliate by placing controls on Belgian accounts and property in Russia if the accounts of the Russian companies and diplomatic missions in Belgium were not released.²⁴⁰ The Russian government has said it will take all sovereign and legal action possible as it has no intention of paying the award, and it also acknowledges that this is only the beginning of an escalating series of international disputes as the shareholders have plans to 'roll out' the tribunal's award also in UK and US jurisdictions. As a result, a domestic political dispute has been internationalised through the investment regime to now engulf up to six countries.

However, it is worth considering that some issues perhaps should be politicised. The existence of sensitive and controversial political elements in a legal dispute should not be cast as inherently illegitimate. One may think of instances where licences may be revoked on the basis of new scientific evidence that is strong enough to persuade local communities and public authorities yet highly contested by foreign investors, especially where regulatory approaches differ significantly from one country to another. In such a situation the best result may not be achieved by an 'impartial' international tribunal instituted for the benefit of the foreign investor with exactly such cases in mind, a tribunal that is furthermore unfamiliar with local and national realities and subtleties. The most suitable decision-makers, those best placed to find a balance that will receive the greatest acceptance from the full spectrum of stakeholders, is most likely to be located in the domestic legal system.

Yet, in the absence of a strong rule on exhaustion of local remedies these systems will have no chance to resolve disputes. Given the depth and extent of controversy over investment tribunals and their own bias, the appeal to such tribunals as paragons of virtue, balance and impartiality in comparison to domestic courts seems untenable. Even if there were a potential argument to support the role of an international site of appeal on technical points of international treaty law, investment arbitration is nigh on impossible to justify as a first and final remedy. Baetens states that "one type of risk that is certainly present in several EU member states relates to the possibility of not being granted a fair trial before a domestic court."²⁴¹ In support she refers to the World Economic Forum's 2014-2015 country rankings of 'judicial independence', pointing out that according to this survey while some EU Member States are near the top, others such as Slovakia and Bulgaria are far down the list, ranked 130 and 126

²³⁹ Aleksandr Gorbachev, 'France, Belgium and Austria to Seize Russian Assets Over Yukos Dispute', *Newsweek*, 18 June 2015.

²⁴⁰ Lynn Berry, 'Russia Angered by Freezing of Accounts in Belgium and France', *Associated Press*, 18 June 2015.

²⁴¹ Freya Baetens, 'Transatlantic Investment Treaty Protection: A Response to Poulsen, Bonnitcha and Yackee', Paper No. 4 in the CEPS-CTR project "TTIP in the Balance" and CEPS Special Report No. 103, March 2015, p. 2.

respectively out of 140. Again leaving aside the undertones of political and cultural hegemony that feed into the framing of such indicators, one might add that the Czech Republic is ranked 106, Croatia 100, Romania 84, Lithuania 71, Latvia 58, and Poland 54. She argues that this provides a rationale for inclusion of ISDS in the EU-US agreement to ensure protection for US investors from suspect EU courts. However, what is not mentioned is that the US already has BITs in place with every one of these 'low ranked' EU Member States. This fact negates the argument. For any remaining EU Member States that the US may regard as lacking in 'judicial independence' it would be far more sensible, easier and logical for the US simply to negotiate BITs with these countries, than to push through controversial negotiations with the entire EU. With reference to the US government's own official Investment Climate Statements, Poulsen et al also find that "[e]ven in what would typically be considered the most 'risky' investment destinations in Eastern Europe, the US government considers foreign investments there generally safe from expropriation and post-establishment discrimination, and advertises it as such to potential American investors."²⁴²

In the context of the EU-US trade and investment relations as a whole, the idea of ISDS reducing politicisation and instabilities is ultimately misleading. Even Tietje and Baetens, in a study arguing in favour of ISDS under TTIP potential beneficial from a Dutch perspective, manage to go from: arguing for ISDS as a depoliticising tool; to demonstrating that in the present case there is no politicisation to de-politicise; to arguing that there may be politicisation but ISDS will make no difference; to stating that ISDS is in fact likely to *increase* politicisation; to ultimately ending on the fact that ISDS can be, and has been, used to force public authorities into settlements that are unjustified, and that furthermore this could be worse than if the case had been pursued through the domestic courts because the public backlash may be greater.²⁴³

Perhaps this is simply indicative of the debate, that it is ultimately confused and difficult to distil any accuracy or coherence. In sum, however, the arguments that investment arbitration reduces the exposure of investors to politicised processes and provides increased legal certainty as compared with domestic judicial systems appear ungrounded at best, deliberately disingenuous at worst.

3.4(b) – The Second Claim: Economic Benefit through Increased Investment Flows

Regarding the second claim that the security afforded by investment protections leads to increased investment and economic benefits, it is widely acknowledged in the literature that despite a long and extensive search and many dedicated studies there is no clear evidence to support this. Although Tietje and Baetens argue strongly for the inclusion of ISDS in the TTIP, it is very difficult to understand where they see the benefits, as they themselves acknowledge the failure of this second claim, concluding that "it is difficult to predict what effect, if any, the TTIP will have on Dutch-US FDI flows. It is equally difficult to predict whether ISDS provisions in the TTIP will have a discernable [sic] effect on FDI flows. ... We can only safely say that investment is important for both the US and Dutch economies, but neither economic costs nor benefits can be statistically linked to the TTIP given the paucity of statistics in this field."²⁴⁴

²⁴² Lauge Poulsen, Jonathan Bonnitcha and Jason Yackee, 'Transatlantic Investment Treaty Protection', Paper No. 3 in the CEPS-CTR Project on "TTIP in the Balance" and CEPS Special Report No. 102, March 2015, p. 5.

²⁴³ Christian Tietje and Freya Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership', Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 24 June 2014, p. 70-72.

²⁴⁴ Ibid.

There is not so much a paucity of statistics however, as a simple paucity of any evidence positively linking ISDS and investment protection to increased levels of foreign investment. Despite a number of dedicated studies the oft-assumed but purely theoretical link between increased protection in treaties and increased investment flows has proved impossible to reliably establish in fact. For example, all that can be concluded from a relatively recent collection of such studies,²⁴⁵ is that for every one study that finds a correlation there is another finding no correlation and yet another that is inconclusive.²⁴⁶ This means that increased protection from TTIP may simply elevate the fortunes of foreign investors already established, giving them new powers to challenge government action and extract compensation, representing an increased cost that is certain with no discernible economic benefit in terms of increased investment or job creation.

One of the most recent studies, by Peinhardt and Allee, is also one of the most respected as it has corrected many of the statistical and methodological faults of previous studies.²⁴⁷ It is also of particular value with respect to potential economic benefits to the EU from TTIP, as it concentrates only on US investment flows. It concludes that very few US investment agreements have had any impact on actual patterns of US investment. Where there has been a positive statistical correlation found, it has been quite weak, and the increase in investment marginal. But most importantly, the study found that no investment agreement between the US and another *developed* country, such as Israel, Singapore, Canada or Australia, has had any impact on incoming US investment.

This only stands to reason, as it is clear that the vast majority of global investment has been flowing within the global North without any need for host States there to ‘signal’ their receptiveness or degrade their domestic courts in order to attract it. Investment has followed, and continues to follow, a completely different logic. It clearly and primarily seeks markets, export opportunities, educated and affordable labour, general political and economic stability, and natural resources, among other practical benefits leading directly to profit-making opportunities; not investment treaty protections. When States possess these qualities, whether in the global North or South, foreign investment will come, regardless of the presence or absence of special protection under investment agreements.

Based on the studies undertaken on the effects of investment protections in BITs and PTIAs on investment flows, the best that can be said for the EU as a whole is that the inclusion of ISDS in TTIP will on balance have no effect at all in terms of economic benefit. The most positive spin that could ultimately be put on this situation is that ISDS may have a very marginal overall effect, particularly in countries that may be presently viewed by US investors as risky but are not yet covered by a BIT with the US. Ireland does not fall into this category, as it is quite evidently viewed as a highly desirable destination for US investment already, despite the absence of protection under the international investment regime. For Ireland, therefore, it is safe to say that, on the evidence, ISDS in TTIP will bring no economic benefit at all.

It must also be noted that the underlying assumption in all of this, that more FDI is always better, at least economically speaking, is itself highly questionable. In fact, those States that are now economically powerful only became so because of protectionist measures that systematically excluded and discriminated against foreign investment. This fact is somewhat taboo in discussions on

²⁴⁵ Karl Sauvant and Lisa Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press, Oxford, 2009).

²⁴⁶ See, Lauge Poulsen, ‘Book Review: Karl P. Sauvant and Lisa E. Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*’ 20 *European Journal of International Law* (2009).

²⁴⁷ Clint Pienhardt and Todd Allee, ‘Failure to Deliver: The Investment Effects of US Preferential Economic Agreements,’ 35 *The World Economy* (2012).

the liberalisation of the investment regime; it is nonetheless well established and accepted among economists. A position assuming that foreign investment is essential to development, economic growth and human wellbeing, and is always a good thing, whereby more is always better and less is always bad, is therefore not a tenable position. This is a thoroughly discredited viewpoint in economic thinking.

This claim of increased investment must also be weighed against the high likelihood of significantly increased costs in the form of awards for damages that States which take the risk of entering the investment regime will inevitably have to pay. There is a particularly high probability that these costs will outweigh any marginal economic benefits (which are the best that can be expected) in the case of the EU as a whole and Ireland in particular. In our view then, the costs will significantly outweigh any benefits. This issue is dealt with further below in the section on Revenue and Budgetary Implications.

3.4(c) – The Third Claim: Saving the Investment Law Regime

When the arguments for the inclusion of ISDS are examined more closely, the many problems of the system as it presently exists in BITs and other investment agreements are only reinforced. As Tietje and Baetens themselves note, “the ISDS system as it currently exists suffers from serious drawbacks that must be overcome.”²⁴⁸ Those advocating for the inclusion of ISDS are often well aware of its many pitfalls, but believe that it can be fixed, and that furthermore we should take any opportunity possible to attempt to do so. From their point of view, the TTIP is a prime opportunity to experiment.²⁴⁹

Baetens, for example, states that “[a]n investment chapter in TTIP offers an unprecedented opportunity to reform and improve the system of investment law. If the EU and the US seize this opportunity, it would set an important precedent in treaty-drafting”.²⁵⁰ According to Quick, similarly, “TTIP provides for a unique opportunity to introduce procedural and substantive reforms for Investor-State Dispute Settlement (ISDS). The EU and the US can define a modern investment chapter protecting foreign direct investment against unjustifiable interferences by the host state whilst ensuring the sovereign right of the state to regulate. ... Such an agreement would function as a catalyst to overcome the fragmented network of bilateral investment agreements. Not to include ISDS in TTIP would demonstrate that the two economic champions of the world are unable to lead by example.”²⁵¹ And in the words of Commissioner Malmstrom, “Eventually, what will be proposed in the TTIP context will set the standard for the further development of investment protection provisions and investment arbitration in EU investment negotiations. TTIP provides a unique opportunity for reforming and improving the system.”²⁵²

That is, investment in TTIP may be bad for the EU and its Member States, and for its people, but it is justified because it is good for the investment law regime as a whole, and its exclusion would

²⁴⁸ Christian Tietje and Freya Baetens, ‘The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership’, Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 24 June 2014, p. 92.

²⁴⁹ The need of the US to consolidate a strong investment protection template in advance of negotiations down the line for a trade and investment agreement with China is also a likely underpinning factor.

²⁵⁰ Freya Baetens, ‘Transatlantic Investment Treaty Protection: A Response to Poulsen, Bonnitcha and Yackee’, Paper No. 4 in the CEPS-CTR project “TTIP in the Balance” and CEPS Special Report No. 103, March 2015.

²⁵¹ Reinhard Quick, ‘Why TTIP Should Have an Investment Chapter Including ISDS’ 49 *Journal of World Trade* 2 (2015), p. 199.

²⁵² EU Commission, Concept Paper, ‘Investment in TTIP and Beyond – The Path for Reform: Enhancing the right to regulate and moving from the current ad hoc arbitration towards an Investment Court’, 7 May 2015, p. 4.

otherwise make the ‘champions’ look bad. This evinces an extraordinary and vested interest in this regime and in its survival. However, there is a valid question mark over whether the deficiencies of the regime can be overcome in a coherent manner, or whether it would not be better simply to allow the system to lapse, and re-design it from scratch. Many believe that it is necessary to re-imagine the purpose of foreign investment and investment protection beyond the frame of profit and investment incentivisation, by taking a large step back and properly incorporating social responsibility, public interest, sustainable development and human rights from the outset. Such a fundamental change will not come about overnight, but that is no reason to keep going in the same direction when the warning signs are getting more regular, when the minimal attempts to ameliorate its negative consequences do not work, and when the conclusion of further agreements make it ever more difficult to begin again.

In any event, there is widespread acknowledgment of the problems with ISDS, even among commercial actors,²⁵³ but there remains profound confusion over how to effect change and what exactly effective reform would look like. In short there is no consensus on the details. As the process of the EU consultation on ISDS verifies, there is a very large grey area when it comes to which reforms can produce the desired result, or even whether the adoption of all of those currently identified would be sufficient. There is little question that any EU-US treaty that does not eliminate or radically overhaul the ISDS system will be counter-productive to the social and economic public interest.

Whether ISDS is redeemable, even after twenty years of NAFTA and a distinct evolution in the standards and procedures of the international investment regime, is still very far from clear. It still amounts to a bet, and therefore a risk in itself. It is also unsure which reforms will be politically viable and implementable given internal divisions in the EU and the external pressure from the US. As such, an approach that views TTIP as an opportunity for reform without any clear idea of what that should be or how it would work, is fundamentally flawed. Quick, Baetens and others, including the EU Commission, effectively ask us to *trust* that their particular mix of reform proposals will solve all of the manifold problems of ISDS. Or, alternatively, that we need to at least try them out and see. They are asking us to let them experiment with this new legal system on a massive scale, not with an individual BIT, but with a regional agreement covering a substantial portion of the world’s capital. This is hugely irresponsible, especially given the very patchy track record of reform proposals to date and the depth of the problems with ISDS. The question is whether we should be taking such an experimental approach to the State’s right to regulate in the public interest? Australia’s answer in the context of its own Free Trade Agreement with the US was a clear no, and it excluded ISDS from that agreement.

Given that the investment arbitration regime has really only fully crystallised in the last 20 years, it is clear that changes occur in the regime relatively rapidly. Therefore, it should be considered that a compromise struck now, relative to the set of reform proposals currently in fashion, is likely to look insufficient or inadequate in the not too distant future. The clear trajectory of the regime is towards accelerated reform. Subsequent reforms will almost certainly overtake those incorporated into TTIP, as even the marginal evolution of EU agreements from rudimentary EU BITs to CETA, and now to the more complex proposals for TTIP, amply demonstrate.

Furthermore, a viewpoint that settles for the level of reform on the table at present ignores the far more radical and socially progressive proposals that are underway in the global South; from the

²⁵³ The Federation of German Industries concedes in a recent position paper that concerns in respect of ISDS have to be taken seriously and current investment instruments and ISDS practice display diverse weaknesses. Bundesverband der Deutschen Industrie e.V., *Positionspapier: Schutz europäischer Investitionen im Ausland: Anforderungen an Investitionsabkommen der EU*, http://www.bdi.eu/download_content/GlobalisierungMaerkteUndHandel-/Schutz_europaeischer_Investitionen_im_Ausland.pdf.

repudiation by Latin American countries of ICSID and their cancellation of existing BITs and moves to establish a new regional investment arbitration institution from scratch, to the incorporation of investor obligations and other deeper reforms in the model treaty of the South African Development Community,²⁵⁴ and the exhaustion of domestic remedies requirement in the latest Indian template.²⁵⁵ More radical texts have even been adopted involving global North States such as the 2015 China-Australia FTA,²⁵⁶ the investment chapter of which only provides for national treatment and most-favoured nation treatment, eschewing the indeterminate FET and indirect expropriation standards.

Further undermining the case for ‘saving’ the investment law regime through TTIP, there is ever growing disenchantment in the global South with the Northern line on investment protection, as the link between investment treaties and increased investment continues to escape empirical validation. As such, it is becoming increasingly less likely that global South States will uncritically adopt Northern standards, which means that whatever happens in TTIP is of decreasing relevance to the rest of the world. The power of the EU and the US to dictate the direction of the investment regime is waning with their simultaneous economic decline, relative to the rising powers such as the BRICS countries. It would indeed be somewhat ironic if the EU and the US, the traditional leaders of restrictive investment agreements finally bound themselves to the standards they have long pushed on others just as the rest of the world either rejected the investment regime or decided to radically alter it.

These considerations are linked to the ‘confidence case’ for TTIP, which may be the largest actual motivation for the negotiations. This ‘confidence case’ holds that TTIP is necessary to boost general levels of confidence and optimism in both the US and EU economies, particularly with respect to the expectations of global capital markets. It is believed that this would then have consequently positive effects on their recovery from the global financial crisis and enable a basic exit from recession and stagnation for the EU, and a return to strong growth for the US. This is largely an argument around the sentiments and psychology of capital markets and investors that may be impossible to either verify or categorically disprove. In large part, however, the EU’s relentless austerity drive since 2008 has been aimed at reassuring markets and investors by demonstrating a commitment to improve economic fundamentals, yet this has not had the intended effect on market sentiment, as the austerity policies continue to stifle economic activity.

In fact, a lack of investor confidence in the EU in general would seem to be linked far more closely to *internal* issues of economic and social management and the relations between Member States than to a concern for a lack of investor protections or any perceived failure to align *externally* with international trade or investment standards. Indeed, there is substantial evidence that the decisions of potential foreign investors are in fact dominated by preoccupations such as macro-economic stability, infrastructure, resources, potential supply chains, an educated population, and prospective markets or exporting opportunities. In short, it is more likely to be increased internal stability and internally-led growth that brings foreign investment, rather than foreign investment bringing stability and growth. In addition, investor’s decisions are not likely to be highly influenced by the existence or otherwise of investment agreements, especially as between two developed regions. Foreign investment has long flowed strongly between developed countries without the aid of commitment devices such as investment agreements.

²⁵⁴ Howard Mann, ‘The SADC MODEL BIT Template: Investment for Sustainable Development’, Investment Treaty News, 30 October 2012.

²⁵⁵ Ashutosh Ray, ‘New Indian Model BIT on the Anvil’, Kluwer Arbitration Blog, 9 January 2015.

²⁵⁶ <http://dfat.gov.au/trade/agreements/chafta/official-documents/Pages/official-documents.aspx>.

Furthermore, the lack of evidence of a net economic benefit or a correlation between the conclusion of investment agreements and any increase in actual foreign investment suggests that this ‘confidence’ argument rests on a particularly shaky empirical premise. The ‘confidence’ argument then boils down to a tenuous hope that does very little to offset the far more concrete and direct negative effects arising from TTIP. These considerations, however, highlight the fact that, relative to each other, the benefits and costs of TTIP have a markedly qualitative difference; the benefits are more ephemeral and indistinct, while the costs are more concrete, immediate and direct. Under these circumstances TTIP represents quite a high risk.

3.5 – The Major Cost of Investor Protection and ISDS: Freedom to Regulate

As mentioned above, one of the clearest manifestations of regulatory chill is the decision taken by New Zealand’s government—despite a clear mandate from the public which overwhelmingly favours plain packaging legislation—not to take any action before the resolution of ongoing investment claims by Philip Morris against Uruguay and Australia. Uruguay itself reportedly considered watering down its tobacco control regulations as an initial response to the claims.²⁵⁷ In the case of *Ethyl v. Canada*, the investor’s claim under NAFTA played a prominent part in the final decision of the government to abandon the environmental measures at issue and to settle with the US company.²⁵⁸ Again involving Canada and a US investor, the case of *SD Myers* also resulted in a settlement and the revocation of a ban on hazardous waste exports.²⁵⁹ Other cases often pointed to include the reversal of a policy to ban open-pit mining in Indonesia where the Minister for the Environment cited the threat of international arbitration by foreign mining companies,²⁶⁰ and a similar reversal by the Costa Rican environmental agency of a decision to withhold a permit for an open-pit mine only two months after the foreign investor initiated an arbitration claim.²⁶¹

There is ongoing debate over the extent and seriousness of the chilling effect of the investment treaty and arbitration regime. Broadly put, there are discernible divisions between a certain legalistic approach that tends to downplay or deny such an effect,²⁶² an approach informed by political science that highlights the seriousness of the effect,²⁶³ and perhaps a middle path holding that the issue certainly exists and should be treated with care, caution and deeper analysis.²⁶⁴ One of the central points of contention is the difficulty of obtaining ‘proof’ of regulatory chill and evaluating its

²⁵⁷ David Elward, ‘Uruguay to Relax Tobacco Laws to Combat Philip Morris Claim’, *Global Arbitration Review*, 28 July 2010.

²⁵⁸ Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press, Cambridge, 2009), p. 157.

²⁵⁹ Jonathan Bonnitcha, *Substantive Protection under Investment Treaties* (Cambridge University Press, Cambridge, 2014), p. 121.

²⁶⁰ Gross, ‘Inordinate Chill: BITs, Non-NAFTA MITs and Host State Regulatory Freedom – An Indonesian Case Study’ 24 *Michigan Journal of International Law* (2003), p. 895.

²⁶¹ Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press, Cambridge, 2009), p. 239.

²⁶² Christian Tietje and Freya Baetens, ‘The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership’, Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 24 June 2014, pp. 39-48; Stephan Schill, ‘Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?’ 24 *Journal of International Arbitration* (2007).

²⁶³ Kyla Tienhaara, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’, in Charles Brown and Kate Miles (eds.), *Evolution in Investment Treaty Arbitration* (Cambridge University Press, Cambridge, 2011).

²⁶⁴ Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press, Cambridge, 2014), pp. 113-127.

occurrence empirically. However, it may be the case that due to the nature of the phenomenon it is simply not amenable to empirical analysis.

We may distinguish two forms of regulatory chill. The first occurs when public authorities factor in the possibility of investment arbitration even before an action is taken, or before any legislation or other measure is drafted or formulated. In this case the chilling effect will be almost invisible and ‘proof’ of the counterfactual case—that is, what would have happened in the absence of the possibility of arbitration—will be virtually impossible to substantiate. Nevertheless, as the number of arbitration claims continues to grow and the investment regime becomes more prominent in the minds of decision-makers, as will surely be the case if ISDS is included in a successfully agreed TTIP, this form of regulatory chill will logically become increasingly prevalent and serious. Furthermore, in this form there is an obvious danger of decision-makers greatly overestimating the extent of investor protections, to be on the ‘safe side’, and thereby refusing to adopt policy positions and measures that may even be technically allowed by some tribunals. The uncertainty inherent in the protections and procedures of the investment regime and the reasoning of any given tribunal, will result in an often unnecessary encroachment on the space for progressive public policy. Even those downplaying the chilling effect admit that this first form of ‘anticipatory’ chill, or “the overall phenomenon whereby the regulatory process is hampered by all areas impacted by foreign investors”, is “a very serious concern”, even if it is not one that they engage with.²⁶⁵

The second form of chill is far more visible, occurring where an investor has expressed opposition to a measure, or already taken a claim, prompting or at least influencing a subsequent change in public policy. The examples provided above mostly adhere to this second form. Here again, despite an increased visibility, there remain issues with the empirical approach, mainly centred on the difficulty of separating and weighting the fact or the threat of an investment claim from the other numerous considerations that will influence a government decision to back down from a previous position in favour of a foreign investor. While it will be evident when the claim or threat plays a part in a given policy reversal or adjustment, it will often be impossible to say with certainty how significant a part that is. Heavily complicating the delineation of levels of influence and their legitimacy is the simple fact that the basic purpose of separate enforceable protections for foreign investors is precisely to chill or disallow certain State actions, and the line between these actions and the ‘bona fide’ exercise of State powers in the public interest is perhaps impossible to precisely define ahead of time. In any event, the confusion over regulatory chill is evident in Tietje and Baetens’ final words on the matter, where, after arguing that it is no particular problem, they nevertheless state that “the potential for actual, threatened, or perceived investment arbitrations to chill legitimate public policy-making is a major concern for TTIP and many other international investment agreements. And rightly so.”²⁶⁶

Echoing the EU Commission, Tietje and Baetens ultimately argue that the adjustments made to the definitions of investment protection standards, additional exception clauses and procedural safeguards in the CETA text and proposed for TTIP could “help protect against any possible regulatory chill while also ensuring that investors can raise legitimate claims.”²⁶⁷ If ISDS is included in TTIP then these steps could help to mitigate unjust outcomes, but there is clearly no guarantee that they will be sufficient, as the heavily qualified language of the proponents of ISDS demonstrates.

²⁶⁵ Christian Tietje and Freya Baetens, ‘The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership’, Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 24 June 2014, p. 40.

²⁶⁶ *Ibid.*, p. 92.

²⁶⁷ *Ibid.*, p. 9.

And yet the creation of the risk in the first place is unwarranted. Legitimate claims can be raised and vindicated through the domestic courts in the US and the EU. There is no objective need for the institution of a new supra-national legal structure and claims mechanism with all the uncertainties entailed. Proponents such as Tietje and Baetens see the obvious dangers in ISDS and the resulting necessity of “risk mitigation”, while neither they nor the EU Commission can point to any compelling reason for taking the gamble in the first place. This is especially true in the case of Ireland. They can only seek to assuage some of the prevalent fears by claiming, in most uncertain terms, that the full list of mitigation devices “are all viable options to make an investment chapter and ISDS, if included in the TTIP, work more efficiently, act more transparently, and better balance investor rights with the policy concerns and priorities of states.”²⁶⁸ That full list is a long one and it is highly doubtful that all of the mitigation devices would survive the negotiations with the US, which opposes some outright and displays reluctance to adopt others. Within the EU itself, many of these measures are also opposed by powerful stakeholders. Even if they were all to be instituted in the final text, transparency and respect for public policies and democratically determined priorities of States can not be ensured. This is the bottom line, and must be balanced against a status quo situation where no such threats from investment arbitration exists.

3.6 – Assessing the EU Position and TTIP’s Provisions in Relation to Public Health Policy

Nevertheless, the European Commission is operating under a mandate to “negotiate investment liberalisation and protection provisions ... on the basis of the highest levels of liberalisation and highest standards of protection that both Parties have negotiated to date”, including “an effective and state-of-the-art investor-to-state dispute settlement mechanism”.²⁶⁹ The question is whether it can satisfy this mandate and still maintain the State’s freedom to regulate in the public interest and to intervene in the economy to the extent required by popular democratic mandates and the obligations to progressively realise social and economic rights. Given widespread consciousness of the flawed nature of the investment law regime as it stands, the answer will depend heavily on the amount of faith that should be placed in the various adjustments proposed. In assessing this, a precautionary approach is essential.

In the following we will address the proposed solutions from the European Commission in its consultation document.²⁷⁰ It is our position that the existing EU proposals are insufficient to guarantee an overall benefit. There is far too much uncertainty regarding the effectiveness of the proposals to satisfy the requirements of an overall precautionary approach, and unless or until that situation changes the risks must be taken as outweighing the benefits. As such, ISDS should be definitively excluded from TTIP, and in this case it would be of little sense to include any substantive provisions on investment. Many if not most of the reform proposals are essentially bets that the system will thereby be improved and that the regulatory space and other responsibilities of States will be accorded due weight. Such bets are upon ground which is far too unsteady to proceed with international treaty rules as far-reaching as TTIP’s investment chapter.

²⁶⁸ Ibid, p. 10.

²⁶⁹ Council of the European Union, ‘Directives for the negotiations on the Transatlantic Trade and Investment Partnership between the European Union and the United States’, Brussels, 11103/13, 17 June 2013, para 22, <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

²⁷⁰ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

In its introduction to the consultation, the European Commission allegedly seeks to reaffirm the right of States to regulate, as a balance to the protections offered for foreign investors. However, while these protections are enumerated in substantive clauses, there is no visible proposal to give the State's right to regulate comparable prominence or enforceability. Reference such a right in a preamble or as a 'general', 'underlying', or 'guiding' principle will never be treated by arbitrators or adjudicators on par with the substantive investor protections set out in the body of the text. If the Commission is sincere in its stated commitment to sovereign regulatory space, it would be essential to incorporate the State's right to regulate at an equal or higher level to the protections afforded to investors.

For instance, the right to regulate was stated clearly in the Havana Charter of 1948:

[W]ithout prejudice to existing international agreements to which Members are parties, a Member has the right:

- (i) to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies;
- (ii) to determine whether and, to what extent and upon what terms it will allow future foreign investment;
- (iii) to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments;
- (iv) to prescribe and give effect to other reasonable requirements with respect to existing and future investments.²⁷¹

This right was placed above the following articles on investors' rights, which were made expressly subject to it:

Members therefore undertake:

- (a) subject to the provisions of paragraph 1(c) and to any agreements entered into under paragraph 1(d),
 - (i) to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments, and
 - (ii) to give due regard to the desirability of avoiding discrimination as between foreign investments.²⁷²

A more recent formulation is found in the second paragraph of Article 1 of Protocol 1 to the European Convention on Human Rights:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.²⁷³

²⁷¹ Havana Charter, Article 12(1)(c).

²⁷² Havana Charter, Article 12(2)(a).

²⁷³ European Convention on Human Rights, Protocol 1, Enforcement of certain Rights and Freedoms not included in Section I of the Convention, Article 1.

The Commission states that the protections enumerated in investment agreements are “fundamental principles of treatment [that] are reflected in the rights that democratic governments grant to their own citizens and companies ... but they are not always guaranteed for foreigners or foreign companies. ... The overall purpose of international investment agreements is to ensure that the country hosting an investment treats foreign investors in accordance with these fundamental principles.”²⁷⁴ This would suggest that a supra-national regime should be understood only as a safety net for those cases where the protections in domestic law are not applied to foreign investors for a particular reason. This is consistent only with a rule for the exhaustion of domestic remedies before appeal could be made to the supra-national level, as is the case with all other comparable regimes of international law. The Commission’s statement also implies that the protections offered should not go beyond those established in domestic legal codes, and that the central purpose of an investment regime should be only to ensure that foreign investors receive the same treatment as domestic investors under such codes. Again, this is consistent only with a domestic exhaustion rule, as any case of a dispute that is decided without reference to, and prior application of, domestic law would make no sense. The other logical conclusion is that if the goal is simply to ensure equal treatment to foreign and national actor alike then all that would be required of any supra-national legal regime is the application of a single standard; the national treatment principle. These issues will be returned to in the ensuing discussion.

Some investors have arguably abused the protections offered in earlier generations of treaties by structuring investments through ‘shell’ or ‘mailbox’ companies that are registered in third States but have no significant commercial operations or presence in those States. For example, a Russian investor in the EU may be able to avail of the protections in a prospective EU-US investment agreement by routing the investment through a shell company in the US. Potentially this could apply to an investor from any country in the world. In a notable recent case, *Khan Resources and others v. Mongolia* from 2012, a claim regarding a Canadian controlled investment in Mongolia operating through a mailbox company in the Netherlands was allowed under the Energy Charter Treaty (to which Canada is not a Party).²⁷⁵ The claimants did not dispute the nature of the shell company, acknowledging that it was incorporated in the Netherlands solely for the advantageous purposes of protection under the ECT. The tribunal allowed the claim to proceed despite the fact that the ECT contains a ‘denial of benefits’ clause stating that each Party to the agreement “reserves the right” to deny the relevant investment protections to companies with “no substantial business activities” in their state of incorporation.²⁷⁶ Controversially, this clause has been interpreted by tribunals to require the advance notice of the host State of a denial of benefits at the time at which the investment was made, which would require the host State to exhaustively investigate the exact corporate structure of every investment made by a foreign company before it entered the country. The tribunal in this case also ignored the fact that the Dutch shell company had been created and inserted into the Canadian parents’ corporate structure *after* the decision to invest in Mongolia had been made and an exploration license had been acquired.

Following recent established practice in the modern BITs of many countries, including the US and Canada, and the provisions of CETA, the Commission seeks to curtail this abuse through requiring that the investing company must be owned or controlled by nationals of the State in which it is registered, and must also engage in “substantial business activities” in that State. This is not contained in a separate denial of benefits clause but is incorporated directly into the definition of ‘investor’ at the

²⁷⁴ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 2, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

²⁷⁵ Clovis Trevino and Luke Peterson, ‘Fortier, Hanotiau and Williams reject Mongolia’s attempt to deny ECT benefits to a Canadian-controlled Dutch shell company’, IA Reporter, 15 May 2015.

²⁷⁶ Energy Charter Treaty, Article 17(1).

outset, making it a useful step in limiting the unnecessary liability of States. However, this is the only substantial proposed change to previous (pre-CETA) practice regarding the definitions of ‘investor’ and ‘investment’.

One major issue that is therefore left fundamentally unaddressed, and that should be cause for concern particularly in the Irish case, is that of sovereign bonds. In regard to Argentina and Greece, claims have been brought by investors in sovereign bonds who have refused to participate in the debt workouts of these countries and take ‘haircuts’ that would significantly reduce the value of their investments in the interests of the public welfare of the people of these countries undergoing extreme economic and social strain.²⁷⁷ Given that sovereign bonds and other similar debt instruments are not excluded from the definition of investment, these deeply distasteful claims seeking to milk a country dry when it has nothing left to give, even to its own people, may continue to arise. They may be ameliorated to some degree by measures taken regarding prudential regulations, discussed below, however they could easily be excluded outright by an appropriate amendment to the scope of the agreement.

The Commission also seems satisfied with a continuation of the requirement that investments be made “in accordance with the applicable law” of the host State in order to avail of standing and the rights and protections conferred in the agreement. However, this practice does not clarify whether an investment must only be established in a lawful manner or whether the investment must comport with the law for the full duration of its existence. As such, despite the assurance of the Commission that this wording has “worked well and has allowed ISDS tribunals to refuse to grant investment protection to investors who have not respected the law of the host state when making the investment”,²⁷⁸ commentators have pointed to numerous occasions where this has not been the case. Van Harten identifies nine cases where the issue was decided on by a tribunal and finds that six cases do not support the statement of the Commission.²⁷⁹ Others point out that this is a very weak phrase to establish what should be significant duties on investors for them to reap the benefits and protections of the agreement.²⁸⁰ The clause should at least state clearly that the investor may not contravene the local law, nor be complicit in its violation, for the full duration of the investment. In addition it should lay down basic duties such as ensuring respect for anti-corruption and international human rights standards, and again avoiding complicity in human rights abuse by others, including the host State. Additionally, it should be made explicit that the tribunal is not simply allowed to refuse protection under such circumstances according to its discretion but is in fact obliged to do so.

3.6(a) – Non-Discriminatory Treatment

The national treatment and most-favoured nation standards ensure that a foreign investor cannot be discriminated against in relation to local investors and investors from other countries. These non-discrimination obligations most often apply only after the investment has been established in the host State thereby protecting the investor only in the post-establishment phase. Alternatively, they may

²⁷⁷ *Abaclat and Others v. Argentina*, ICSID Case No ARB/07/05; *Ambiente Ufficio v. Argentina*, ICSID Case No ARB/08/09.

²⁷⁸ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 3, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

²⁷⁹ Gus Van Harten, ‘Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA’, Osgoode Hall Law School Legal Studies Research Paper No. 59, Volume 10, Issue 13, 2014, p. 8.

²⁸⁰ Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP), signed by over 100 prominent scholars, https://www.kent.ac.uk/law/isds_treaty_consultation.html.

apply at the point of entry into the host market, at the pre-establishment phase, acting to open the market to foreign investment on the same terms as local investors. Pre-establishment obligations have been a consistent part of US, Canadian and Japanese treaties, however, it is important to note that they have not been common in the treaties of EU Member States, aside from the recent CETA text, and therefore represent a significant departure in the investment treaty practice of the EU as a whole.

When understood to apply only to the post-establishment phase the national treatment standard may be regarded as the core of investment agreements, and from the point of view of the right to regulate it is relatively unproblematic. Significant concerns persist that this standard does not actually institute a level playing field between foreign and domestic investors. The ISDS mechanism and favourable arbitrators provide evident advantages for foreign investors alone. Furthermore, the standard is usually phrased as requiring treatment ‘no less favourable’ than that accorded to local investors, maintaining silence on treatment that actually discriminates against domestic investors, leaving the possibility wide open for the creation of a playing field that is in fact more favourable to foreign investors. Many argue that the national treatment standard should be reframed so as to expressly demand the *equal* treatment of domestic and foreign investors, and to clearly prevent discrimination in either direction. All other things being equal however, under a post-establishment national treatment standard the State will be able to impose certain conditions on foreign investment at the point of entry, and as long as subsequent regulation respects the terms of these conditions and does not discriminate on the basis of the nationality of investors it will not attract liability. Furthermore, the EU acknowledges that “in certain rare cases and in some very specific sectors, discrimination against already established investors may need to be envisaged”,²⁸¹ allowing for a level of discrimination in the interests of the host State, albeit quite a low level.

On the other hand, this highlights the danger of setting pre-establishment or market access provisions into an agreement. These provisions will significantly restrict the control governments have over national economies and their ability to set the terms of operation for foreign investment in those economies. For countries like Ireland and the Netherlands, with such high levels of US investment relative to the economy as a whole, these restrictions will be of far greater significance. This ties in with the issue of performance requirements. As noted above, the ability of governments to set these requirements at the point of entry of an investment is an important tool enabling a certain level of control over foreign investment in the host economy and helping to ensure that there is a net benefit from that investment in terms of the transfer of technology, local employment and integration with local service and goods providers. The practice of the US is to demand pre-establishment rights for its investors and disallow performance requirements in its investment agreements. Although the Commission’s consultation document does not directly address these issues they are of great importance and should be a central consideration. It is a widely held opinion that for the benefit of host State economic development pre-establishment rights should be excluded, or if included in the agreement then definitely excluded from strict enforcement through the ISDS mechanism,²⁸² and that there should be no ban on performance requirements.

Of particular relevance to public health, the EU has also proposed the use of general exceptions in TTIP that will be modelled on those employed regularly in the trade context. These exceptions are intended to “allow differences in treatment between investors and investments where necessary to

²⁸¹ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 4, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

²⁸² This would seem to be required by the Commission’s mandate; “ISDS shall not apply to market access provisions.” Council of the European Union, ‘Directives for the negotiations on the Transatlantic Trade and Investment Partnership between the European Union and the United States’, Brussels, 11103/13, 17 June 2013, para 23, <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

achieve public policy objectives”,²⁸³ such as the protection of public health and the environment and would apply equally to investment provisions in the agreement.

However, such general exception clauses utilise highly restrictive language and have been typically interpreted very narrowly in the trade context, allowing only small windows through which authorities must fit their public policies on health and the environment. Compared to a clearly established right of States to regulate in the public interest, the approach of exceptions and carve-outs is by nature an extremely limited method of attempting to preserve regulatory flexibility. Indeed it is so limited that this approach is all but an admission that such flexibility will not be preserved. Public regulatory space is framed from the outset as an exception to the central and primary objective of investment protection, not as an equal, and far from a pre-eminent or pre-existing principle, right or objective. According to this conceptualisation any government regulation that restricts the rights of foreign investors is assumed to be disallowed, and it is then up to the government to meet a high burden of proof that its action clears all of the hurdles set out to qualify as an exception. Investment tribunals typically take strict and restrictive approaches to any carve-outs or exceptions to the general rules of investment agreements.²⁸⁴

An alternative conceptualisation would be to flip the burden of proof such that the investor would have to prove that a government action was not in fact for a valid public purpose and was motivated by questionable aims, or otherwise that it disproportionately compromised the investor’s interests. In addition, exceptions typically apply only to sections of the treaty, meaning that significant parts may be excepted from the exception, therefore giving arbitrators space to expand those protections lying outside the scope of exceptions to still find violations against investors and award compensation. In CETA, for example, the general exception is not applicable to the provisions on indirect expropriation and FET, the most controversial and broad provisions where protection for the right to regulate is most needed. This fact bears emphasising, as it undermines the value of a general exceptions clause almost entirely. Finally, exceptions often only apply to particular areas of the adjudication process, meaning that creative counsel and compliant arbitrators can often reason around the exceptions and base claims and awards on those areas that are not covered.

In more concrete terms, the model for the exceptions, Article XX of GATT, requires that government measures be proven as strictly “necessary” for the protection of public health and the environment. The carve-out fails if necessity cannot be demonstrated. To determine necessity arbitral tribunals will have to engage in an analysis of proportionality. They will be charged with a highly subjective task of weighing and balancing the interests of investors against their perception of the validity, legitimacy and importance of the public measures taken. They will decide on whether the measures are appropriate to achieve the public welfare aims stated, and whether alternative measures that are less damaging to investors would be more appropriate. In short, they will engage directly in second guessing these often delicate decisions subject to the complex democratic processes of nation States, and they will do so according to far more restrictive criteria. They will therefore take on an express role of administrative oversight that is normally reserved to the domestic judiciary applying broader and more complex standards, which is also balanced by its equal footing with the executive and the legislative bodies. Arbitral tribunals are subject to no such balancing. To be clear, investment tribunals have long engaged in this role, however, instituting this particular form of general exception, despite

²⁸³ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 5, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

²⁸⁴ For example see, *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/1 1, Award, Oct. 12, 2005, para 55. See also, *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, Sept. 28, 2007, para 373, where the tribunal stated that a restrictive interpretation of exclusions is mandatory.

its arguably positive intentions, will have the effect of illegitimately solidifying the station of tribunals to justifiably engage in this role.

One can immediately see that it may be very difficult, in the absence of any further textual grounds, for a government to prove that plain packaging for cigarettes is in fact *necessary* to achieve the aim of protecting public health. The WTO Appellate Body has interpreted ‘necessary’ in this context to be almost equivalent to ‘indispensable’.²⁸⁵ It is uncontroversial to say that the measure helps, and may even make a significant contribution to public health, but taking into account the reasoning of arbitrators in determining proportionality as described above, it is on balance more than likely that plain packaging would fail the necessity test. These considerations are of particular concern when paired with differences between the US and EU approaches to regulation. Put simply, the requirement of necessity would seem to leave very little room for the EU’s precautionary approach, as the scientific link between a government action and its express purpose would have to be drawn with high clarity. If the clarity is not demonstrable for whatever reason, the link would be presumed not to exist. This is in fact basically incompatible with the precautionary approach, where the presumption may often be the other way around, where it is highly desirable and democratically mandated to take ‘common sense’ measures that may nevertheless fail to meet high standards of scientific proof. This may often be the case not because the measures or the presumed causality is wrong, but because in a sense it is too obvious, and for this reason has not been the subject of extensive scientific inquiry.

The previous context of the EU’s proposed exceptions model is the trade regime, which is an entirely different situation, involving disputes directly between States. The operation of WTO dispute resolution panels in this regard is far less problematic, as they are balancing the right to regulate of one State against the other sovereign interests of another State, necessitating a more nuanced and considered approach. This is because the result of their deliberations will equally apply to the State bringing the case, such that a broad reading of the exception could benefit the complaining State at a future date. The trade context also involves a fully judicialised Appellate Body that can correct and harmonise the decisions of the panels. In investment arbitration the situation is not comparable. The investor has no future interest in the exception being interpreted expansively or with nuance. This is understood well by ad hoc tribunals whose decisions are not currently subject to any proper appellate review.

There have been no instances as yet of an investment tribunal interpreting such a general exception clause. However, in a number of cases against Argentina, arising out of the country’s severe economic crisis at the turn of the century, tribunals were called to decide on a defence of ‘necessity’ claimed by Argentina. The State claimed that under international law many of the measures it took that were damaging to foreign investors were nevertheless justified and excused Argentina from liability under the relevant BITs due to the fact that they were necessary to avert economic and social catastrophe. The vast majority of tribunals hearing this defence rejected it on a narrow interpretation of the term ‘necessary’, finding in its proportionality analysis that other measures less damaging to investors could have been taken by the State and that it remained liable under the investment regime.²⁸⁶ Even tribunals that did accept it only did so partially. The extremity of the circumstances that Argentina suffered, where average income fell by 60%, unemployment was over 20%, and those living in poverty

²⁸⁵ WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161,169/AB/R, 10 January 2001, para 161.

²⁸⁶ For discussion of these cases see, Jose Alvarez and Tegan Brink, ‘Revisiting the Necessity Defense: Continental Casualty v. Argentina’, in Karl Sauvant (ed.), *Yearbook on International Investment Law and Policy 2010/2011* (Oxford University Press, New York, 2011).

accounted for 40%,²⁸⁷ demonstrates the extraordinarily high reluctance of arbitral tribunals to excuse the actions of States by reference to ‘necessity’ where foreign investors incur damage. The measures taken by Argentina were arguably required by the government’s human rights obligations towards its own people, as argued by Argentina itself in the arbitration. However, it is widely acknowledged that neither these alternative social obligations nor the severity of the social impact to the Argentinean people were properly accounted for by most tribunals.

In addition, in terms of protecting government regulatory space the general exception has not operated particularly well even in the trade context. It is not expected to operate any better in the investment context, and will may provide even less protection for the right than currently exists.²⁸⁸ The provisions of GATT Article XX have been read very narrowly by WTO adjudicative bodies, which have set high thresholds for the success of a government measure to pass as a legitimate exception. According to one focussed study on the matter, “Article XX has served as a last resort stopgap measure, not as a proactive environmental or health policy instrument. ... [S]uccess with using the Article in the GATT has not been high.”²⁸⁹ This would not seem to be a well suited tool to the investment context, and expectations regarding its efficacy are not likely to be met.

In fact, some commentators are of the opinion that an exception clause that included the concept of a measure being ‘necessary’ for public health may further restrict what government regulatory space exists under the standards of FET and indirect expropriation.²⁹⁰ This could cause a number of difficulties especially in the application of the precautionary principle, which would lose its meaning if restricted to a standard of necessity. If such exceptions clauses are to be used the EU should apply them clearly to the entire agreement without reservation, as well as to the complete dispute resolution process. There should also be a move beyond the strict language of necessity. Other commonly utilised phrases in comparable clauses require a lower level of causality, referring to the exception of measures ‘relating to’, or ‘designed and applied for the purposes of’ protecting public health and the environment. These alternative formulations should be applied, providing greater leeway for the, nevertheless still exceptional, exercise of the State’s right to regulate. As is clear however, only a limited exercise of that right could be expected even with the inclusion of broader language and blanket coverage.

²⁸⁷ Paul Blustein, *And the Money Kept Rolling In (and Out): The World Bank, Wall Street, the IMF, and the Bankrupting of Argentina* (Public Affairs, New York, 2006); Miguel Solanes, ‘Efficiency, Equity and Liberalisation of Water Services in Buenos Aires, Argentina’, in OECD/World Bank, *Liberalisation and Universal Access to Basic Services: Telecommunications, Water and Sanitation, Financial Services and Electricity* (OECD Trade Policy Studies, Paris, 2006); Paul Cooney, ‘Argentina’s Quarter Century Experiment with Neoliberalism: From Dictatorship to Depression’ 11 *Revista de Economia Contemporânea* 1 (2007).

²⁸⁸ Newcombe, A. (2011). General exceptions in international investment agreements. In M-C. C. Segger, M. Gehring, & A. Newcombe (Eds.), *Sustainable development in world investment law* (pp. 351–370). The Hague: Kluwer International Law; Lévesque, C. (2013). ‘The inclusion of GATT XX exceptions in IIAs: A potentially risky policy’, in R. Echandi, & P. Sauvé (Eds.), *Prospects in international investment law and policy* (pp. 363–370). Cambridge: Cambridge University Press, p. 364.

²⁸⁹ Julien Chaisse, ‘Exploring the Confines of International Investment and Domestic Health Protections-Is a General Exceptions Clause a Forced Perspective?’ 39 *American Journal of Law and Medicine* (2013). p. 359.

²⁹⁰ “[I]nvestment law, unlike WTO/GATT jurisprudence, does not include a “necessity” test which could be problematic for precautionary regulation. Even if the indirect expropriation standard is interpreted as potentially requiring compensation for “takings” caused by legitimate regulations, the space for investors to prevail on such a claim appears very narrow-albeit more open in cases of precautionary regulation.” Rahim Moloo and Justin Jacinto, ‘Environmental and Health Regulation: Assessing Liability Under Investment Treaties’ 29 *Berkeley Journal of International Law* (2011), p. 62.

3.6(b) – Fair and Equitable Treatment

States such as the US, Canada and Mexico have sought to limit expansive readings of the FET standard by including conditional language in their BITs and in NAFTA containing the standard to its understanding in customary international law. However, the content of custom is almost equally open to interpretation, and as the Commission notes “this has also resulted in a wide range of differing arbitral tribunal decisions on what is or is not covered by customary international law, and has not brought the desired greater clarity to the definition of the standard.”²⁹¹ Such efforts by States to curb the excesses of arbitrators have not worked, with tribunals responding for instance, that “in fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.”²⁹² Such tribunals have thereby identified the treaty standard with custom and all but wiped out any difference, paving the way for the application of the old standard in the usual expansionary manner. The *LG&E* tribunal has stated for instance that FET requires “consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor”,²⁹³ which would entail a very severe restriction on the State’s right to regulate where such regulation negatively affects investors once they are established. With respect, some tribunals have displayed more reason. In *Glamis Gold v. United States* the tribunal set the customary standard far closer to the traditional standard set in 1926 in the famous *Neer* decision;

an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards.²⁹⁴

Given the extreme confusion the Commission has proposed some other alterations to the FET standard instead. The first is the employment of a closed list approach, where only the types of actions listed will be considered grounds for a breach of the provision. However, this list is still extensive and includes nearly all of the traditional grounds for appealing to the FET provision for protection, such as a denial of justice, a breach of due process, manifest arbitrariness (without any further qualification), targeted discrimination, and abusive treatment. These are all worded in an open way providing no real protection for the right to regulate. In particular, there would seem to be little difference in scope between the old demand for ‘fair and equitable treatment’ as a whole and the scope of a prohibition on ‘abusive treatment’, especially as it is to include such low levels of abuse as ‘duress’ and ‘harassment’. These would seem to amount to two sides of the same coin ultimately representing virtually the same standard. This list still allows a large degree of interpretive freedom on further terms such as ‘disregard of the principle of effective transparency’. The closed list would then seem to make no difference to an arbitrator’s scope for interpretation. Another problem is that from the CETA text it is not even clear if the list is in fact closed. The text reads that “a Party breaches the obligation of

²⁹¹ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 5, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

²⁹² *CMS Gas v. Argentina*, ICSID Case ARB/01/8, Award, 12 May 2005, para 284.

²⁹³ *LG&E Energy v Argentina*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, para 131.

²⁹⁴ *Glamis Gold Ltd v United States of America*, Award, UNCITRAL, 8 June 2009, IIC 380, para 616. The *Neer* standard stated that; “The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.” *LFH Neer & Pauline Neer (USA) v. Mexico*, Award and Separate Opinion, 1926, 4 RIAA 60.

fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes” one of the prohibited measures listed. It is actually quite possible that a tribunal might state that if the real intention of the Parties was to ensure a closed list they would have stated that a breach can occur ‘*only* where a measure or series of measures constitutes’ a measure on the list.

In fact, as was pointed out by a number of submissions in the consultation, the Commission’s so-called clarification of the FET standard may have the immediate effect of producing another set of major expansionary interpretive doctrines when applied by arbitrators. It would at least seem to go further than the restrictions placed on FET in the NAFTA context, by removing the caveat on customary law, which at least had the *potential* to restrict arbitrators, and re-implementing essentially the old standard through the vaguely worded closed list. The Commission’s proposals also do nothing to address the issue of ‘creeping’ unfair and inequitable treatment, as set out above. All in all it is highly unlikely that the changes made to the FET standard will have any effect on the interpretive powers of tribunals. This is of central importance due to the fact that this singular standard has caused the majority of problems in the investment regime, being abused and interpreted by far the most broadly in favour of investors and also being the standard most difficult for States to restrict and redefine in their evident dissatisfaction. This amounts to a strong argument for the simple exclusion of the standard altogether.

3.6(c) – Expropriation

Interpretations of indirect expropriation have perhaps been the second most serious source of concern regarding restrictions on the State’s right to regulate in the public interest. The Commission apparently seeks to overcome this concern and “avoid claims against legitimate public policy measures” by reference to the CETA text on expropriation.²⁹⁵ The relevant clause states that,

except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

While this text is a step in the right direction it does not secure the right to regulate in the designated areas. In the same manner as the general exceptions discussed above, the text instead solidifies the role of tribunals in second guessing the democratically formulated position of public authorities regarding a balance between public goals and costs incurred by foreign investors. Tribunals will again engage in inherently subjective proportionality analysis, requiring evaluations of whether or not the measures at issue are substantially and sufficiently related to the given public purpose, whether or not they are justified according to their own cost-benefit analysis, and whether alternatives that are more desirable from the investor’s standpoint should have been adopted instead. The standard of review here, of ‘appearing manifestly excessive’, and the qualification involved in a reference to ‘rare circumstances’, admittedly sets a relatively high threshold. However, the track record of tribunals in skirting around restrictive wording does not instil too much confidence in the ultimate effectiveness of these conditions. For starters, only the *appearance* of manifest excess is required, which may preclude an in depth analysis of whether a measure was *in fact* excessive.

²⁹⁵ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 7, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

To take the example of cigarette plain packaging again, foreign investors in the UK have threatened claims on the basis that the relevant legislation could cost them £ 11 billion due to the lost value of their trademarks and intellectual property.²⁹⁶ It is not beyond the realms of possibility that a tribunal may decide that this level of ‘damage’ appears manifestly excessive in relation to the stated aim of protecting public health. From the wording of the clause above it is not clear how deeply the tribunal would have to investigate this appearance. Such a straightforward case of legislating in the public interest, backed by public demand and the requirements of international law under the FCTC, could therefore conceivably qualify as a ‘rare’ set of circumstances requiring a vast pay-out from the public purse. This makes one wonder how many other seemingly straightforward cases may in the future run afoul of investor protections, no matter how restrictively worded on the surface, which highlights the fact that where investment treaties are concerned there remains a significant amount of unknown unknowns.

It must also be noted that in the same way as the exceptions clause, with its threshold of necessity, does not relate to the FET, neither does the clause at hand here, with its somewhat higher threshold of manifest excess. Ultimately, non-discriminatory government measures taken in the public interest that damage investors may still attract compensatory awards through the virtually unchanged FET standard, even if they do not fall foul of these ‘protective’ thresholds elsewhere.

In addition, the inclusion of the above clause as formulated may even be seen as a step backward with respect to the balanced interpretations of some tribunals, which are admittedly in the minority however. For example, in *Saluka v. Czech Republic*, the tribunal held that “[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.”²⁹⁷ This clear and unqualified statement of international law is ruptured by the formulation of indirect expropriation in CETA, which formally introduces the notion that at least some, albeit manifestly excessive and rare, *bona fide* regulations in the public interest must be compensated. Far from a mechanism for its protection, this is a definite erosion of the State’s right to regulate.

In further contrast to the stated intention regarding FET and indirect expropriation, to restrict the expansive interpretations of tribunals, the Commission’s position on the most-favoured nation (MFN) clause runs a high risk of negating these efforts. The MFN clause provides for treatment equal to that of the most well treated foreign investors in a given host State. This provision has been used to ‘import’ higher standards of protection from other treaties, both in terms of the substantive rights investors enjoy and in terms of access to the ISDS system. The Commission’s proposals, in line with the CETA text, will prevent the importation of access to the ISDS mechanism, but *will not prevent the importation of higher standards* from other treaties. There is nothing to stop arbitrators applying the wording of FET and expropriation from other treaties that do not include the qualifications above, if it is argued by a US investor that it is entitled to such equal treatment under the MFN provision. This

²⁹⁶ John Bingham, ‘Tobacco companies prepare multi-billion compensation claims over UK plain packaging’, *The Telegraph*, 21 May 2015.

²⁹⁷ *Saluka v. Czech Republic*, UNCITRAL, Partial Award, 17 May 2006, para 255. Similarly, with respect to the relevant article on expropriation the 2007 COMESA Common Investment Area Agreement states that: “Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.” Common Market for Eastern and Southern Africa, Investment Agreement for the COMESA Common Investment Area (2009), Art. 20(8).

oversight could render all of the above efforts useless.²⁹⁸ The MFN provision should therefore either be excluded or, if maintained, explicitly restricted to ensuring equal treatment in terms of domestic regulation rather than international protection, expressly disallowing the importation of both procedural *and* substantive standards from other treaties.

3.6(d) – The Right to Regulate

Responding to the fact that investment agreements have not traditionally engaged with the relationship between investment protections and the State’s right to regulate in the public interest, and that only some tribunals have taken the public purpose of disputed measures into account while others have outright refused to consider this aspect, the Commission affirms the right as “a basic underlying principle”, believing that “arbitral tribunals will have to take this principle into account when assessing any dispute settlement case.”²⁹⁹ It is nevertheless obvious that tribunals will naturally see a very large difference between firstly applying the substantive law of the treaty and adjudicating an alleged violation of the primary rights conferred on investors therein, and secondly, ‘taking this principle into account’. As pointed out by Hindelang, “such language would not put *additional* emphasis on public interests or may not create an inherent assumption that a regulatory measure taking in the public interest would be in compliance with the investment agreement.”³⁰⁰ Indeed, legally speaking it would seem to be incoherent and possibly internally contradictory to nominate, and essentially downgrade, a right as a principle. As mentioned above, it is not possible to see the right to regulate being given equal weight compared to investor’s rights as long as it is not the subject of an equally substantive clause in the main body of the text.³⁰¹

The Commission also points to efforts to attempt to protect the right to regulate by complicating the definitions of expropriation and FET, which are of dubious worth as addressed above. The Commission also speaks of adopting “all the necessary safeguards and exceptions”, including the horizontal exceptions intended to cover public health that are also dealt with above, and additional carve-outs in the areas of the audio-visual sector, subsidies and State aid, competition matters and prudential regulation.³⁰² Yet again, the adequate functioning of these carve-outs remains highly uncertain due to open language and the known tendencies of arbitrators.

²⁹⁸ Steffen Hindelang, ‘Study on Investor-State Dispute Settlement (‘ISDS’) and Alternatives of Dispute Resolution in International Investment Law’, in Pieter Jan Kuijper et al, ‘Investor-State Dispute Settlement (ISDS) Provisions in the EU’s International Investment Agreements: Volume 2-Studies’, Directorate-General for External Policies of the Union, European Parliament, EXPO/B/INTA/2014/08-09-10, September 2014, p. 87.

²⁹⁹ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 8, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

³⁰⁰ Steffen Hindelang, ‘Study on Investor-State Dispute Settlement (‘ISDS’) and Alternatives of Dispute Resolution in International Investment Law’, in Pieter Jan Kuijper et al, ‘Investor-State Dispute Settlement (ISDS) Provisions in the EU’s International Investment Agreements: Volume 2-Studies’, Directorate-General for External Policies of the Union, European Parliament, EXPO/B/INTA/2014/08-09-10, September 2014, p. 84.

³⁰¹ There is some indication that the Commission may be moving towards this position; “The EU and the countries with whom it has negotiated (Canada and Singapore) have considered that the right to regulate is part and parcel of their agreement, and have recalled this in the preamble to those agreements. Nevertheless greater clarity in relation specifically to investment protection and arbitration could be helpful. A reform on this point should reaffirm the right to regulate in a legal provision in the body of the relevant chapter.” EU Commission, Concept Paper, ‘Investment in TTIP and Beyond – The Path for Reform: Enhancing the right to regulate and moving from the current ad hoc arbitration towards an Investment Court’, 7 May 2015.

³⁰² Steffen Hindelang, ‘Study on Investor-State Dispute Settlement (‘ISDS’) and Alternatives of Dispute Resolution in International Investment Law’, in Pieter Jan Kuijper et al, ‘Investor-State Dispute Settlement (ISDS) Provisions in the EU’s International Investment Agreements: Volume 2-Studies’, Directorate-General for External Policies of the Union, European Parliament, EXPO/B/INTA/2014/08-09-10, September 2014,, p. 8.

The prudential carve-out, which, as mentioned above, may help to combat the abuse of investor protections in the case of sovereign debt workouts and economic crises, contains heavy qualifications. Most notably, the measures taken by the State must not be “more burdensome than necessary to achieve their aim.” This phrase creates a wealth of leeway for arbitrators to decide on what is ‘necessary’ and what is overly ‘burdensome’. In the context of sovereign debt workouts they would place far greater restrictions on the ability of States to get their economies back together after crisis. As indicated by a series of Argentinean cases related to the country’s economic crisis in 1999-2001, arbitral tribunals almost invariably interpret the word ‘necessary’ very strictly where the State measures in question affect foreign investors.³⁰³

Similarly, the space for the exercise of the right to regulate through leeway for particular ‘safeguard measures’ would also seem extremely narrow. Measures are allowed only in “exceptional circumstances of serious difficulties” and only when “strictly necessary.” Where ‘necessary’ is expected to be interpreted narrowly, adding the word ‘strictly’ would seem to virtually eliminate the relevance of the exception. These limited tools are far too meagre and cannot be said to adequately protect the State’s right to regulate. In fact they are themselves made necessary exactly because the right is *not* protected, through its clear and unambiguous establishment with its own substantive clause, at least equal to and alongside the rights conferred on foreign investors in the operative body of the agreement.

Of importance is the fact that the CETA text may even be interpreted as to actively encourage regulatory chill. CETA Article x-36(3) gives direction to tribunals when calculating damages incurred by investors. In this context tribunals are told to take “any repeal or modification” of the measure or measures complained of into account when calculating ultimate damages. This could act as an incentive for States, either before or in the course of litigation, to in fact change or withdraw the measure in the hope of ultimately paying less to the injured investor. This text is highly undesirable as it “institutionalizes the pressure for a state to change its decisions in favour of foreign investors.”³⁰⁴

The Commission also relies on the creation of a Committee of the State Parties, which could attempt to correct any undesired interpretations by tribunals, providing “greater clarity and precision ... in order to protect the right to regulate” through the issuance of pronouncements adopting official interpretations that would be binding on the tribunals.³⁰⁵ However, while such a mechanism has been a part for NAFTA for 20 years it has been used to issue an interpretive statement on a substantive standard in the treaty only once. Furthermore, this statement was of questionable effectiveness,³⁰⁶ which is the reason why the US and Canada have gone to lengths to change the wording of their treaties in an attempt to gain more effective control. Outside of NAFTA the mechanism has never been used at all in relation to investment agreements, despite the fact that it exists as a matter of international treaty law. That is, any States Party to an international agreement can issue a binding

³⁰³ William Burke-White, ‘The Argentinean Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System’ 3 *Asian Journal of WTO and International Health Law and Policy* 1 (2008); Marie Christine Hoelck Thjoernelund, ‘State of Necessity as an Exemption from State Responsibility for Investments’ 13 *Max Planck Yearbook of United Nations Law* 1 (2009).

³⁰⁴ Gus Van Harten, ‘Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA’, Osgoode Hall Law School Legal Studies Research Paper No. 59, Volume 10, Issue 13, 2014, p. 29.

³⁰⁵ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 9, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

³⁰⁶ Arbitrators subsequently held that “both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development”, again granting themselves allowance to interpret broadly. *ADF Group v United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para 179. For further discussion of the failure of such statements to affect the reasoning of tribunals see, Frederik Ortino, ‘Refining the content and role of investment ‘rules’ and ‘standards’: A bolder approach to international investment treaty-making’ *ICSID Review*, Vol. 1, 2013, pp. 152-155.

collective statement on the interpretation of that treaty. There is no need for an express clause on such a mechanism in the treaty itself. Yet the fact is that this mechanism is almost never used, and is widely regarded as unmanageable and ineffective.

It is argued by many that the Commission and others place too much faith in the effectiveness of textual modifications in constraining the very clear tendency for arbitral tribunals to expand the extent of investor protections, and to create new scope and areas for ‘progressive’ interpretation.³⁰⁷ The issue addressed above concerning the new field of ‘creeping’ fair and equitable treatment is a classic example. It would seem to be in the nature of these arbitrators, especially given the fact that they are not in any real sense accountable, to take the text of agreements in directions that follow the preferences of investors, even where they are applying relatively clear textual language that would require restraint.³⁰⁸ To many who have studied the field of investment treaty arbitration the Commission’s statement, that “the decisions of arbitral tribunals are only as good as the provisions that they have to interpret and apply”, seems exceptionally naïve.³⁰⁹ It would instead seem that more often than not, regardless of the wording of the provisions applied the decisions of arbitral tribunals are likely to be equally unpredictable, with the exception that they are more likely to favour investors than to disfavour them. One prevalent example is the fact that despite the wording in almost every investment agreement requiring tribunals to take cognisance of all law “applicable” to a dispute, and despite the clear wording of the Vienna Convention on the Law of Treaties requiring the same, and despite the fact that numerous respondent States and amicus interventions have pointed out the human rights issues directly involved in many disputes, no investment tribunal has yet engaged with international human rights law, let alone sought to apply it.

As such, the quality of arbitral decisions is perhaps less dependent on the texts interpreted than on the nature of the arbitrators, the process of their appointment and the manner in which they and their decisions are supervised and corrected where necessary. As noted by Van Harten in his submission to the consultation; “The lack of institutionalized independence and procedural fairness in investor-state arbitration means that all outcomes of investor-state arbitration lack integrity regardless of the underlying text on substantive provisions.”³¹⁰ For these reasons, many have long demanded deep changes to the ISDS procedure. The Commission itself is aware that there are many problems with ISDS and proposes a number of further adjustments to the procedural aspects of an investment chapter in TTIP. However, the Commission would seem to deliberately avoid some very simple and effective solutions to these problems, such as instituting a requirement to exhaust domestic remedies (and replacing arbitrators with judges, and allowing all ‘stakeholders’ or ‘parties’ to a dispute—including local communities and affected individuals whose rights or interest are affected—to enjoy equal standing and access to the adjudicative process), in favour of more cosmetic but ultimately ineffective adjustments.

³⁰⁷ Gus Van Harten, ‘Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA’, Osgoode Hall Law School Legal Studies Research Paper No. 59, Volume 10, Issue 13, 2014, p. 3.

³⁰⁸ Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, Oxford, 2013); Gus Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’ 50 *Osgoode Hall Law Journal* (2012).

³⁰⁹ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 8, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

³¹⁰ Gus Van Harten, ‘Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA’, Osgoode Hall Law School Legal Studies Research Paper No. 59, Volume 10, Issue 13, 2014, p. 26.

3.6(e) – Transparency

Perhaps the classic example of the Commission’s overall cosmetic tendency in this regard is its focus on transparency. This is widely regarded as the most positive change proposed by the Commission, yet it is also by far the easiest to make in the prevailing environment. The lack of transparency is indeed a deep flaw in the ISDS procedure, however this has been perhaps the central issue for a long time and there is clear consensus that this aspect must and will be remedied, despite some States still opposing reforms. Given that arbitral tribunals have enormous influence, dealing with important issues of public administration and making final decisions on core sovereign powers, the basic requirement that their deliberations and the documents involved be on the public record as an essential step to help ensure accountability, independence and fairness, should be seen as incontestable. As the Commission states; “Transparency is essential to ensure the legitimacy and accountability of the system.”³¹¹

A great many model BITs, including those of the US and Canada, now require qualified transparency in arbitrations to a similar level as that proposed by the EU. The EU proposes adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, in line with CETA, which is in no way controversial, and there would be little likelihood that the US would oppose this. It is low hanging fruit for the Commission, and for this reason, though admirable, does not glean the Commission any great credibility.

Nevertheless, the Commission’s approach would still protect “confidential information and business secrets” from the public record.³¹² While it is in some respects understandable that certain documents will inevitably be protected, it nevertheless leaves significant leeway for arbitrators to decide in the dark what exactly constitutes legitimately confidential information and justifiable secrets. These questions should undergo proper judicial review. In addition, the Commission’s position formalises the possibility for civil society and interested individuals to file submissions to the tribunal in an effort to make their views and arguments known. However, affected parties to a dispute other than the State and the investor will not have standing in front of the tribunal and will be able to participate only through a submission. Furthermore, the ability to file a submission is not automatic, but is subject to the discretion of the tribunal after “consultation with the disputing parties”.³¹³ This leaves open the probability that affected communities and individuals will have no say where it is undesirable to both the State and the investor. With respect to disputes that touch closely on human rights issues, this can pose serious problems, as traditionally both parties, corporations and States, are averse to acknowledgement of their human rights obligations and responsibilities. Therefore, a forum is created that tends to structurally exclude the framing of human rights issues and the application of human rights law.

Tribunals will still have significant latitude in refusing a submission on the grounds that the party may be deemed not have a “significant interest” in the proceedings or may not seem to “assist the arbitral tribunal in the determination of a [relevant] factual or legal issue”.³¹⁴ The tribunal will then exercise crucial powers in deciding what counts as a significant interest and what are the relevant factual or legal issues. Notably, the tribunal in *von Pezold and Border Timbers v. Zimbabwe* has been roundly criticised for excluding a submission that sought to present arguments based on indigenous peoples’

³¹¹ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 10, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

³¹² Ibid, p. 11.

³¹³ UNCITRAL Rules, Article 4(1).

³¹⁴ UNCITRAL Rules, Article 4(3)(a) and (b).

rights under international law on these grounds, despite the fact that the dispute directly concerned title to territory on which an indigenous community lived and to which it also claimed ownership.³¹⁵ The tribunal stated that the human rights norms referred to by the petitioners were “unrelated to the matters before” the arbitrators. The only support for this assertion was that neither the State nor the investor directly referred to human rights, which ironically is a further requirement of a successful submission, i.e., that it bring “a perspective, particular knowledge or insight that is different from that of the disputing parties.”³¹⁶ In this light the UNCITRAL Rules should be significantly adapted and clarified to allow meaningful and appropriate participation by affected parties, and the tribunal should be required to publically release its reasoning in writing.

In addition, the UNCITRAL Rules provide a great deal of leeway to the tribunal to adapt any of the rules to the circumstances of particular cases. Article 3(b) provides that:

The arbitral tribunal shall have the power, besides its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

This provision may be seen to be inherently prone to significant abuse.

In sum, the Commission’s stance would still leave important decisions regarding the release of documents, the participation of affected persons and the openness of proceedings to ad hoc and largely unaccountable arbitrators, who will enjoy significant discretion and will remain subject to the temptation of deferring overly much to foreign investors. This is because only investors can bring claims thereby constituting the fundamental reason for the existence of an ISDS institution which ensures arbitrators’ increasing employment and remuneration. For this reason, as Van Harten puts it, arbitrators are still susceptible to viewing foreign investors as their “customers”.³¹⁷

3.6(f) – Multiple Claims and Relation to Domestic Courts

The EU’s approach in this section is extremely weak. On the possibility of investors bringing multiple claims in front of various international forums, the Commission states only that it intends to instruct tribunals to “take into account” any parallel proceedings “pursuant to another international

³¹⁵ *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, and *Border Timbers Limited and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 2, 26 June 2012. For commentary see, Cameron Mowatt and Celeste Mowatt, ‘Case Comment: Border Timbers and others v. Zimbabwe and von Pezold and others v. Zimbabwe’ 28 *ICSID Review* 1 (2013).

³¹⁶ UNCITRAL Rules, Article 4(3)(b).

³¹⁷ Gus Van Harten, ‘Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA’, Osgoode Hall Law School Legal Studies Research Paper No. 59, Volume 10, Issue 13, 2014, p. 34. Arbitrators are often “perceived by the general public as having an interest in interpreting an investment instrument in a way encouraging more and more investment claims and, thereby, advancing their business model, hoping for re-appointment as arbitrator or party representative. As it is the *investor* who *brings the claim* the public might suspect inherent bias in favour of the investor is present; broadening available remedies under an investment instrument would allow for more claims.” Steffen Hindelang, ‘Study on Investor-State Dispute Settlement (‘ISDS’) and Alternatives of Dispute Resolution in International Investment Law’, in Pieter Jan Kuijper et al, ‘Investor-State Dispute Settlement (ISDS) Provisions in the EU’s International Investment Agreements: Volume 2-Studies’, Directorate-General for External Policies of the Union, European Parliament, EXPO/B/INTA/2014/08-09-10, September 2014, p. 101. See further, Gus Van Harten, ‘Perceived Bias in Investment Treaty Arbitration’, in: Waibel/Kaushal/Chung/Balchin (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, The Hague, 2010).

agreement”.³¹⁸ This would clearly be insufficient to attain the Commission’s stated aim “to avoid any risk that the investor is over-compensated ... by excluding the possibility for parallel claims.”³¹⁹ The Commission’s approach would avoid the possibility of parallel claims simultaneously under TTIP and in domestic courts by imposing a ‘fork in the road’ clause that requires the investor to choose either domestic or international litigation. However, this would only preclude simultaneous claims *of the same type*. An investor would still be able to pursue a claim for monetary compensation through ISDS and at the same time take a claim for non-monetary compensation, such as declaratory relief, in the domestic courts.

There is nothing further in the proposals to give any substance to the Commission’s statement that “[a]s a matter of principle, the EU’s approach favours domestic courts” and that it “aims to provide incentives for investors to pursue claims in domestic courts”,³²⁰ which remain empty sentiments. An obvious way to give meaning to these statements would be to at least require the exhaustion of domestic remedies before an investor is allowed to take make a claim under the ISDS procedure, however this logical mechanism is very conspicuous by its complete absence. This requirement could easily be nuanced, as it is in the case of human rights treaties, by allowing for direct access to ISDS where it can be demonstrated that the domestic courts would be unable or clearly unlikely to provide an adequate remedy according to specified criteria.

3.6(g) – Arbitrators

To continue an evident pattern, the Commission also does little to allay its own apparent concern that “arbitrators on ISDS tribunals do not always act in an independent and impartial manner” and indeed may display “potential bias or conflicts of interest” due to a practice of acting both as arbitrator and as counsel.³²¹ In line with CETA the Commission proposes the creation of a roster of arbitrators that would be vetted by the State Parties, however these arbitrators would only be employed as chairpersons of the tribunals in question, and only in the event that the original arbitrators appointed freely by the parties to the dispute cannot decide on a chairperson themselves. As such, these arbitrators will only be involved in some tribunals and even where they are involved, vetted arbitrators will only constitute one third of the decision-making body. This change in relation to the status quo in ISDS is insignificant.

Of only slightly greater significance is a proposal to ensure that arbitrators adhere to a certain code of conduct, relying on the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. Yet this instrument has been drafted by arbitrators themselves and is an exercise in self-regulation, which has evidently been totally insufficient to safeguard against the practices that apparently cause the Commission so much concern. There is little content in this instrument that would make any major difference to the ISDS system. Most notably there is no clear ban on an individual simultaneously operating as an arbitrator and counsel. The IBA Guidelines also state that the Secretary-General of ICSID will decide on challenges to arbitrators, which would appear highly incongruous as this individual is not accountable to either US or EU authorities.

³¹⁸ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 33, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

³¹⁹ Ibid, p. 12.

³²⁰ Ibid.

³²¹ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 12, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

For the Commission to give meaning to its implied desire to remove the possibility of bias or conflicts of interest, and to ensure independence and impartiality in ISDS it would have to make clear proposals to effectively ‘judicialise’ the system, that is to make the procedure far more like a public court than a commercial tribunal. This would then reflect the primarily public law nature of most disputes, rather than basing resolution on secondary commercial characteristics. This would mean an end to ad-hoc appointments of adjudicators, the establishment of secure tenure and the setting of stable and predictable levels of remuneration, clear prohibitions on dual roles of adjudicators, independent and credible decisions on conflicts of interests in accord with a substantive and independently drafted code, and perhaps even a standing appellate body. While the Commission’s initial proposals made no significant moves in these directions, subsequent developments addressed below may indicate that, following the strongly negative response to its approach in the public consultation, it is now more disposed to envision such judicialisation.

3.6(h) – Appellate Mechanism

An appellate mechanism that could serve to ensure a better level of correction and consistency in the plethora of divergent and largely unsupervised awards to date has long been a prominent suggestion in the literature. It is now enjoying a certain renaissance given the moves of some States to include an intention to at least discuss the establishment of an appellate body in the text of some investment agreements. One such is CETA, which states that the Parties commit to “consult on ... whether, and if so, under what conditions, an appellate mechanism could be created under the Agreement to review, on points of law, awards rendered by a tribunal”. The agreement contains a number of specific issues that would structure the consultations, but that is all. The Commission’s consultation document effectively goes not further in elaborating the substance of the proposed mechanism, stating only that “in TTIP the EU intends to go further and create a bilateral appellate mechanism immediately through the agreement.”³²² As such there is little that can be said by way of assessment given that there is little of substance to assess.

A properly functioning appellate body, operating as a permanent and judicial body not as yet another ‘glorified’ arbitral tribunal, would be a very welcome addition to the ISDS system, and there are some indications that concrete steps in this direction may be taken by the EU. The negotiating mandate refers to a “Transatlantic Investment Tribunal” that “shall be a permanent, independent, impartial organisation” and “shall exclusively be composed of impartial professional judges”.³²³ However, it must be remembered that while this might make a certain level of difference in some outcomes, it would not correct the initial illegitimacy and assorted other failures of the first-instance arbitral tribunals that would continue to operate as normal. Decisions of the system as a whole would therefore continue to be tainted by these deficiencies, no matter how many ‘corrections’ an appellate mechanism made.

Ultimately, the Commission does not address the deeper and persistent problems of ISDS. There is no convincing evidence of any alleged inadequacy in the domestic courts of the US or the EU. Yet there is no substantial engagement with the preliminary question of why these domestic courts do not then

³²² European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 17, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

³²³ Council of the European Union, ‘Directives for the negotiations on the Transatlantic Trade and Investment Partnership between the European Union and the United States’, Brussels, 11103/13, 17 June 2013, 23, <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

suffice, beyond simplistic statements: “Domestic remedies would be preferable, but TTIP provisions cannot be invoked directly in front of a national court ... it is possible that investors will not be given effective access to justice ... [and] ISDS is therefore necessary”.³²⁴ As such there is no suggestion of a simple rule, in line with all other comparable regimes of international law, to require the exhaustion of domestic remedies. In fact it is hard to see how the stated preference for domestic remedies is reflected anywhere in the Commission’s proposals. This is despite the evident fact that the “aberrations of international investment law must be cut back to its initial idea: providing a *safety net in case the primary means available in a host state fail* to prevent or remedy abuse of sovereign power. Put differently, international investment law and ISDS can only regain legitimacy when they do *not aim at replacing national administrative and judicial safeguards* but back them up in case of failure.”³²⁵

Nor does the Commission make any effective proposals to address the evident structural imbalances; in the process of ISDS whereby only investors can bring claims; or in the weight of investor rights with no responsibilities and State responsibilities with no rights; or the lack of procedural fairness, given the lack of standing for affected communities and individuals; or the lack of safeguards for the independence of arbitrators and the fairness of proceedings. Ultimately, the ISDS procedure would remain fundamentally illegitimate and lacking in integrity. If it is left in place, or worse, greatly expanded through TTIP, it will continue to discolour the relations between States and foreign investors who deal with each other continuously in its shadow.

3.7 – Revenue and Budgetary Implications

The expenses related to ISDS, through the costs of arbitrations for both parties, investors and States, and the additional costs of adverse awards for States, can be very considerable. According to the OECD, the cost of litigation expenses for both parties to the dispute has so far averaged at around US\$8 million per claim, and has at times been as much as US\$30 million.³²⁶ Costs may vary greatly however. In the *Abaclat* case, which is as yet still pending, the Italian claimants have expended USD\$27 million already in legal costs just to clear the first jurisdictional hurdle.³²⁷ Argentina has already spent USD\$12 million on its defence. The remainder of the case will no doubt be even more expensive. One study has found that overall costs have also been climbing quickly, far beyond any standard measure of inflation, reflecting the growth of the investment arbitration ‘industry’. Comparing claims before and after 2006 the costs of lawyers and expert witnesses have risen on average by 32%, and the costs of tribunals by 56%.³²⁸

In addition, in many, if not most instances, even if the State is vindicated it may still have to contribute to the costs of the tribunal and cover its own legal expenses in the defence of the claim. In one case,

³²⁴ European Commission, ‘Public consultation on modalities for investment protection and ISDS in TTIP’, p. 9, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

³²⁵ Steffen Hindelang, ‘Study on Investor-State Dispute Settlement (‘ISDS’) and Alternatives of Dispute Resolution in International Investment Law’, in Pieter Jan Kuijper et al, ‘Investor-State Dispute Settlement (ISDS) Provisions in the EU’s International Investment Agreements: Volume 2-Studies’, Directorate-General for External Policies of the Union, European Parliament, EXPO/B/INTA/2014/08-09-10, September 2014, p. 53.

³²⁶ OECD, *Investor-State Dispute Settlement, Public Consultation: 16 May-9 July 2012*, at 18 (2012), available at: <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>. This tallies with the results of another study, also calculating an average overall cost per litigation of USD\$8 million; Matthew Hodgson, ‘Counting the Costs of Investment Treaty Arbitration’, Allen & Overy, 2012.

³²⁷ OECD, *Investor-State Dispute Settlement, Public Consultation: 16 May-9 July 2012*, at 18 (2012), available at: <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>.

³²⁸ Matthew Hodgson, ‘Counting the Costs of Investment Treaty Arbitration’, Allen & Overy, 2012.

Plama v. Bulgaria, for instance, the State had to spend over US\$6 million in its defence, a cost that was not recouped even though the claim was dismissed.³²⁹ When claims succeed the awards of damages vary greatly, however it is fair to say that the majority are in the hundreds of millions (US\$). Although much larger pay-outs are becoming more numerous. In 2014 the largest award ever rendered, US\$50 billion, was made against Russia in the *Yukos* case. In 2012 *Occidental Petroleum Corporation v. Ecuador* resulted in damages of US\$1.77 billion (US\$2.3 billion with the required interest),³³⁰ and 2013 saw two awards of almost US\$1 billion go against Libya, one of which amounted to US\$900 million in lost future profits relating to a failed tourist venture.³³¹ These costs represent a large drain on public budgets, even those of developed countries, and furthermore only very few tribunals have ordered investors who have brought failed or frivolous claims to cover the litigation costs of respondent States.³³² To say the least, these facts have “put into doubt the oft-quoted notion that arbitration represents a speedy and low-cost method of dispute resolution.”³³³

There are complex issues regarding how the financial burden of the costs of arbitrations and the payment of awards will be distributed between the EU and its Member States. The approach of the Commission has been clarified in a draft regulation where positions are taken on some of these issues.³³⁴ The central principle of the draft regulation is that financial responsibility will be allocated according to the actor that is responsible for the measure that caused the damage to a given investor, or in other words, that “financial responsibility for any costs should follow the origin of the treatment of which the investor complained.”³³⁵ Where the actor is an EU institution then the EU will be liable. Where the actor is a Member State acting under its own volition the State will be financially responsible, and where the Member State is acting as directed by EU law then the EU will be liable. This would seem to result in a fairly logical and reasonable financial division. Member States would have to pay awards and costs in circumstances where it is solely their responsibility, and where responsibility lies with the Union or its laws the financial burden will be shared between the States.

The suggested rules are complicated regarding which entity will act as the respondent in any given dispute, the EU or a Member State, due not least to the fact that disputes may entail either mixed competences, or multiple measures that are attributable to both parties, or legal issues of importance to either party even though the other is directly responsible for the measure under dispute. However, what is clear is that even if the EU acts as respondent on behalf of a Member State, the State will ultimately incur the expense of the dispute. A final point may be small but telling. Despite the fact that, as the Commission states, “[i]t is by definition not possible to give precise information on the likely costs associated with investor-state dispute settlement”, it also refers to the “potential for significant demands (even temporary) on the Union budget and on Union resources were the Union to act as respondent in all cases”.³³⁶ This would indicate that the Commission is preparing for a significant amount of cases and therefore a significant amount of eventual costs.

³²⁹ *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.

³³⁰ Tai-Heng Cheng and Lucas Bento, ‘ICSID’s Largest Award in History: An Overview of Occidental Petroleum Corporation v the Republic of Ecuador’, Kluwer Arbitration Blog, 19 December 2012.

³³¹ UNCTAD, ‘Recent Developments in Investor-State Dispute Settlement (ISDS)’, IIA Issues Note No. 1, April 2014, p. 21.

³³² Lauge Poulsen, Jonathan Bonnitcha and Jason Yackee, ‘Transatlantic Investment Treaty Protection’, Paper No. 3 in the CEPS-CTR Project on “TTIP in the Balance” and CEPS Special Report No. 102, March 2015, p. 24.

³³³ UNCTAD, ‘Reform of Investor-State Dispute Settlement: In Search of a Roadmap’, IIA Issues Note No. 2, June 2013, p. 4.

³³⁴ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party’, Brussels, COM(2012) 335 final, 2012/0163 (COD), 21 June 2012.

³³⁵ *Ibid*, p. 5.

³³⁶ *Ibid*, p. 5.

As noted above, these costs are likely to rise in proportion to the amount of US investment in the State. This means that Ireland and the Netherlands will be the most likely to accrue the largest costs. Also as mentioned, this burden will weigh far heavier on Ireland not only due to its lesser income, but also due to its straightened financial circumstances, relative to the Netherlands and the vast majority of other EU Member States. Especially in relation to Ireland, costs will also depend on the degree to which investment has been treated liberally to date, in the sense of benefiting from advanced implementation of internally generated neo-liberal policies and externally imposed structural adjustment measures. This significantly raises the likelihood of restrictions, greater regulation and legislative changes in the future, probably in reaction to popular demands and the emergence of democratic mandates, which could prove very costly under ISDS.

Some believe the answer to deterring frivolous claims and unwarranted expenses arising for Member States and the EU through ISDS is to establish a clear 'loser pays' rule, whereby the unsuccessful party pays for the full costs of the arbitration, including the expanses of the 'winner'.³³⁷ Although this is not a widely applied principle in arbitrations some tribunals have charged the losing party with covering the expenses of the winner, either in whole or in part.³³⁸ This may have the effect of shifting government costs to unsuccessful investors and deterring 'frivolous' claims in the first place, or discouraging investor's tactics to pressure governments into settlements by launching or threatening litigation. Moreover, some also argue that the costs of domestic litigation could prove higher than international arbitration, due to a perhaps increased use of State subsidised national courts and the lengthening of the process due to the availability of multiple forums for appeal.³³⁹ They conclude that ISDS with a loser pays rule, and other mechanisms to filter and deter frivolous claims, is the most cost effective route in purely financial terms.

However, it is far from clear that the use of domestic courts will in fact be more expensive. While the overheads for these forums are borne exclusively by the State it is a cost that is independent of investment claims and will be incurred in any event. The only additional cost will relate to the time spent specifically by domestic forums on investment cases, and this additional cost may be more than offset in terms of the additional benefits already mentioned at length of deciding such cases in a domestic environment. Additionally, the vast majority of costs related to investment claims are legal representation and witness costs, or 'party costs', which will have to be incurred by the parties in any case, and may even be expected to be lower in a domestic rather than an international setting. The institutional cost, which is the main saving at issue, amounts to less than 10% of total costs in most disputes.³⁴⁰

Savings would therefore depend on the relative difference between party costs comparing between international arbitration and domestic courts. Strong reasons exist to believe that, on average, party costs will be less in the domestic context. In investment arbitration, costs will be heightened due to

³³⁷ Christian Tietje and Freya Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership', Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 24 June 2014.

³³⁸ *ADC Affiliate Limited and ADC & ADMC Management Limited v. the Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, paras 531-533; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award 27 August 2008, paras, 316-324; *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, paras 185-186; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v United Mexican States*, ICSID Cases Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, paras, 18.2-18.10.

³³⁹ Christian Tietje and Freya Baetens, 'The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership', Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 24 June 2014, p. 75.

³⁴⁰ Lauge Poulsen, Jonathan Bonnitcha and Jason Yackee, 'Transatlantic Investment Treaty Protection', Paper No. 3 in the CEPS-CTR Project on "TTIP in the Balance" and CEPS Special Report No. 102, March 2015, p. 25

ever more frequent arbitrator challenges, lengthy processes of appointing third arbitrators when the first two cannot agree, and the time taken to argue and decide on the vague standards established in treaties, among other circumstances particular to the forum. These issues will often not pertain in the domestic courts, and here the rule of precedent and well-established codes of administrative, corporate and contract law may serve to simplify disputes and render judgements more speedy and precise. To illustrate, Japan Tobacco International took a case through Australia's domestic courts challenging the government's plain cigarette packaging legislation, which took less than a year until the final judgement of Australia's High Court. Yet an identical claim from Philip Morris challenging the same legislation through investment arbitration under the Hong Kong-Australia BIT has to date taken 4 years, 3 years just to get to a hearing on preliminary objections, and remains far from a resolution.

The availability of multiple appeals levels may theoretically lengthen the process in the domestic context, however as the Australian case indicates, this will not always occur in reality. This argument loses more force when it is considered that the lack of an appeals mechanism in ISDS has been one of its most widely accepted failures, meaning that the consequences for certainty and justice in slightly longer disputes will often outweigh any additional financial costs. This will spill over into increased social acceptance of awards when rendered and less likelihood of further unforeseen financial costs down the line. Moreover, the finality of arbitration awards is sometimes over emphasised, as the Yukos case illustrates. These awards may undergo lengthy challenges in multiple national courts or, in the ICSID system at least, be subject to annulment proceedings.

With respect to the 'loser pays' rule it must again be remembered that, as in so many instances, such a consistent rule cuts both ways. It will also act to saddle governments with the costs of investors in those cases where their claim is vindicated. As noted by Poulsen et al, "whether a 'loser pays' rule will result in a net benefit or cost to the EU over the status quo of each side pays its own costs will depend on assumptions about the distribution of losers and winners and the likely magnitude of the costs on each side."³⁴¹ These considerations are hard to predict. Of the 274 concluded cases the State has won outright only 43% of the time, while the investor has won in 31% of cases and the dispute has been settled in 26%.³⁴² This indicates that a loser pays rule may not make any significant difference from the State's point of view.

A telling point is the fact that the rule does nothing to dissuade the most important claims from the viewpoint of States; those brought by very wealthy investors for very large amounts of compensation. As one commentator states, "one should not give in to the world of illusions by assuming that such a rule would seriously deter financially robust claimants from resorting to arbitration if it would serve strategic interests."³⁴³ For such investors the prospect of a vast win or a forced settlement far outweighs the (relatively) insignificant cost of the arbitration if the gamble is lost. On the flipside, this creates a huge amount of pressure on the State to settle unless it is almost certain of vindication, which, given the uncertainty of the system as a whole, will not be very often. The loser pays rule will then do very little to prevent regulatory chill in this way.

This highlights the fact that the structural anomalies of the system increasingly favour the investor the higher the amount of compensation sought, to a large extent irrespective of the wealth of the

³⁴¹ Lauge Poulsen, Jonathan Bonnitcha and Jason Yackee, 'Transatlantic Investment Treaty Protection', Paper No. 3 in the CEPS-CTR Project on "TTIP in the Balance" and CEPS Special Report No. 102, March 2015, p. 25.

³⁴² UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS)', IIA Issues Note No. 1, April 2014, p. 1.

³⁴³ Steffen Hindelang, 'Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law', in Pieter Jan Kuijper et al, 'Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements: Volume 2-Studies', Directorate-General for External Policies of the Union, European Parliament, EXPO/B/INTA/2014/08-09-10, September 2014, p. 110.

claimant. The sheer uncertainty of the investment regime adds to this structural favouritism. Due to this uncertainty, coupled with a fair presumption that on balance tribunals are more likely than not to interpret treaty texts in favour of investors (even where textual clarifications and explanatory annexes are included), they have a strong incentive to bring ‘long-shot’ claims. Even if they lose a few and have to pay the full costs as a result, they may eventually win a large claim thereby wiping out their losses and setting the State’s finances back significantly.

For example, in *Occidental v. Ecuador* the tribunal, under the FET standard, somewhat unexpectedly expanded the common understanding of contract-based rights to terminate a commercial relationship. In most domestic legal systems a party can terminate a contract at will, with no qualification, when the opposite party has breached the contract. There is no requirement to do so in any particular way or with any due respect for the opposite party. However, the tribunal did read in a ‘new’ condition that, even though Occidental breached the relevant contract that Ecuador subsequently terminated, Ecuador’s termination of the contract was done in a manner that was not ‘proportionate’, thereby violating the FET standard. The tribunal ultimately ended up awarding Occidental the second largest amount of compensation of any case to date, USD\$ 1.7 billion.

The only way that the State could recoup this loss, and we must be clear that ISDS only represents a potential loss for the State monetarily speaking, is through attracting an equal or greater amount of foreign investment than it would have without ISDS. As we argue above, the likelihood of this added financial inflow actually materialising is very low, even more so for peripheral States already heavily dependent on foreign investment such as Ireland.

Ireland simply does not have a great deal of spare income to compensate for the costs of the investment regime. This is a point on which it differs dramatically from the core EU States. Because of the higher proportion of (US) foreign investment in the country and the perhaps greater need to re-regulate there is a high probability that Ireland will incur greater proportional costs in terms of claims and settlements. It remains to be seen whether the EU adopts some internal measures to alleviate these greater costs, but for now such balancing schemes would be purely speculative and unlikely. Nothing like this is mentioned in the Commission’s draft regulation on financial responsibility for ISDS.

3.8 – An Investment Court?

To date there have been two major responses to the results of the Commission’s consultation and the ensuing debate, one from the Commission itself and one from an academic charged with drafting an investment chapter for TTIP by the German government. Commissioner Malmstrom has released a concept paper on the future direction for negotiations on investment which aims to enhance the right to regulate and move from “the current ad hoc arbitration towards an Investment Court.”³⁴⁴ And at the behest of Sigmar Gabriel, the German Vice Chancellor, Professor Markus Krajewski has contributed a draft investment chapter that also outlines a proposal for a similar investment court, in this case called a US-EU Permanent Investment Tribunal.³⁴⁵

³⁴⁴ EU Commission, Concept Paper, ‘Investment in TTIP and Beyond – The Path for Reform: Enhancing the right to regulate and moving from the current ad hoc arbitration towards an Investment Court’, 7 May 2015.

³⁴⁵ Markus Krajewski, ‘Project No. 83/15 of the Federal Ministry for Economic Affairs and Energy, Model bilateral investment treaty with investor-state dispute settlement for industrial countries, giving consideration to the U.S.’, <http://www.rph1.jura.uni-erlangen.de/material/150429-muster-bit-fr-industriestaaten-krajewski-englische-bersetzung.pdf>.

Krajewski's draft is a notable advance in many ways. Although it does not include the right to regulate as an operative clause of the text it does use the phrase "the provisions of this Agreement *preserve* the right to regulate", which may be understood as stronger phrasing than the Commission's previous approach of only "recognizing" the right. Also in the preamble it is stated that the agreement "does not provide a higher level of protection to foreign investors than provided by each Contracting Party to its own domestic investors and investments", which would help to foreclose the possibility that the text could be used to ground a higher level of protection for foreign investors. Yet one of its major innovations of the draft is to suggest that the substantive standards provided are limited to most-favoured nation treatment and national treatment. As the text notes:

If the aim is to ensure that foreign companies are granted the same protection as domestic companies, it is sufficient for the treaty to define only NT [national treatment] as a standard of protection. Standards of protection like fair and equitable treatment and protection against expropriation are then no longer necessary, since they will have a function if - and only if - the foreign investor is to be granted better or additional protection. For this reason, it makes sense to dispense with the protection standards of fair and equitable treatment and indirect expropriation in a treaty with the U.S. or other countries with a legal system comparable to the German rule of law and only to include non-discrimination standards.³⁴⁶

This approach has already actually been taken in the 2015 China-Australia FTA. This agreement also limits the substantive investment protections of the treaty to MFN and national treatment, and provides only for a 'work program' that sets out the intention of the Parties to discuss further, after 3 years, the possible inclusion of other standards of protection.

Given that this approach may not be politically feasible in negotiations with the US, Krajewski's draft also provides more restrictive language for the FET provision, which is also limited to a closed list following the practice in CETA. For instance, a measure will only be manifestly arbitrary if it "is not based on a rational reason", and there is express direction to tribunals mandating that they must "give appropriate regard to the right to regulate of a Contracting Party and leave a margin of appreciation to the respective Contracting Party."³⁴⁷ It is made clear that non-discriminatory measures in the public interest *per se*, and without qualification, do not amount to indirect expropriation. The general exception clause applies expressly to the whole agreement, correcting the problems of the Commission's approach that excluded FET and expropriation from its scope. However, the draft still retains the qualifier 'necessary' from GATT Article XX. This is something that could be changed to better protect the State's right to regulate, by for example replacing 'necessary' with 'related to' or a less strict standard.

Notably, Article 16 of the draft proposes the institution of a 'Permanent International Investment Tribunal', which would eliminate the traditional ad-hoc tribunals made up of party-appointed arbitrators. The Tribunal would only be responsible for this specific treaty and would be staffed by independent and impartial judges, with knowledge of international law and domestic public law, and possessing "the qualifications required in their respective countries for appointment to the highest judicial office".³⁴⁸ Adjudicators would be expressly forbidden from service if they had ever served as legal counsel to either of the disputing parties in a previous case. And perhaps most notably, the Tribunal could only accept jurisdiction if the claimant had exhausted all reasonably available domestic

³⁴⁶ Ibid, p. 12.

³⁴⁷ Ibid, p. 13. Furthermore, the list is made into an actual closed list through the inclusion of the word 'only' in the phrase "A Contracting Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 only where a measure or series of measures constitutes".

³⁴⁸ Ibid, p. 20.

remedies. However again, if this is not feasible the draft makes provision for a ‘fork in the road’ clause. Finally, the draft proposes the institution of an Appellate Review Panel that is similarly staffed and has comprehensive review powers with respect to issues of law, and may also address issues regarding new facts.

Krajewski’s draft takes some large steps towards a better balance between public interests and investor protection. The draft has various ‘strong’ and ‘weak’ versions, but if the stronger options are consistently chosen then a resulting agreement restricted to MFN and national treatment standards, with a permanent tribunal staffed with tenured judges and a requirement for domestic exhaustion, would have a fighting chance of adequately protecting the democratic mandates of governments to regulate in the interests of their people. However, this strong version may not survive negotiations, in fact it is yet to make it to the negotiating table, therefore little more in the way of commentary at this point is warranted. Yet it must be stated that all versions of the draft, weak or strong, will still introduce a risk that does not presently exist in the EU. On balance it remains most likely that there is nothing substantial to gain from that risk.

In its recent concept note the Commission would also seem to be solidifying its approach to establishing an appellate mechanism, which would be based on the WTO Appellate Body. However, as Commissioner Malmstrom notes, there are deep and complex questions regarding how this appellate mechanism would actually work.³⁴⁹ For example, would it operate only for the EU and the US under TTIP or would it apply across treaties? If the former route is taken separate appellate mechanisms for every treaty would entail some very cumbersome arrangements, increasing uncertainty and confusion in the system, and will most likely be cost ineffective. This is a difficulty that Krajewski’s draft would also encounter. Yet the Commissioner’s proposal would seem to envisage the latter possibility: “[I]t should be considered to start working on an appellate mechanism with tenured judges, applying to multiple agreements and between different partners, for example on the basis of an opt-in system.” This institutional plan would furthermore seem to be extended down from the appellate level to encompass all initial disputes related to investment agreements: “[T]he EU should pursue the creation of one permanent court. This court would apply to multiple agreements and between different trading partners”.³⁵⁰ Apparently, “[w]ork has already begun on how to start this process.”

Similar to Krajewski’s draft, this would seem to be a welcome development along the lines of judicialising the entire ISDS system, and the Commission’s apparent responsiveness to the outpour of negative submissions in the consultation should be acknowledged. However, in the absence of a single multilateral treaty, a number of problems will arise. For instance, a new set of complications will be produced in this quest for more ‘consistency’ across different treaties. The process will seek to harmonise the standards of different treaties and diverse decisions across a range of mostly bilateral investment agreements. Although there are evident similarities in these agreements, they will all be substantially different, representing the specific compromises made between the State Parties to each agreement. A ‘harmonising’ interpretation given at an appellate level, or at the level of a permanent court, could fail to respect these specific compromises. This process would also seem to be contrary to the rules on treaty interpretation under international law. Put simply, there will be a lessened likelihood that each State’s intention at the time of drafting the treaty will be reflected in the outcomes of disputes. This has serious consequences for democratic control and accountability. As a result, there is a significant danger that this process of harmonisation could lead to a large shift in

³⁴⁹ EU Commission, Concept Paper, ‘Investment in TTIP and Beyond – The Path for Reform: Enhancing the right to regulate and moving from the current ad hoc arbitration towards an Investment Court’, 7 May 2015, p. 11.

³⁵⁰ Ibid, p. 11

power from States to a permanent or an appellate court. The conceptualisation and establishment of these bodies should be approached with great care and precision. As one prominent commentator notes, “each investment instrument reflects a specific balance between public and private interests established in the negotiations between states. By importing standards from one investment instrument into another one at the discretion of an appeals facility, this facility would turn into a powerful self-styled and unchecked lawmaker.”³⁵¹

The bottom line is that while these new developments are indeed positive, far more discussion is need to flesh out the details and to guard against incompatibility with the general rules of international law and the possibility of inordinate power transfers to these new institutions. The pressures of a negotiating context are far from ideal in this situation and must not be allowed to rush or constrain such an important process.

³⁵¹ Steffen Hindelang, ‘Study on Investor-State Dispute Settlement (‘ISDS’) and Alternatives of Dispute Resolution in International Investment Law’, in Pieter Jan Kuijper et al, ‘Investor-State Dispute Settlement (ISDS) Provisions in the EU’s International Investment Agreements: Volume 2-Studies’, Directorate-General for External Policies of the Union, European Parliament, EXPO/B/INTA/2014/08-09-10, September 2014, p. 65.

4. TRADE IMPACTS

The most significant trade impacts on public health are most likely to occur in the areas of intellectual property, regulatory harmonisation or non-tariff barriers to trade, and services. These areas will be addressed in sequence below. However, the recent challenges to Australia's tobacco plain packaging legislation under the trade regime are highly illustrative in a number of respects and have attracted substantial attention from the media, and so will be the subject of the first part of this chapter. These challenges have been brought in tandem with the claims made by Philip Morris under the investment regime against the same legislation. This highlights the manner in which the trade and investment regimes can act to reinforce each other for the benefit of multinational corporations to the detriment of State's capacities to protect and promote the wellbeing of their citizens.

In contrast to the investment regime, where multinational corporations and foreign investors are empowered to directly initiate claims and sue States, the trade regime is populated only by States as actors. This focus on States, particularly in the dispute resolution context, can allay popular concerns due to a public perception that because only States are formally involved the public interest will be better protected. This may be true to some degree yet it can obscure the fact that the trade regime is increasingly designed for the benefit of the same corporations and investors that are the more visible actors in the investment regime. Generally speaking, disputes increasingly arise under the trade regime for the same reasons as under the investment regime, because some State measures may harm the interests of foreign investors. Claims for relief are then brought under the trade regime by other States essentially for the benefit, if not at the direct behest, of these investors. Attention to the cross-regime challenges to Australia's legislation designed to protect and promote public health serves to dispel some of these misperceptions and demonstrates clearly that adequate protection of the public interest, in the final analysis, will require equal attention to both aspects of TTIP.

4.1 – WTO Tobacco Plain Packaging Cases

The core of Philip Morris' claims against Australia and Uruguay under the investment regime is an allegedly unjustified infringement of the corporation's intellectual property rights. These rights are protected by investment agreements as part of the definition of investment. They are also protected under the multilateral trade agreements of the WTO, specifically through the agreement on Trade Related Intellectual Property Rights (TRIPS) and to some extent under the Agreement on Technical Barriers to Trade (TBT) and the General Agreement on Trade and Tariffs (GATT). In fact Philip Morris' original claim against Australia under the Hong Kong-Australia BIT specifically referenced the standards of intellectual property protection in the WTO and sought to have those standards applied equally by the tribunal charged with deciding the case under investment law.³⁵² This displayed a definite opportunism, seeking to import standards from a multilateral regime where corporations and individuals have no standing in dispute settlement into a bilateral treaty allowing corporations to bring suit directly against States. It also demonstrates how the different rules in the investment and trade

³⁵² The company sought to incorporate the law of the WTO through a claim that under the FET standard of the BIT it had a 'legitimate expectation' that Australia would comply with its other treaty obligations including WTO rules. The company further claimed that under the 'umbrella clause' of the BIT Australia was also required to live up to its other 'contractual' non-BIT treaty obligations, again including WTO obligations. Luke Pererson, 'ANALYSIS: Australian defense strategy puts spotlight on timing of Philip Morris's corporate structuring moves, claims "abuse" of investment treaty', IA Reporter, 31 December, 2011.

regimes are becoming somewhat confused, a process exacerbated by the inclusion of investment chapters in traditional trade agreements such as TTIP. However, under the general law of international treaties a tribunal constituted under a BIT has no competence or jurisdiction to apply the law of another treaty and would be bound to refuse to do so. Perhaps due to a realisation of this fact Philip Morris subsequently made an amended claim in which the references to application of WTO law have been deleted. Nevertheless, the investment tribunals seized with disputes over Australia's and Uruguay's plain packaging legislation may turn to an appreciation of those WTO standards and their jurisprudence in interpreting the relevant clauses of the BIT under which Philip Morris eventually limited its litigation.

In the course of 2012-2013 five countries initiated proceedings against Australia in the WTO over its plain packaging legislation; Ukraine, Dominican Republic, Honduras, Cuba and Indonesia.³⁵³ All countries are major tobacco exporters, and it would seem that the Dominican Republic, Honduras and Cuba have initiated their disputes on behalf of their local cigar manufacturing industries. Yet with respect to the Ukraine and Indonesia it is an open question whether the legal actions brought by the countries to the WTO are founded on actual national interests or those of foreign investors, in the form of major multinational tobacco companies operating within these countries with considerable influence over their governments. A previous and successful challenge to tax regulation of tobacco imports into Thailand was brought by the Philippines in 2011 at the behest of Philip Morris,³⁵⁴ which has extensive operations in the Philippines that are the pride of the government's drive to attract foreign investment. As a recent World Health Organisation Report states, this case

reflects the way foreign direct investment and preferential trade arrangements through free trade agreements may create a staging point for international litigation. More specifically, foreign direct investment of this type can create an incentive for a Government to bring an international claim on behalf of a tobacco company where such an incentive may not previously have existed.³⁵⁵

It is indicative that the Ukraine has subsequently suspended its dispute with Australia amid controversy over the original motivations for the challenge.³⁵⁶ Ukraine was the first country to take WTO action over Australia's legislation, opening the door to later challenges. According to the Ukrainian Prime Minister, Arseniy Yatseniuk, the country initiated the dispute at the request of the American Chamber of Commerce, presumably on behalf of tobacco multinationals headquartered in the US but operating through subsidiaries in the Ukraine.³⁵⁷ The Ukraine has one of the world's highest smoking rates and

³⁵³ Request for Consultations by Ukraine, *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434/1, 15 March 2012; Request for Consultations by the Dominican Republic, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS444/1, 23 July 2012; Request for Consultations by Honduras, *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/1, 10 April 2012; Request for Consultations by Cuba, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS458/1, 7 May 2013; Request for Consultations by Indonesia, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS467/1, 25 September 2013.

³⁵⁴ WTO Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, 17 June 2011.

³⁵⁵ WHO, 'Confronting the Tobacco Epidemic in a New Era of Trade and Investment Liberalisation', World Health Organisation, 2012, p. 89. See also, Jane Kelsey, 'The Trans-Pacific Partnership Agreement: A Gold-Plated Gift to the Global Tobacco Industry?', 39 *American Journal of Law and Medicine* (2013).

³⁵⁶ *Australia – Certain Measures concerning Trademarks and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Communication from the Chairperson of the Panel, WT/DS434/16, 3 June 2015. If the Ukraine does not make a request for the resumption of the dispute before 12 months elapse then the dispute will be considered withdrawn.

³⁵⁷ 'Ukraine ends dispute with Australia over cigarettes', Interfax – Ukraine, 5 June 2015; Nick Miller, 'Ukraine likely to drop plain packaging challenge against Australia', Sydney Morning Herald, 5 June 2015.

produces some of the world's cheapest cigarettes through the operations of multinational tobacco companies headquartered mostly in the US and the UK. Production far outstrips demand in the Ukraine and large quantities of cigarettes are smuggled into Europe and further afield. Within the country it is widely accepted that, at least until recently, the tobacco industry has been highly integrated into government decision-making and has often 'called the shots' on national decisions affecting tobacco products.³⁵⁸ A former senior corporate affairs officer at British American Tobacco was later appointed deputy Minister for Foreign Affairs and a longstanding and prominent lobbyist for the tobacco companies was also made deputy Minister for the Economy.

The four WTO challenges that remain are important test cases to assess the level of protection in existing trade agreements for measures taken by States to regulate in the interests of public health. The purpose of TTIP is to provide for greater liberalisation of trade beyond the level established in these agreements,³⁵⁹ which may entail an increased threat to the State's right to regulate. It is therefore essential to have an idea of the state of play and the plain packaging cases are highly illuminating in this respect. On the basis of this knowledge we can better ensure that the present level of protection for the State's right to regulate in trade agreements is not eroded in the TTIP, and that in fact it is strengthened where appropriate.

The general position in the academic literature is that Australia's plain packaging legislation would not be disallowed by the current provisions of the trade regime, and that the State's right to regulate may be adequately protected, at least in relation to these particularly clear circumstances.³⁶⁰ The prognosis is not so positive in regard to the Philip Morris claims under the investment regime,³⁶¹ so it is instructive to appreciate the differing flexibilities in trade provisions.

Australia's legislation requires the packaging of all tobacco products to be standardised in "drab dark brown" packets. No logos are allowed and graphic health warnings must cover 75% of the front of the packet and 90% of the back. The brand names and other manufacturer information must only appear in a specific font, colour and size.³⁶² Irish legislation on plain packaging is very much the same, therefore an assessment of how such legislation may fare under the trade regime is highly pertinent.

Before proceeding it is necessary to make two points. The first is that, as with the current investment regime, the State's right to regulate is not expressly provided for in the trade regime. Like the investment regime, the trade regime constitutes primarily obligations on States in the interests of trade liberalisation but does not balance these with express positive rights. Therefore the State will be immediately on the defensive in these disputes and will be tasked with proving that its measure meets the numerous requirements of certain exceptions to the primary obligations imposed by the regime.

Secondly, it is important to note at the outset that one of the critical factors in an assessment of the likely success of these claims is the large amount of evidence amassed scientifically establishing two

³⁵⁸ Sandra MacKenzie, 'Yatsenyuk mulls end to challenge of Australia's plain packaging law', *Kyiv Post*, 22 June 2015.

³⁵⁹ "By no means are new provisions to fall short of obligations arising from already concluded free trade agreements." Markus Krajewski and Britta Kynast, 'Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Legal Framework for Public Services in Europe', Hans-Böckler-Stiftung, Friedrich-Alexander University Erlangen-Nürnberg, 1 October 2014, p. 9.

³⁶⁰ Tania Voon, 'Flexibilities in WTO Law to Support Tobacco Control Regulation' 39 *American Journal of Law and Medicine* (2013); Mark Davison and Patrick Emerton, 'Rights, Privileges, Legitimate Interests, and Justifiability: Article 20 of TRIPS and Plain Packaging of Tobacco' 29 *American University International Law Review* (2014); Javier Garcia Olmedo, 'The Use of Tobacco Trademarks versus Public Health: A New Trend in Investor-State Arbitration' 15 *International Arbitration Law Review* (2012).

³⁶¹ Tania Voon and Andrew Mitchell, 'Implications of international investment law for plain tobacco packaging: lessons from the Hong Kong–Australia BIT', in Tania Voon (et al eds.), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, Cheltenham, 2012).

³⁶² *Tobacco Plain Packaging Act 2011* (Cth) (Austl.).

very strong connections; one between smoking and serious illness³⁶³ and the other between cigarette advertising and levels of tobacco consumption. The WTO's dispute resolution bodies will undergo a process of quasi-administrative review of Australia's legislative measure, effectively second guessing the elected and accountable government, which as noted above is in itself cause for serious concern. In doing so they will adopt a proportionality analysis that will weigh the harm done to tobacco companies against the seriousness of the public health issue and the degree to which the measure contributes to its resolution. In this process the strength of the scientific evidence will be a strong factor in Australia's defence of its right to regulate against the systemic strictures of the trade regime. This is fortunate, however it highlights the well noted structural tension between the approach of WTO dispute resolution bodies and the EU's highly valued precautionary approach to regulation, whereby certain regulations that may not meet such a high evidentiary threshold will be disallowed under WTO rules regardless of their desirability or the democratically expressed wishes of EU citizens.³⁶⁴ This issue is central and will be returned to below.

As alluded to above, the WTO claims challenge this legislation on three main grounds, under the provisions of TRIPS, GATT 1994, and the TBT.

4.1(a) – Trade-Related Intellectual Property Rights

The TRIPS challenge is perhaps the most serious. Article 20 of TRIPS states the following:

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.³⁶⁵

It will be argued that the packaging restrictions described above are special requirements rising to the level of 'encumbrances' that reduce the ability of consumers to tell one brand from another. Although Australia's legislation clearly interferes with the use of trademarks it is not so clear whether it is an encumbrance within the context of this article. Manufacturers may still use 25% of the front of the package to distinguish their brand from others, leading to a reasonable conclusion that brands will remain easily distinguishable; that the words 'Marlboro', 'Camel' and 'Benson and Hedges' for example will remain clearly different from each other. However, even if a detrimental encumbrance is conceded it will still be allowed where it can be shown to be justified. Here Articles 7 and 8 come into play, together with the Doha Declaration on TRIPS and Public Health.

Articles 7 and 8 refer to the objectives and the purpose of the TRIPS agreement, which must be taken into account in a decision on whether measures restricting the use of a trademark are justified or not. Article 7 states that intellectual property rights are protected and enforced by the agreement such that

³⁶³ Even Philip Morris accepts that smoking has serious health consequences. On one of its websites it states that; "Tobacco products, including cigarettes, are dangerous and addictive. There is overwhelming medical and scientific evidence that smoking causes lung cancer, heart disease, emphysema, and other serious diseases." http://www.pmi.com/marketpages/pages/market_en_ua.aspx?pageNumber=4.

³⁶⁴ WTO Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998; WTO Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006; Request for Consultations by the United States, *European Communities—Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States*, WT/DS389/1, 20 January 2009.

³⁶⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, 1869 U.N.T.S. 299. Article 20.

they “contribute to the promotion of technological innovation and to the transfer and dissemination of technology ... in a manner conducive to social and economic welfare, and to a balance of rights and obligations.” That is, intellectual property rights should serve an innovative purpose and contribute to social wellbeing. They are not absolute, and must be understood as inherently subject to qualification in order to balance their effects against other competing rights and obligations. It is not clear that the trademarks on cigarette packages are particularly innovative, or that they transfer any technology or increase social welfare. In fact it is because of significant evidence that they are damaging to social welfare that plain packaging legislation is being brought in. However, it is clear that the human right to health and the corresponding obligations of States to protect and fulfil this right are entirely legitimate considerations against which the use of trademarks must be balanced.

Article 8 is in some ways more direct. Accordingly, States are enabled to “adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socioeconomic and technological development”. This provides a clear basis for the Australian legislation. However, in a final caveat, the Article states that these measures must be “consistent with the provisions” of the TRIPS agreement. This article would not then operate as an exceptions clause, and does not wholly justify measures that would go against the meaning of Article 20. Yet the meaning of Article 20 is as yet unsettled and only an unjustifiable measure will be inconsistent with the agreement.

Also aiding in an interpretation of whether the measure is justified is the Doha Declaration on TRIPS and Public Health announced by the WTO’s Ministerial Conference, its highest authoritative body. This Declaration was developed in response to the difficulties developing countries have with providing access to necessary medicines for those who cannot afford the prices maintained by pharmaceutical companies with the aid of overly strict intellectual property provisions. However, it has force beyond this singular issue. The Declaration requires that the TRIPS agreement should as a general rule be interpreted in an accommodating manner where public health regulations are concerned. Accordingly, all WTO Member States have agreed that

the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health . . . [T]he Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.... In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.³⁶⁶

This statement does not substantively alter the provisions of the TRIPS agreement but it does have a significant effect on the interpretation of the justifiability of measures that restrict the use of trademarks and intellectual property in the interests of public health. It counts as an authoritative pronouncement of the agreed understanding of the manner of interpretation of the agreement under customary international law,³⁶⁷ and therefore any WTO dispute panel is obliged to take heed of it when applying Article 20 above. This is in accordance with the WTO rules on the operation of its dispute settlement system,³⁶⁸ and with customary international law on the interpretation of treaties, which

³⁶⁶ WTO Ministerial Conference, ‘Declaration on the TRIPS Agreement and Public Health of 14 November 2001’, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2001), paras 4 and 5(a).

³⁶⁷ Andrew Mitchell and Tania Voon, ‘Patents and Public Health in the WTO, FTAs and Beyond: Tension and Conflict in International Law’ 43 *Journal of World Trade* (2009).

³⁶⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 ILM 1226, 15 April 1994, Article 3.2, stating that dispute settlement

states that a panel must account for “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”³⁶⁹ The EU has stated that

in the case of disputes ... Members can avail themselves of the comfort provided by this Declaration. ... [T]he Declaration is part of the context of the TRIPS Agreement, which, according to the rules of treaty interpretation, has to be taken into account when interpreting the Agreement.³⁷⁰

Other considerations in the interpretation of Article 20 include the nature of trademarks and the line drawn between their registration and their use in the treaty. As pointed out by Olmedo,³⁷¹ among others, the right that companies and individuals can have over a trademarks in TRIPS is a negative right, in that it only entitles the owner to prevent anyone else from using that trademark.³⁷² It does not provide the owner with a positive right to use the trademark in any particular way. Neither does a right to use the trademark exist in any comparable treaties such as the Paris Convention for the Protection of Industrial Property.³⁷³ According to experts on trademarks, “when granted the trademark registration the owner has a ‘negative’ right entitling him to prevent all third parties not having the owner’s consent from using in the course of trade identical, or similar, signs for goods or services which are identical or similar to those in respect of which the trademark is registered”.³⁷⁴ Trademark owners may have an *interest* in using their mark, but they do not have a right to use it. This is admittedly a technical distinction. However, it means that Article 20 effectively protects an interest of tobacco companies in using their trademarks, which in turn means that it would be easier for a well-recognised *right* of States to regulate in protection of public health to displace or qualify that interest.

Furthermore, Article 15.4 of TRIPS states that “[t]he nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark”. This could be said to establish a right to register a trademark regardless of the product it is intended to distinguish. However, again, it does not establish a right to *use* the trademark. Evidently, plain packaging legislation does not affect the registration of trademarks, and therefore would not contravene this rule. The measures taken by Australia do not cancel or revoke any trademarks and do not create any barriers to their registration, only their use. In addition, they do not affect the rights associated with trademarks because they do not prevent the owners from stopping others from using and thereby benefiting from those trademarks.

To summarise, it would seem that the flexibilities included in the TRIPS agreement, and the clear intention of the State Parties to allow themselves a significant degree of latitude in respect of measures taken to protect public health in particular, would be sufficient to exempt plain packaging from the

panels must “clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”.

³⁶⁹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 33 1, 23 May 1969, Articles 31(3)(a).

³⁷⁰ Carlos Correa, ‘Implications of the Doha Declaration on the TRIPS Agreement and Public Health’, Health Economics and Drugs, EDM Series No. 12, Essential Drugs and Medicines Policy, World Health Organisation, WHO/EDM/PAR/2002.3, June 2002, pp. 44-45.

³⁷¹ Javier Garcia Olmedo, ‘The Use of Tobacco Trademarks versus Public Health: A New Trend in Investor-State Arbitration’ 15 *International Arbitration Law Review* (2012), p. 45.

³⁷² According to TRIPS Article 16.1; ““The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner’s consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion ...”

³⁷³ Paris Convention for the Protection of Industrial Property (as amended on September 28, 1979), http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html.

³⁷⁴ Jeremy Phillips and Ilanah Simon, *Trade Mark Use* (Oxford University Press, Oxford, 2005), p.288.

range of measures prohibited by the agreement. As the submission from Canada to the WTO panel dealing with these issues states;

The complainants argue for an interpretation of the TRIPS Agreement that would create new rights for trademark owners, establish new obligations for Members, and erode Members' ability to regulate in the interest of public health – a right that was carefully and purposefully preserved. The interpretations of the TRIPS provisions in issue must not only be faithful to the text but also to the objectives and principles expressed in TRIPS Articles 7 and 8.1, as well as the interpretive direction in paragraph 4 of the Doha Declaration on Public Health.³⁷⁵

4.1(b) – The General Agreement on Trade and Tariffs 1994

This measure may nevertheless amount to a violation of the Agreement on Trade and Tariffs. This agreement, however, includes the original general exception clause discussed above, Article XX GATT, which has been imported into some investment agreements and is now one of the options considered by the EU Commission for the prospective investment chapter of TTIP. As such, plain packaging legislation may be acceptable if it passes the tests of the exception clause. In relevant part, the clause states the following:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(b) necessary to protect human, animal or plant life or health; ...

It is evident that the relevant measure falls clearly within the subject matter of section (b), however the crucial question is whether it would pass the test of necessity. As discussed above it is not an easy question to answer. As also noted above, the WTO Appellate Body has interpreted the term 'necessary' in Article XX GATT as synonymous with 'indispensable'.³⁷⁶ This is quite a high threshold. Nevertheless, there are reasons to believe that in the case of plain packaging legislation that threshold can be met *in the trade context*.

In determining necessity a WTO panel must take close note of the degree to which the measure contributes to the aim of protecting public health by reducing the incidence of smoking. The significant scientific evidence mentioned above linking plain packaging with a decrease in the incidence of smoking will play a very large role. It is not possible here to properly review this evidence. However, in the opinion of the WHO as well as numerous health organisations and official bodies, and the governments of Australia, Uruguay, Ireland and the UK, the existing evidence is more than sufficient to conclude that plain packaging will have a direct and significantly positive effect on lowering the incidence of smoking and ameliorating its health impact on the populations of these countries. The authors therefore adopt

³⁷⁵ WTO Panel established pursuant to Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434, and *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS444/1, WT/DS435/1, WT/DS458/1, WT/DS467/1, Third Party Submission of Canada, 10 April 2015, para 109.

³⁷⁶ WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161,169/AB/R, 10 January 2001, para 161.

the widely held viewpoint in the legal literature,³⁷⁷ that WTO panels are most likely to agree that plain packaging “appears sufficiently related to its purpose that it could be considered likely to fulfil the effectiveness requirement” for the purposes of a determination of necessity,³⁷⁸ and is therefore justifiable on health grounds.³⁷⁹

The ‘proof’ of this positive effect is, as they say, in the pudding. According to surveys and reports,³⁸⁰ since the introduction of the measure Australia has recorded the fastest decline in smoking rates in 20 years, falling 15% between 2010 and 2013 according to a National Drug Strategy Household Survey.³⁸¹ Younger people, the central target of the measure, are delaying taking up smoking and the average number of cigarettes smoked has dropped.

Even if it is accepted as necessary the measure must still pass more tests. Its restrictiveness on trade must be proven to be justified in the light of the importance of the measure and with respect to alternative measures that could have been taken. The importance of plain packaging in reducing smoking is, as mentioned, widely accepted, and is indeed reflected in the language of the Framework Convention on Tobacco Control, which states that State Parties must

within a period of three years ... adopt and implement ... effective measures to ensure that: (a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products.³⁸²

Accordingly, Australia will undoubtedly point to its alternative obligations under international law to demonstrate that the measures are justified as against their restrictions on trade and that no lesser measures would suffice. In this respect Australia could also point to its human rights obligations. As mentioned above, the human right to health is protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of Discrimination against Women (CEDAW). In respect to the latter treaty the Committee charged with monitoring States adherence to its provisions has expressed concern for the fact that “women are often targets in tobacco advertising campaigns” and urging States to “ratify and implement the World Health Organization Framework Convention on Tobacco Control and put in place legislation aimed at banning smoking in

³⁷⁷ Tania Voon, ‘Flexibilities in WTO Law to Support Tobacco Control Regulation’ 39 *American Journal of Law and Medicine* (2013); Mark Davison and Patrick Emerton, ‘Rights, Privileges, Legitimate Interests, and Justifiability: Article 20 of TRIPS and Plain Packaging of Tobacco’ 29 *American University International Law Review* (2014); Javier Garcia Olmedo, ‘The Use of Tobacco Trademarks versus Public Health: A New Trend in Investor-State Arbitration’ 15 *International Arbitration Law Review* (2012); Tsai-yu Lin, ‘The Status of FCTC in the Interpretation of Compensable Indirect Expropriation and the Right to Adopt “Stricter” Tobacco Control Measures under BITs’ 9 *Asian Journal of WTO and International Health Law and Policy* 1 (2014). For a contrary viewpoint see, Memorandum from Lalive to Philip Morris International Management SA, ‘Why Plain Packaging is in Violation of WTO Members’ International Obligations under TRIPS and the Paris Convention’, 23 July 2009,

³⁷⁸ Benn McGrady, ‘TRIPs and Trademarks: The Case of Tobacco’ 3 *World Trade Review* (2004), p.10.

³⁷⁹ Carlos Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, Oxford, 2007), p.179.

³⁸⁰ See, Melanie Wakefield et al, ‘Australian Adult Smokers’ Responses to Plain Packaging with Larger Graphic Health Warnings 1 year after Implementation: Results from a National Cross-sectional Tracking Survey’, 24 *Tobacco Control* (2014), concluding; “The specific objectives of plain packaging were achieved and generally sustained among adult smokers up to 12 months after implementation.” See also, Jamie Smyth, ‘Australia Smoking Rates Tumble after Plain Packaging Shift’, *Financial Times*, 17 July 2014.

³⁸¹ Australian Institute of Health and Welfare, ‘National Drug Strategy Household Survey: Detailed Report 2013, Drug Statistics Series No. 28, AIHW, Canberra, 2014.

³⁸² FCTC, Article 11.

public spaces and restricting tobacco advertising.”³⁸³ Human rights and tobacco control can in this respect be seen a mutually supportive endeavours. The former requires the latter. Government’s obligations regarding the right to health require them to regulate private parties if their activities threaten public health. This necessitates the development of laws and policies that adhere to the minimum international requirements of public health protection, which are contained in the FCTC.

That there are no less demanding measures that could be taken is also evident from this discussion. The measures themselves are required by international law. There is as such no room for manoeuvre. In any event, even if we remain within the legal boundaries of the WTO agreements, the WTO Appellate Body has stated that

certain complex public health ... problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health . . . objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained ... can only be evaluated with the benefit of time.³⁸⁴

This statement would provide significant leeway in the present case with respect to a State’s decision on which measures are appropriate to address a given health problem.

Finally, the measure must not constitute “arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade”. To begin with, plain packaging applies to all tobacco products sold in Australia, whether they are sourced or manufactured locally or internationally. The measure is clearly non-discriminatory. Even if some form of discrimination could be made out, the discussion above demonstrates that the measure is assuredly not arbitrary, and is on balance clearly justified. As to the final hurdle, it is unlikely in the extreme that taking all this into account a WTO panel will see plain packaging as an underhanded measure the ultimate purpose of which is actually to restrict trade.

Plain packaging is therefore most likely to meet the requirements of the exception in GATT Article XX.

To illustrate why this conclusion differs in the trade context as compared to the prospects of plain packaging under investment arbitration it is important to consider that WTO panels are bound to adhere to past decisions. This is not the case for ad hoc investment tribunals, which are not required to follow previous interpretations. WTO panels must therefore apply previous precedent where the necessity criteria are concerned. As argued above, due to the vast difference in the structure and the actors in relation to the settlement of trade disputes, the jurisprudence of the WTO is far more likely to be balanced and to better accommodate the right of States to regulate in the public interest. The level of respect accorded to the States right to regulate within the trade regime, although in important aspects still subject to concern and criticism for not being high enough, is therefore more predictable, and is on the whole higher than the level of respect accorded in aggregate by investment tribunals.³⁸⁵

With respect to a dispute involving measures taken to protect public health in relation to the use of asbestos, the Appellate Body of the WTO stated that “the preservation of human life and health through the elimination, or reduction, of ... well-known, and life threatening, health risks is both vital and

³⁸³ Speech by Dr Douglas Bettcher at the Third Meeting of the Human Rights and Tobacco Control Network (HRTCN), Singapore, 19 March 2012, http://www.who.int/tobacco/communications/highlights/human_rights/en/.

³⁸⁴ WTO Appellate Body Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, para 151.

³⁸⁵ Markus Wagner, ‘Regulatory Space in International Trade Law and International Investment Law’ 36 *University of Pennsylvania Journal of International Law* (2014).

important in the highest degree.”³⁸⁶ With respect to plain packaging this understanding will add substantially to the likelihood of it passing the tests of necessity, smoking being an issue that affects far more people than asbestos. All other WTO panels are unlikely to diverge from this understanding. This approach, to treat the reduction and elimination of health risks as “vital and important in the highest degree”, may also be taken by investment tribunals, however there is no security in this regard whatsoever. Tribunals may equally be likely to take an approach that accords a lesser degree of importance for public health relative to the rights of investors. Indeed many would agree that they are more than likely to do so. This is why it is recommended above that especially in the case of investment any application of exception clauses should expressly direct adjudicators to apply a lesser standard than that of necessity.

4.1(c) – The Agreement on Technical Barriers to Trade

The Agreement on Technical Barriers to Trade also prohibits certain technical regulations that may be relevant to the issue of public health. These regulations include those affecting

product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.³⁸⁷

On the face of it plain packaging would therefore come within the scope of the TBT. As such, under Article 2.1 States will be required to ensure that with respect to these regulations “products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.” These requirements echo the basic rules of the trade regime relating to national treatment and most-favoured nation treatment, which generally prohibit States from discriminating between local and foreign products and services and between one foreign product or service and another from a different State. With respect to plain packaging it is very difficult to see what type of discrimination there could be within this understanding. As noted, the measure requires all tobacco products, whether local or foreign and without distinction on the grounds of foreign origin, to be treated the same.

Nevertheless, and for the purposes of illustrating the degree to which the right to regulate is protected, even if some form of discrimination is conceded the measure may still be allowed. Similar to TRIPS and in contrast to GATT and GATS, the TBT agreement does not contain a general exceptions clause. However, the preamble of the agreement does ‘recognise’ that

no country should be prevented from taking measures necessary ... for the protection of human, animal or plant life or health, ... subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.

The preamble therefore incorporates the same language as in the exceptions clauses of GATT and GATS, but without the express force of those clauses. Nevertheless the WTO Appellate Body has stated that

³⁸⁶ WTO Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, para 172.

³⁸⁷ Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, 1868 U.N.T.S. 120, 15 April 1994, Annex 1, para 1.

the purpose and nature of the measures under question must be taken into account, and that their ‘necessity’ must be assessed in the event of a possibly discriminatory effect, more or less the same manner as applies to the exceptions clauses.³⁸⁸ Thus, Member States “have a right to use technical regulations in pursuit of legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the TBT Agreement”, specifically in “recognition of Member’s right to regulate”.³⁸⁹

As such, despite the absence of an express exceptions clause, legitimate regulatory infringements of the rules set out in the TBT would nevertheless be allowed, provided that they meet the tests set out in the exceptions clause. As addressed above, this would mean that plain packaging is likely to be allowed even if it is shown that it discriminates in some form relevant to Article 2.1 of the TBT.

Some of the States disputing Australia’s regulations also argue that they violate Article 2.2 of the TBT, which states;

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective ... Such legitimate objectives are, *inter alia*: . . . protection of human health or safety In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

In this case it is precisely the consequences of the end use of the product that is the reason for the regulation. Additionally, this article has a built-in exclusion in the form of the expressly legitimate objective of protecting human health. The test is again ‘necessity’, which has been dealt with, and the required element in the form of copious scientific and technical information would seem to be satisfied.

This discussion allows us to make a general but important point about the difference between dispute resolution in the trade regime as compared to the investment regime. While, like investment agreements, trade treaties do not at present expressly provide for the State’s right to regulate as an enforceable provision, it is clear that they are complex instruments and do to some extent allow regulation for legitimate purposes through express carve-outs and exceptions and through inclusion of reference to the State’s legitimate objectives in taking measures that may also conflict with trade obligations. The interpretation of the space for States to regulate is open to criticism as being too narrow from some perspectives, as is discussed further below. However, the nature of adjudication in the trade regime changes this completely.³⁹⁰ The fact that it is more clearly understood, from the jurisprudence of the WTO, where the boundaries of regulatory space are, allows a more fair assessment of the extent to which States may currently regulate, and provides greater clarity for States when formulating their regulatory responses to social problems. Future regulations will have to be assessed in accord with the same interpretations and the same standards as set out above. There is at least consistency in the WTO regime. This stands in stark contrast to the current state of the investment regime, where the interpretations of each ad hoc tribunal are largely unknown and where, according to many, an accurate prediction of those interpretations is primarily based not on the law but on a

³⁸⁸ WTO Appellate Body Report, *United States-Clove Cigarettes*, WT/DS406/R, 2 September 2011, para 96.

³⁸⁹ *Ibid*, paras 95 and 96.

³⁹⁰ Markus Wagner, ‘Regulatory Space in International Trade Law and International Investment Law’ 36 *University of Pennsylvania Journal of International Law* (2014), p. 71-85.

knowledge of the predilections of individual arbitrators.³⁹¹ Effectively, at the moment, nothing like an equally accurate, albeit objectively rough, assessment can be made of the extent of regulatory space allowed by the investment regime. If ISDS is included in TTIP this goes to emphasise the great importance of reforming the dispute settlement process in keeping with the operation of legitimate courts. The comparative fogginess of the investment regime has an important consequence that is not often voiced as it should be; namely that there are a huge amount of consequences and problems that cannot yet be seen but certainly can be sensed, or unknown unknowns, in respect of investment, most likely far more than relate to trade.

In conclusion, it would seem from the foregoing analysis that plain packaging of tobacco products in the case of Australia, and as such in the case of Ireland, are more likely to be allowed by the trade regime than not. Most tend to agree that a reasonable application and interpretation of the standards of WTO law would not bar this measure. This by no means is a certainty and in fact it is only the most likely outcome by a marginal degree. The language clearly exists for a restrictive interpretation that would bar the measure.

The analysis above gives rise to serious concern. Australia has a particularly strong case for allowing plain packaging legislation, a case that on the whole will not be representative. It is not difficult to imagine alternative measures that State's would wish to employ to protect and promote public health that would not fare so well under the trade regime, but which would nevertheless be equally legitimate and perhaps even more beneficial given that smoking is now in significant decline. One may think of plain packaging for chocolate products or soft drinks for example. Anti-smoking is in a sense in fashion, and the Australian measures benefit from a large backlog of scientific evidence that has attracted a great deal of funding and a long track record of progressive and aggressive regulation, not to mention an international Framework Convention. It is difficult to think of a health issue that reaches this level of validation from both scientists and the international community, and adequate funding is not always available to discover the evidence relating to important health issues that are not so fashionable.

In addition, plain packaging benefits greatly from being non-discriminatory. States will often need to regulate in a discriminatory manner in order to adequately defend the public interest. These measures will be far harder to defend against trade rules.

It would therefore be prudent to consider ways of creating greater flexibility in the trade regime to better accommodate public health measures that are not *prima facie* 'meritorious' to this degree but are nonetheless highly important.

All of the Member States of the WTO have recognised the need for greater flexibility and have formalised this acknowledgement in the Doha Declaration on TRIPS and Public Health. This is a significant step in the right direction, taken by consensus. Consideration should be given to taking the next obvious steps. The Declaration should be broadened to apply to the entire trade regime beginning with its extension to all of the WTO agreements and texts. The most effective way of doing this would be to incorporate the principles of the Declaration directly into the general exceptions clauses and make provision for their application to all agreements as a safeguard. The Declaration should also be applied to all other free trade agreements, existing and planned. The EU and the US could consider

³⁹¹ "Perhaps the clearest indication of bias in the system is that experienced practitioners too often can predict the outcome of an investor-state arbitration based upon the composition of the tribunal, not the merits of the case. In other words, the same facts can lead to different outcomes depending upon the tribunal's proclivities, especially those of the president or chairman of the tribunal, which can be gleaned from prior decisions or writings on the subject of investor-state relations." George Kahale, 'Is Investor-State Arbitration Broken?' *Transnational Dispute Management* 7 (2012), p. 3.

incorporating the principles of the Declaration into a self-standing clause that would apply to the whole of TTIP, both the trade section and any prospective investment section.

Failing this, further flexibility for the right to regulate would be achieved by amending the language of the exceptions clauses to lower the standard of necessity currently required for measures in the public interest to qualify as legitimately restrictive of trade. This follows the reasoning outlined above in relation to exceptions clauses in the investment context. The assessment of the plain packaging case illustrates that the highest barrier to overcome is the requirement of necessity, and that even in such a clear-cut case as this, from the viewpoint of public health and human rights at least, there is still no certainty that it will be overcome. This does not auger well for the future ability of States to regulate in the public interest and protect human rights, especially where, for whatever reason, desirable and publically demanded measures may not be taken due to this high standard and perhaps also due to a lack of available 'proof' of the contribution of the measure to the public aim. Consideration should therefore be given to the removal of the phrase 'necessary for' in exceptions clauses, and its replacement by a phrase such as 'related to' or 'reasonably understood as required for'.

From the perspective of the EU in particular, it would be sensible to seek a general exception clause that specifically excludes measures related to tobacco control in alignment with the FCTC from the scope of the whole agreement.

4.2 – Intellectual Property Rights

On intellectual property rights, the EU's negotiating mandate states that:

The Agreement will reflect the high value placed by both Parties on intellectual property ... The negotiations shall aim to provide for enhanced protection ... in a manner that complements and builds upon the TRIPS.³⁹²

The references to enhancement and an approach that 'builds upon' TRIPS clearly evinces an intent to expand the protection of intellectual property rights (IPR) under TTIP, which will be of major benefit to the pharmaceutical industry in both the US and the EU. This industry is viewed as highly important to the economy on both sides of the Atlantic. Yet the push for so-called 'TRIPS-plus' provisions in TTIP is highly controversial.³⁹³ An expansion of IPR protection will also have effects on the price and availability of medicines, the quality of health care and food and health security, among other social effects of major concern to the public and civil society.³⁹⁴ The IPR aspect of TTIP is also of particular importance to Ireland as the pharmaceutical sector accounts for a large part of the Irish economy and is dominated by foreign and US corporations. Ireland is one of the major hosts for the pharmaceutical industry in Europe, with around 120 pharmaceutical multinationals operating in the country including 9 out of 10

³⁹² Council of the European Union, 'Directives for the negotiations on the Transatlantic Trade and Investment Partnership between the European Union and the United States', Brussels, 11103/13, 17 June 2013, <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

³⁹³ For a description of common TRIPS-plus provisions see, Carlos Correa, 'Implications of the Doha Declaration on the TRIPS Agreement and Public Health', Health Economics and Drugs, EDM Series No. 12, Essential Drugs and Medicines Policy, World Health Organisation, WHO/EDM/PAR/2002.3, June 2002, pp. 92-98.

³⁹⁴ Commons Network, 'The Transatlantic Trade and Investment Partnership – TTIP: A Civil Society Response to the Big Pharma Wishlist', Creative Commons, Berlin/Brussels, 24 March 2014; Mohammed El Said, *Public Health Related TRIPS-plus Provisions in Bilateral Trade Agreements: A Policy Guide for Negotiators and Implementers in the WHO Eastern Mediterranean Region* (World Health Organization and International Centre for Trade and Sustainable Development, 2010); Xavier Seuba, Joan Rovira and Sophie Bloemen, 'Welfare Implications of Intellectual Property Enforcement Measures', PIJIP Research Paper No. 5, American University Washington College of Law, Washington, D.C., 2010.

of the largest in the world. The industry employs more than 24,500 people and is the largest net exporter of pharmaceuticals in the EU, accounting for more than 50% of all Irish exports.³⁹⁵ The importance of the industry to Ireland can hardly be exaggerated and the corresponding pressure on the Irish government to accommodate the industry must be significant. The same would no doubt hold true for the European Commission due to the fact that the industry employs around 700,000 people Europe-wide.³⁹⁶

Issues of public health and IPRs have traditionally been approached from the perspective of developing countries, particularly with regard to the ability of poor people in these countries to access life-saving medicines.³⁹⁷ IPRs allow pharmaceutical companies, mostly from developed countries, to prevent copies of their drugs and medicines, otherwise known as 'generics', from being produced within certain timeframes. This creates a de facto monopoly held by these corporations over a particular medicine that may be vital to human health. Due to this monopoly power such companies often set high prices to take advantage of the situation, to the clear detriment of public access and broadly beneficial health outcomes, which become concentrated in the wealthy tier of society. This polarises society and exacerbates inequality in living standards and access to healthcare, with all of the consequent negative effects on social cohesion, democracy, human rights, crime levels and political stability. While this has traditionally been seen as a developing country problem, the effects of recession and ever more progressive cuts to social welfare, social services and benefits schemes in the developed world have resulted in a declining ability for average people in the North to afford appropriate health care and the products this often depends on.³⁹⁸ As such, adaptations to the TRIPS system of rules in 2001 and 2005, which were initially made primarily with developing countries in mind, are now becoming increasingly important to ordinary people in the EU and the US.³⁹⁹

The TRIPS system itself is strongly viewed in the literature as deficient,⁴⁰⁰ representing an unfair balance between the interests of pharmaceutical and other corporations and the value of public health,⁴⁰¹ and deeply at odds with the realisation and protection of human rights.⁴⁰² Access to medicines is irrevocably linked to the right to health. The United Nations Human Rights Council has stated that

medicine is one of the fundamental elements in achieving progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health ... [and it is] the responsibility of States to ensure access to all, without discrimination, of

³⁹⁵ Irish Pharmaceutical Healthcare Association, 'Contribution to the Irish Economy', <http://www.ipha.ie/alist/contribution-to-the-irish-economy.aspx>.

³⁹⁶ European Federation of Pharmaceutical Industries and Associations, 'The Pharmaceutical Industry in Figures: Key Data, 2013', EFPIA, Brussels, 2013.

³⁹⁷ James Gathii, 'Approaches to Accessing Essential Medicines and the TRIPS Agreement', in Peter Yu (ed.), *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age, Volume Four – International Intellectual Property Law and Policy* (Praeger, Westport, 2007).

³⁹⁸ Sophie Bloemen and Tessel Mellema, 'Trading Away Access to Medicines – Revisited', Oxfam Joint Agency Briefing Paper, 29 September 2014.

³⁹⁹ Carlos Correa, 'Implications of the Doha Declaration on the TRIPS Agreement and Public Health', Health Economics and Drugs, EDM Series No. 12, Essential Drugs and Medicines Policy, World Health Organisation, WHO/EDM/PAR/2002.3, June 2002.

⁴⁰⁰ Abdulqawi Yusuf and Carlos Correa (eds.), *Intellectual Property and International Trade: The TRIPS Agreement*, Second edition (Kluwer Law International, Alphen aan den Rijn, 2008); NS Gopalakrishnan, 'TRIPS Agreement and Public Health: An Overview of International Issues' 13 *Journal of Intellectual Property Rights* (2008).

⁴⁰¹ Kojo Yelpaala, 'Quo Vadis WTO? The Threat of TRIPS and the Biodiversity Convention to Human Health and Food Security' 30 *Boston University International Law Journal* (2012); Frederick Abbot, 'The TRIPS Agreement, Access to Medicines and the WTO Doha Ministerial Conference', Occasional Paper No. 7, Quakers United Nations Office, Geneva, September 2001.

⁴⁰² Xavier Seuba, 'Human Rights and Intellectual Property Rights', in Abdulqawi Yusuf and Carlos Correa (eds.), *Intellectual Property and International Trade: The TRIPS Agreement*, Second edition (Kluwer Law International, Alphen aan den Rijn, 2008).

medicines, in particular essential medicines, that are affordable, safe, effective and of good quality.⁴⁰³

The Council called on States “to take steps ... to ensure ... that the application of international agreements is supportive of public health policies that promote broad access to safe, effective and affordable medicines”.⁴⁰⁴

This statement has direct application to TTIP, in that the agreement should not jeopardise access to affordable medicines by increasing the current levels of IPR protections without clearly adequate safeguards, which would result in a deterioration of the right to health for the populations of the US and the EU. In addition, government negotiators should attend to measures they could take to in fact increase access to medicines by remedying the deficiencies of the TRIPS agreement where possible and strengthening existing flexibilities related to that agreement, as a matter both of straightforward responsibility to their people and of international human rights law. The European Parliament has echoed these sentiments by calling on the European Council

to support the idea that the mechanism created by the WTO Decision and the Protocol to the TRIPS Agreement represents just a part of the solution to the problem of access to medicines and public health and that other measures to improve health care and infrastructure are equally indispensable.⁴⁰⁵

While States in the North have had the finances and the will to shield their populations from the worst effects of the TRIPS system, through government subsidies, benefits schemes and properly funded public health care systems, TRIPS and IPR has not caused any major public concern. However, in the current economic and political environment the TRIPS system is becoming increasingly problematic in the developed world. There have been impressive advances in medical technology, however the exorbitant prices of many available medicines and treatments are now out of reach for the vast majority of middle-class people in developed countries. For example, the imbalance of the IPR regime is primarily responsible for the fact that in 2014 a new drug called sofosbuvir (Sovaldi), which treats hepatitis C, costed US\$ 84,000 for a 12 week course or UD\$ 1,000 per pill. Yet “there are 170 million people living with hepatitis C worldwide, and around 350,000 deaths every year.”⁴⁰⁶ In the first 3 months of 2014 the company made sales of US\$ 2.27 billion.⁴⁰⁷ Such high prices and profits are not justified by production costs. Furthermore, arguments from pharmaceutical companies that such high costs are necessary for them to recoup the expenses of research and development are undermined by the fact that often a large percentage of the expenses for research and development are indirectly subsidised by governments or otherwise funded by direct contribution from public budgets.⁴⁰⁸ Nobel laureate in economics, Joseph Stiglitz, and many other economists argue that patent monopolies are economically

⁴⁰³ UN Human Rights Council Resolution 12/24, Access to medicine in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc A/HRC/RES/12/24, 12 October 2009.

⁴⁰⁴ Ibid. See further, UN Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, on access to medicines, UN Doc A/HRC/23/42, 1 May 2013; Hans Hogerzeil and Zafar Mirza, ‘World Medicines Situation 2011: Access to Essential Medicines as Part of the Right to Health’, World Health Organisation, Geneva, 2011.

⁴⁰⁵ European Parliament, Resolution of 12 July 2007 on the TRIPS Agreement and access to medicines, (P6_TA(2007)0353), para 8.

⁴⁰⁶ Martin Khor, ‘Access to medicines and the right to health and life’, South News, No. 85, 14 April 2015.

⁴⁰⁷ JH Hoofnagle and AH Sherker, ‘Therapy for Hepatitis C--the costs of success’ 16 *New England Journal of Medicine* (2014), pp. 1552–3.

⁴⁰⁸ Frank Lichtenberg and Bhaven Sampat, ‘What Are the Respective Roles of the Public and Private Sectors in Pharmaceutical Innovation?’ 30 *Health Affairs* 2 (2011).

inefficient and stifle innovation, in contradiction to the central principle that justifies the present IPR regime.⁴⁰⁹

Public budgets in the peripheral Member States of the EU, including Spain, Portugal and Greece, but also Ireland, are now under significant strain and are increasingly unable to support the burden of expensive new medicines. One study has found that public expenditure on pharmaceuticals increased on average by 76% over the EU as a whole between 2000 and 2009.⁴¹⁰ This situation is exacerbated by the ageing population and the global recession. Another study performed by the European Commission into the pharmaceutical sector in 2009 noted that “public budgets, including those dedicated to cover health expenditure, are under significant constraints. Competition, in particular competition provided by generic medicines, is essential to keep public budgets under control and to maintain widespread access to medicines to the benefit of consumers/patients.”⁴¹¹ The study found that companies routinely abused the intellectual property rights system as it stands by delaying the entry of generic medicines on the market by significant periods, costing the public billions of euros. It concluded that there was an unjust balance between guarantees for affordable health products in the EU and incentives for pharmaceutical companies, in favour of the latter.

In this context, given that the baseline operation of the WTO TRIPS agreement is beginning to cause serious concern as it is, the efforts of the EU and the US to strengthen IPRs and to extend them in new directions, further impinging on public health outcomes in the absence of adequate mitigation devices, evidently worsens the situation and raises the stakes for public health dangerously. In addition, such a result in the final version of TTIP would be contrary to international human rights law.

The European Parliament has on numerous occasions passed resolutions demanding that the Commission not include provisions in trade agreements going further than the level of IPR protection in TRIPS. In 2007 a resolution was adopted within the context of EU trade agreements with developing countries urging the European Council to observe the Doha Declaration on TRIPS and Public Health and “restrict the Commission's mandate so as to prevent it from negotiating pharmaceutical-related TRIPS-plus provisions affecting public health and access to medicines, such as data exclusivity, patent extensions and limitation of grounds of compulsory licences”.⁴¹² In relation to the EU-ASEAN trade agreement the Parliament referred back to these statements and pointed out that

nothing in the agreement should create legal or practical obstacles to the maximum use of flexibilities set out in the Declaration amending the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS agreement) and access to medicines and calls on the Commission negotiators to take full account of the points set out in its above mentioned resolution of 12 July 2007 on this topic.⁴¹³

⁴⁰⁹ Joseph Stiglitz, ‘Economic Foundations of Intellectual Property Rights’ 57 *Duke Law Journal* (2008).

⁴¹⁰ S. Vogler, N. Zimmermann, C. Leopold and K. de Joncheere (2011) ‘Pharmaceutical policies in European countries in response to the global financial crisis’, *Southern Med Review*, 4(2):

⁴¹¹ European Commission, ‘European Competition Pharmaceutical Sector Inquiry: Final Report’, 8 July 2009.

⁴¹² European Parliament, Resolution of 12 July 2007 on the TRIPS Agreement and access to medicines, (P6_TA(2007)0353), para 11. It should be noted that TRIPS has been amended to extend the use of compulsory licenses, which are crucial in the production of generic medicines; Protocol amending the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), done at Geneva on 6 December 2005.

⁴¹³ European Parliament, Resolution of 8 May 2008 on trade and economic relations with the Association of South East Asian Nations (ASEAN), (2007/2265(INI)), para 13.

The Parliament has repeated these statements within resolutions on the EU-India free trade agreement⁴¹⁴ and the new trade policy for Europe under the Europe 2020 strategy.⁴¹⁵ It has furthermore rejected the Anti-Counterfeiting Trade Agreement negotiated between the EU, the US, Australia, Canada, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea and Switzerland, partially on the basis that the TRIPS-plus provisions in the agreement constituted “possible interruptions in the supply of generic medicines.”⁴¹⁶

This should be a strong warning to TTIP negotiators that a final agreement will be closely scrutinised by a body unafraid of rejecting dangerous moves to increase the protection of IPRs in the EU’s trade agreements. The European Parliament also reiterates that “trade policy is not an end in itself” and reminds “all stakeholders that a modern trade policy is required to take into account other policy areas such as: a) human rights, b) securing and creation of jobs, c) labour rights and ILO core labour standards, d) corporate social responsibility,”⁴¹⁷ The *intended* prominence of human rights in the trade agenda according to a *democratic* mandate is clear.

Nevertheless, some agreements have slipped through. Previous TRIPS-plus provisions in trade agreements negotiated by the US and the EU have included efforts to lengthen the period of patent protection for new medicines. For example, Annex V, Article 3 of the EU–Macedonia FTA mandates 25 years of pharmaceutical patent protection in comparison to the 20 years mandated by TRIPS.⁴¹⁸ In addition, the EU-Morocco agreement extends industrial patents to 15 years compared to the TRIPS’ 10 years.⁴¹⁹ The US–Bahrain FTA explicitly commits both parties to provide protection for patents on plants, which is an expressly allowable exception under TRIPS. There have also been provisions linking pricing and reimbursement decisions to the market value of patented pharmaceuticals (e.g. US-South Korea FTA and EU-South Korea FTA), thereby increasing obstacles for public access to clinical trial data. There have been moves to give companies more power to intervene in government decision-making, and there has of course been the inclusion of investment protections and ISDS, an indirect if nevertheless highly effective limitation on the flexibilities of TRIPS thorough protection of IPRs within the meaning of ‘investment’. In addition, provisions in some agreements have sought to wind back the flexibilities in TRIPS allowing for compulsory licensing,⁴²⁰ by locking in ‘voluntary’ commitments to effectively alter relevant domestic laws thereby limiting the effectiveness of the flexibilities.

Some provisions will act to reduce democratic control over decisions whether or not to compensate companies for delays in the granting of marketing authorisation by locking in regulations that award ‘supplementary patent certificates’ that compensate by extending the term of the patent. Provisions

⁴¹⁴ European Parliament, Resolution of 11 May 2011 on the state of play in the EU-India Free Trade Agreement negotiations, (P7_TA(2011)0224).

⁴¹⁵ European Parliament, Resolution of 27 September 2011 on a New Trade Policy for Europe under the Europe 2020 Strategy, (2010/2152(INI)).

⁴¹⁶ ‘ACTA before the European Parliament’, European Parliament News, 4 July 2012, <http://www.europarl.europa.eu/news/en/news-room/content/20120217BKG38488/html/ACTA-before-the-European-Parliament>.

⁴¹⁷ European Parliament, Resolution of 27 September 2011 on a New Trade Policy for Europe under the Europe 2020 Strategy, (2010/2152(INI)), para 5.

⁴¹⁸ Mohammed El Said, *Public Health Related TRIPS-plus Provisions in Bilateral Trade Agreements: A Policy Guide for Negotiators and Implementers in the WHO Eastern Mediterranean Region* (World Health Organization and International Centre for Trade and Sustainable Development, 2010), p. 120, FN 100.

⁴¹⁹ *Ibid*, p. 96.

⁴²⁰ Compulsory licensing is allowed by TRIPS for production serving the domestic market and has been extended in 2005 to allow countries to use this flexibility for export purposes as well. Governments are therefore able to grant licenses to generic manufacturers, under certain conditions, even before the relevant patents have expired. The licenses are not exclusive meaning that the patent holder may still produce the product as well. The patent holder is furthermore entitled to “adequate” compensation.

on ‘patent linkage’ seek to delay the entry of generic medicines on the market by tying the approval process for the generic to the prior ‘status’ of the original medicine. Other provisions allow for the extended secrecy of clinical data beyond the term of the patent, which means that generic manufacturers cannot have access to information vital to the application for a license. As a result, the original company maintains an effective monopoly for the duration of the ban on public access to the data, unless the generic manufacturer performs its own clinical trials, which is both costly and time consuming. Yet further provisions may interfere with the decisions that governments in the EU often make in straightened economic times to limit the prices of certain medicines that have a low cost-benefit ratio, or to control the rates of reimbursement for their purchase or even to directly cut prices in some cases. The US has historically sought to ensure limits on government price controls in its trade negotiations. There are also requests from the pharmaceutical industry to allow companies a ‘voice’ in such government decisions through the imposition of ‘procedural safeguards’ that would involve mandatory consultation with the industry. And even calls for provisions allowing companies to directly challenge government pricing and reimbursement decisions in the courts. If accepted, these provisions could seriously hamper the ability of the Member States to ensure public health and manage their finances.

The impact of lengthened patent terms and the protection of clinical trial data can add up to 11 years to the monopolies that pharmaceutical companies already enjoy,⁴²¹ greatly extending profit-making opportunities and equally reducing public budgets. Rules denying public access to clinical trial data can even create a de facto monopoly even in the absence of a valid patent. The financial consequences of TRIPS-plus provisions are clearly quite large. Extending patent terms and protecting clinical data in the EU-Colombia-Peru free trade agreement may cost Colombia alone up to US\$ 620 million by 2030.⁴²² Protected data in the US-Jordan FTA has been estimated to have cost between USD\$ 6 million and UDS\$ 22 million over the period 2002-2006.⁴²³ A closer comparison is provided by a study on the effects of IPR provisions in CETA, which were found to be likely to comprise an additional 15% drain on the Canadian government’s budget for medicines.⁴²⁴ However, it should be noted that the price of generic medicines is generally higher in Canada than the EU.⁴²⁵ Aside from the financial cost, the protection of clinical data has been found to risk the underestimation of harms associated with potential medicines and to interfere with the safe conduct of rational evidence-based research techniques, with obviously negative health consequences.⁴²⁶

In this context, where trade agreements as reciprocal commitment devices that also tie the hands of EU Member States with respect to their ability to protect public health, The European Parliament is evidently worried, not only for the negative effects on the people of developing countries but also for Europeans. As such, The Parliament has requested the Council

⁴²¹ Xavier Seuba, ‘Health Protection in the European and Andean Association Agreement’, Health Action International Europe, March 2009.

⁴²² IFARMA, ‘Impact of the EU-Andean Trade Agreement on Access to Medicines in Colombia’, Health Action International, October 2009.

⁴²³ Oxfam, ‘All Costs, No Benefits: How the US–Jordan FTA affects access to medicines’, Oxfam International Briefing Paper No.102, March 2007.

⁴²⁴ Statement by Michael McBane, Executive Director, Canadian Health Coalition, before the Canadian International Trade Committee on 28 January 2014, <https://openparliament.ca/committees/international-trade/41-2/13/michael-mcbane-1/>.

⁴²⁵ Usman Khan, Robert Pallot, David Taylor and Panos Kanavos, ‘The Transatlantic Trade and Investment Partnership: International Trade Law, Health Systems and Public Health’, London School of Economics and Political Science, January 2015, p. 51.

⁴²⁶ Health Action International, ‘Protecting citizens’ health: Transparency of clinical trial data on medicines in the EU’, HAI Policy Paper, October 2013.

to adopt a Joint Policy Statement with Parliament to the effect that the Member States remain free to use all exceptions from the TRIPS Agreement under their domestic patent laws to authorise production and export "to address public health needs in importing Members" and asks the Council to ensure that the Commission refrains from taking action to interfere with these proceedings.⁴²⁷

The 'action' referred to would clearly encompass the conclusion of further international agreements containing TRIPS-plus provisions.

As is clear, these provisions may take a large variety of forms. The notion of TRIPS-plus has been described as "is an evolving concept and has proven to be case- and country-specific."⁴²⁸ It is therefore difficult to make distinct recommendations along a theme that advises the non-inclusion of provisions expanding the range of the intellectual property regime. Little of concrete substance can be said in the absence of a specific text to analyse. However, on the basis of previous TRIPS-plus provisions in other agreements and the known requests of the pharmaceutical industry regarding TTIP a few suggestions can be made.

The direction of change should logically be in the direction of greater restrictions on IPRs, earlier licensing for generic manufacturers, shorter patents, and an alternative research and development model that better acknowledges the public stake in the financing already both directly and indirectly provided for in R&D, and moves towards greater public financing with more patents being publically owned such that their proceeds may be recycled into health and other common goods. In the face of the fact that the US and the EU are the leading proponents of TRIPS-plus however, these rational proposals begin to look like a little like a wishlist, as they represent a complete about-face in respect to current US and EU policy. In addition, this change of direction would clearly require a new mandate for the European Commission, as it could not take this direction and continue to negotiate in good faith.

In light of this the next level of recommendation is to exclude the section on intellectual property from the agreement and further negotiations on the grounds that by nature, and given the Commission's mandate, it will raise the level of IPR protection above that which currently applies and that is already posing serious health and other risks. Such a result would seem to go against the wishes of the European Parliament. Therefore an exclusion of the IPR chapter may in this way save the broader agreement, which would otherwise be in serious jeopardy if placed in front of a Parliament that only has the power to accept or reject the agreement in whole. This is the same argument as can be made with respect to ISDS, and is indeed made by many, including the Director of the Center for Trade Policy Studies at the highly conservative Cato Institute.⁴²⁹ It is argued even by TTIP supporters that, similar to the issue of domestic courts, the levels of IPR protection at the domestic level in the EU and US are already so high that further international legislation would achieve very little, other than threaten advances in far more beneficial areas. In fact, according to one US Congressional Research report there is an ongoing debate over exclusion of the IPR chapter at the highest levels in the US.⁴³⁰

⁴²⁷ European Parliament, Resolution of 12 July 2007 on the TRIPS Agreement and access to medicines, (P6_TA(2007)0353), para 10.

⁴²⁸ Mohammed El Said, *Public Health Related TRIPS-plus Provisions in Bilateral Trade Agreements: A Policy Guide for Negotiators and Implementers in the WHO Eastern Mediterranean Region* (World Health Organization and International Centre for Trade and Sustainable Development, 2010), p. 94.

⁴²⁹ Daniel Ikenson, 'A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement', Herbert A. Stiefel Center for Trade Policy Studies, *Free Trade Bulletin*, No. 57, 4 March 2014.

⁴³⁰ Shayera Akhtar and Vivian Jones, 'Transatlantic Trade and Investment Partnership (TTIP) Negotiations', Congressional Research Service, 2014.

Failing this, it is suggested that in the interests of their people's health and access to medicines, among other risks, the parties should seek to limit any developments in the IPR regime within TTIP to a level as closely aligned with the standards of TRIPS as possible. This would mean an exclusion of most of the TRIPS-plus provisions referred to above and many others as yet unidentified. The considerations here also reinforce the exclusion of ISDS from any investment chapter as it is as yet unknown how far tribunals will interpret the rights of intellectual property holders under investment standards, but it is almost certain that these interpretations would equate to a standard of protection significantly higher than that of the TRIPS agreement. Alternatively, IPRs should be excluded from the meaning of 'investment'.

Finally, there should be more flexibility built into the agreement for government regulation in the public interest through the same measures as expressed above relating to the case of plain packaging and TRIPS. This would better ensure that any increased threat to public health inherent in the provisions of the IPR section will be more easily mitigated, even if it cannot be removed.

These are general recommendations and it will be necessary for the European Parliament and all concerned sections of civil society to pay very close attention to the final section on IPR at the conclusion of negotiations to give them substance. In particular, there should be particular care taken to protect the recent moves by the EU to increase public access to clinical trial data through a regulation adopted by the European Parliament in 2013.⁴³¹ This regulation in particular should not be subject to change under any moves towards regulatory 'harmonisation' in TTIP. As stated by the European Generic Medicines Association with respect to clinical trial data; "in the light of the different historical circumstances and intentions behind the respective intellectual property/data protection rights, we strongly recommend not to attempt creating harmonisation in this area, but to recognise the different approaches between the parties."⁴³² This is a live issue, as according to a recent document outlining the EU's approach to pharmaceuticals both parties are seeking the "[h]armonisation of requirements for the authorisation of biosimilars",⁴³³ otherwise known as generics.

4.3 – Technical Barriers to Trade (Non-Tariff Barriers) – Regulatory Harmonisation

Very closely linked to the issues swirling in relation to intellectual property is the question of regulatory convergence, cooperation and harmonisation in TTIP, which is widely viewed as one of the most central to the negotiations. Where past trade negotiations were focussed almost entirely on issues of freeing trade by lowering or eliminating actual tariffs or *straightforward* financial barriers to trade, we now live in a world where most tariffs have already been effectively removed, especially with respect to trade between developed countries. With tariffs largely gone, attention has shifted more and more towards *technical* barriers to trade. This category of trade offensive barriers is potentially extremely large, and is not clearly defined, however, as they are the chief source of frustration for business, regulations and regulatory procedures are currently the focus.

⁴³¹ European Parliament, Legislative resolution of 2 April 2014 on the proposal for a regulation of the European Parliament and of the Council on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC (COM(2012)0369 – C7-0194/2012 – 2012/0192(COD)) (Ordinary legislative procedure: first reading), (P7_TA(2014)0273). The regulation provides for access to previously 'commercially confidential' information on clinical studies and requires pharmaceutical companies to release their trial data.

⁴³² European Generic Medicines Association, 'Position Paper: EU-US Transatlantic Trade and Investment Partnership', EGMA, 6 May 2013, pp, 12-13.

⁴³³ European Commission, 'Towards an EU-US trade deal: Making trade work for you - The Transatlantic Trade and Investment Partnership (TTIP) Regulatory Issues - EU position on pharmaceutical products', 14 May 2014, para 2.3.

Differences in these regulations between countries are also known as non-tariff barriers, or NTBs. Trade negotiations now centre on eliminating or minimising regulations and regulatory divergence as the principle obstruction to increased trade and investment, measures that should therefore be altered, removed or harmonised in order to facilitate economic growth.

4.3(a) – The EU Negotiation Mandate

The EU and US have placed regulatory harmonisation at the centre of TTIP, seeking to create institutions, rules and processes that are intended to identify and minimise differences in regulatory practices, and to cooperatively vet future regulations. The EU’s negotiating mandate on regulatory harmonisation is lengthy in comparison to other sections, and states the following:

The Agreement will aim at removing unnecessary obstacles to trade and investment ... through effective and efficient mechanisms, by reaching an ambitious level of regulatory compatibility for goods and services, including through mutual recognition, harmonisation and through enhanced cooperation between regulators. Regulatory compatibility shall be without prejudice to the right to regulate in accordance with the level of health, safety, consumer, labour and environmental protection and cultural diversity that each side deems appropriate, or otherwise meeting legitimate regulatory objectives.⁴³⁴

Together with the US, the EU seeks to ensure what seems to be an equivalent level of risk assessment in the process of regulatory framing, that is to be science-based, following the US model, but which recognises “the right for the Parties to appraise and manage risk in accordance with the level of protection that each side deems appropriate, in particular when relevant scientific evidence is insufficient”, in deference to the EU’s precautionary principle.⁴³⁵ However, the EU approach is to be “applied *only to the extent necessary* to protect human, animal, or plant life or health, and developed in a transparent manner, without undue delay.” The use of the word ‘necessary’ again, as with the exceptions clauses of GATTT and GATS, implies an intention to impose highly restrictive conditions on the exercise of the precautionary principle,⁴³⁶ and the EU concession to commit to the elimination of ‘undue delay’ is worrying to the extent that accurate knowledge generation for informed decisions often takes a long time. The precautionary principle is enshrined in EU law and cannot be overridden by TTIP, however TTIP can certainly place external legal and practical constraints on its factual use.

According to the EU mandate, “pharmaceuticals and other health industries” are expressly included in the scope of regulatory harmonisation, which is intended to ensure “the removal of existing NTBs” and

⁴³⁴ Council of the European Union, ‘Directives for the negotiations on the Transatlantic Trade and Investment Partnership between the European Union and the United States’, Brussels, 11103/13, 17 June 2013, <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

⁴³⁵ This principle allows regulators to take action in situations of risk to public health or other common goods where insufficient scientific evidence exists to definitively prove causation or negative effects. This allows for regulatory action before the effects become fully apparent or obvious. Decisions taken in accord with the precautionary principle are not permanent but are in force only until sufficient scientific evidence has been found on which to base a clearly justified permanent position. Susan Rose-Ackerman, ‘Precaution, Proportionality, and Cost/Benefit Analysis: False Analogies’ 4 *European Journal of Risk Regulation* 2 (2013).

⁴³⁶ Rene von Schomberg, ‘The Precautionary Principle: Its Use Within Hard and Soft Law’ 3 *European Journal of Risk Regulation* (2012). For a concise overview of the debate between proponents of the cost-benefit US style and the precautionary EU approach see, David Driesen, ‘Cost-Benefit Analysis and the Precautionary Principle: Can they be Reconciled?’ *Michigan State Law Review* (2013), pp. 771-772. The article itself argues that they can be reconciled within an overall cost-benefit approach. The author advocates that cost-benefit analysis be made precautionary through adjusted (more pessimistic) assumptions in the foundation of the analysis.

prevent “the adoption of new NTBs.” It is aimed to “establish a mechanism for improved dialogue and cooperation” that would seek “to reduce redundant and burdensome testing and certification requirements, promote confidence in our respective conformity assessment bodies, and enhance cooperation on conformity assessment and standardisation issues globally.”

The intention is also to create an institution forming a permanent body tasked with “identifying opportunities and for guiding further work on regulatory issues”. In addition, the agreement will put in place rules on “regulatory coherence and transparency for the development and implementation of efficient, cost-effective, and more compatible regulations for goods and services, including early consultations on significant regulations, use of impact assessments, evaluations, periodic review of existing regulatory measures, and application of good regulatory practices.”

These are very ambitious goals with very extensive ramifications. Finally, the agreement “shall be binding on all regulators and other competent authorities of both Parties.”

4.3(b) – The Draft Chapter on Regulatory Cooperation

The European Commission has recently released a textual proposal for the chapter on regulatory cooperation in TTIP,⁴³⁷ together with a detailed explanation.⁴³⁸ The ideal is to turn TTIP into a ‘living instrument’ that will establish mechanisms and institutions for the further development of the principles established through the expansion and development of its scope well into the future. Besides the possible extension of ISDS, this is this single aspect that has the most power to reshape the future of both Europe and the US. Through the deep integration of the principles of the agreement into the process of government regulation itself, as foreseen in these documents, the regulatory cooperation chapter will arguably have more significant but less visible effects on economies and societies than ISDS, as the latter is increasingly in the spotlight and operates clearly outside the normal democratic process and the day-to-day running of governments.

In contrast, the key innovation of the regulatory cooperation chapter is the establishment of a Regulatory Cooperation Body “in order to monitor and facilitate the implementation of the provisions set out” in the chapter and in other, as yet unspecified, sections of the agreement.⁴³⁹ This essentially sets up a soft enforcement or supervisory body for the agreement,⁴⁴⁰ which, although limited in title to ‘regulatory cooperation’ and nominally to the provisions of that chapter, will also have power to enforce other commitments under the agreement. This is important. Although this Body would not have any legal power to enforce the agreement through concrete sanction or penalty, it will presumably be given powers to execute its functions to ‘monitor’ and ‘facilitate’ the implementation of the agreement, and is by design situated *within* the regulatory processes of governments.

⁴³⁷ European Commission, ‘TTIP - Initial Provisions for CHAPTER [] -Regulatory Cooperation’, EU Commission’s proposal on regulatory cooperation submitted during the 9th round of TTIP negotiations, made public on 4 May 2015, http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf.

⁴³⁸ European Commission, ‘Transatlantic Trade and Investment Partnership (TTIP): Chapter on Regulatory Cooperation - Detailed Explanation on the EU proposal for a Chapter on Regulatory Cooperation’ (as per revised version made public on 4 May 2015), 6 May 2015.

⁴³⁹ European Commission, ‘TTIP - Initial Provisions for CHAPTER [] -Regulatory Cooperation’, EU Commission’s proposal on regulatory cooperation submitted during the 9th round of TTIP negotiations, made public on 4 May 2015, Article 14(1), http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf.

⁴⁴⁰ Article 14(2)(c); “The RCB will not have the power to adopt legal acts”.

The specific functions of this institution would be to decide on what should comprise its Annual Regulatory Cooperation Programme, which is detailed to the level of envisaging follow-up to past commitments and evaluating the steps taken towards their fulfilment, those envisaged in the future and the timeframes for regulatory change.⁴⁴¹ This should be understood as a very intrusive advance into the formulation of government regulation. The institution will monitor and report on progress made in regulatory convergence to the Joint Ministerial Body. It is charged with considering new initiatives for regulatory harmonisation and with the preparation of joint initiatives to develop new international rules on government regulation that would factor into proposals for new treaties in this area. The institution is also given an open mandate in the sense that it may address any issue related to regulatory cooperation that a Party brings to its attention. Transparency is provided for by making the agenda and the minutes of meetings of the Body public.

The participation of stakeholders is limited to an annual event, which will be coordinated through “Civil Society Contact Groups, including a balanced representation of business, consumers, trade unions, environmental groups and other relevant public interest associations”.⁴⁴² It will not be necessary for participants to demonstrate that they are directly affected by the issues at hand. The exact mechanics for outside participation are not further specified, beyond a note that the RCB will receive “concrete suggestions” from stakeholders “for further regulatory co-operation between the Parties”, which will be “given careful consideration by the relevant sectoral working group that shall present recommendations to the RCB.”⁴⁴³ A reply in writing will be provided without undue delay”, and these replies will be published in the Annual Regulatory Cooperation Programme.

Besides whatever other parts of TTIP may be brought into the scope of this institution, it will administer rules on regulations with respect to goods and services that have a significant impact on international trade and investment. The Parties will have to make early provision of information on planned acts of regulation, as well as the process of impact assessment applying to the ongoing development of regulations, the timing of their adoption and planned stakeholder engagements.⁴⁴⁴

The text mandates stakeholder consultations that must be open to “any interested natural or legal person”, with no qualification. The idea is that consultations would not be limited to citizens but must take into account the view of those in the other country or region. This is a very significant widening of usual stakeholder consultations, and is not to be opposed on principle. However, it will add a very significant extra burden to the present regulatory process in terms of time and cost. It will also be very highly biased in favour of those stakeholders who are financed sufficiently and are structured in such a way as to be able to take advantage of cross-Atlantic participatory mechanisms. Obviously, multinational corporations with subsidiaries in the EU and the US fit this description precisely. Diverse, underfunded and often highly localised civil society actors are thereby structurally disadvantaged from the start.

Impact assessments are given a certain flexibility, as they are to be carried out in accordance with each Party’s own “respective rules and procedures”. It is mandated that these impact assessments must “take account of the regulatory approaches of the other Party”, as well as the impact on international trade and investment.⁴⁴⁵ A bilateral cooperation mechanism is to be established for the facilitation of

⁴⁴¹ Article 14(2)(a).

⁴⁴² Article 15(2).

⁴⁴³ Article 15(3).

⁴⁴⁴ Article 5.

⁴⁴⁵ Article 7(2)(b) and (c).

knowledge exchange between the Parties and “to seek increased compatibility between their respective regulatory frameworks, where appropriate.”⁴⁴⁶

Of interest is that fact that the text envisages the establishment of “an exchange on planned or existing regulatory acts”.⁴⁴⁷ This would sound quite innocuous until the text is read closely, which would imply, by stating that when one Party makes a request the other Party “shall enter into” such an exchange, that if a request is made there is no room for the opposite Party to refuse. Typically, the word ‘shall’ in legal texts connotes a mandatory obligation. This analysis displays a sleight-of-hand in the statement by the Commission that

[a]s regards cooperation on regulatory acts adopted by an EU Member State or a US State, Article 11 of the EU proposal (*‘Information and Regulatory Exchanges on regulatory acts at non-central level’*) provides for *voluntary cooperation based on common interest*.⁴⁴⁸

Article 11 applies only to government bodies at the non-central level, which means the state level in the US and the Member State level in the EU, and says:

If one Party makes a request to engage in a regulatory exchange on specific planned or existing regulatory acts at non-central level, the requested Party will take steps to accommodate such a regulatory exchange.¹⁷ The regulators and competent authorities at non-central level concerned will determine their interest in entering into a regulatory exchange.

The language would suggest an obligation through use of the word ‘will’. This is confirmed by footnote 17, which states that “The US Party, upon receipt of a request, shall solicit the responsible regulators and competent authorities at non-central level to engage in regulatory exchanges”. ‘Shall solicit’ would imply that an obligation is at issue. However, the last sentence in Article 11 suggests that an exchange is voluntary. Therefore Article 11 is at best ambiguous and possibly internally contradictory. In any event, Article 9(3), which applies at the central level (at the levels of the EU and US federal government), and which the Commission does not discuss in its detailed explanation, uses clearly mandatory language as described above. If the Commission does not intend exchanges to be interpreted as mandatory upon request it should attend more closely to the language in Articles 9 and 11. Confusion would be avoided, and the Commission’s statement that only “voluntary cooperation” is envisaged would be clarified, if, in both articles, the words ‘will’ and ‘shall’ were replaced by ‘may’.

These ‘exchanges’ have further legal significance in the Commission’s text. For example; “The Parties shall participate *constructively* in regulatory exchanges”.⁴⁴⁹ Again, shall is mandatory. Furthermore, “a Party shall provide to the other Party, if the other Party so requests, complementary available information related to the planned regulatory acts under discussion.” In addition, “[e]ach point of substance raised by one Party shall be addressed and answered by the other Party.” Finally; “When a regulatory exchange on a planned or existing regulatory act ... is requested ... it shall start promptly.”⁴⁵⁰

⁴⁴⁶ Article 8(1).

⁴⁴⁷ Article 9(3); “Upon the request of a Party made via the respective Focal Points, the Parties shall enter into an exchange on planned or existing regulatory acts at central level.”

⁴⁴⁸ European Commission, ‘Transatlantic Trade and Investment Partnership (TTIP): Chapter on Regulatory Cooperation - Detailed Explanation on the EU proposal for a Chapter on Regulatory Cooperation’ (as per revised version made public on 4 May 2015), 6 May 2015, p. 7 (emphasis in original).

⁴⁴⁹ Article 9(5) (emphasis added).

⁴⁵⁰ Article 10(1).

It is provided for that all of these extra mandatory measures “shall not prejudice the right to regulate in a timely manner”.⁴⁵¹ In relation to this point the preamble provides the following:

The provisions of this Chapter do not restrict the right of each Party to maintain, adopt and apply measures to achieve legitimate public policy objectives, such as those mentioned in paragraph 1, at the level of protection that it considers appropriate, in accordance with its regulatory framework and principles.⁴⁵²

Nevertheless, it is clear that there is a high risk that in fact they could prejudice the right to regulate in a timely manner.⁴⁵³ Again, it must be emphasised that the document as a whole treats the right to regulate is an exception. Despite formal reiteration it may be factually eroded through significant delays that would be very easy for a Party to cause through numerous requests for information that may not in fact be relevant but *must* be provided, through raising numerous ‘points of substance’ that *must* be answered, and through the requirement that Parties *must* participate constructively, which would not appear to be met if regulation was legislated while requests for information and points of substance from the other Party were pending. There is little doubt that powerful and well-resourced multinationals could utilise this process either informally through influence over relevant organs of the State Parties or even blatantly in a form of diplomatic protection.⁴⁵⁴

4.3(c) – Analysis

Both the mandate and the Commission’s proposals are obviously extremely broad and they set out a worrying understanding that regulations are almost automatically a bad thing, restricting markets, complicating the trade, investment and business process, and adding to the overheads of employers and corporations who argue that this amounts to wasted finances that would otherwise allow them to employ more people. In this context, the State’s right to regulate could easily be seen to have gotten lost in passive language in the EU’s mandate. The active language is all reserved for the fight against costly regulations. NTBs must be ‘removed’ and their future adoption ‘prevented’. However, the vast majority of regulations that could easily be understood as NTBs are there for good reasons, to compensate for what economists call ‘market failures’. Many of them are related to the protection of public health and safety, or to ensure provision of goods and services not valued by the market, and many are also essential to our standard of life.

In fact quite a few of our regulations have evolved in response to long and arduous civil campaigns and legislative debates. So, regulations have costs and benefits, and regular research by the US Office of Information and Regulatory Affairs definitively demonstrates that the benefits of modern regulation far outweigh the costs, by an average factor of 6.⁴⁵⁵ Yet with regard to regulations, often one person’s

⁴⁵¹ Article 10(3).

⁴⁵² Article 1(2).

⁴⁵³ The authors maintain this conclusion of likelihood despite the Commission’s clear statement that “according to Article 1 paragraph 3 -in combination with Article 12 paragraph 3 -any regulatory exchanges shall *not* prejudice the right to regulate in a timely manner in accordance with deadlines under domestic law. Neither side would be required to suspend or delay its respective regulatory processes.” European Commission, ‘Transatlantic Trade and Investment Partnership (TTIP): Chapter on Regulatory Cooperation - Detailed Explanation on the EU proposal for a Chapter on Regulatory Cooperation’ (as per revised version made public on 4 May 2015), 6 May 2015, p. 10.

⁴⁵⁴ Jennifer Sass and Daniel Rosenberg, ‘The Delay Game: How the Chemical Industry Ducks Regulation of the Most Toxic Substances’, National Resources Defense Council, October 2011.

⁴⁵⁵ See further on the relative costs and benefits of regulation, Frank Akerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (WW Norton, New York, 2004); Frank Akerman, ‘The Unbearable Lightness of Regulatory Costs’, Global Development and Environment Institute, Working Paper No. 06-02, Tufts University, February 2006.

obstacle to free trade and investment is another's protection from precisely the same thing. The foreign owner of a chain of private hospitals may view a set of regulations as onerous or hampering economic opportunities and efficiency, while the local staff and patients may view the same regulations as vital to health and wellbeing. On the other hand many businesses support greater regulation to provide certainty under which they will not incur liability, or to standardise procedures such that less scrupulous competitors cannot gain economic benefits.

Regulations exist at a critical point where common economic conceptions of efficiency and other social conceptions of efficiency and socio-economic justice come into direct contact, and can often collide. For good reason many believe that a technical framing of regulations and related procedures as well as a distancing of these issues from local and democratic control should therefore be resisted if not rejected on principle. If there is no principled rejection then this raises the question of how contact and collision is managed at this crucial juncture, and most importantly how average people can come as close as possible to being involved and informed in this management. TTIP is planned to set up a new regime of concepts, rules or 'disciplines' and institutions that will have a very large influence on this conjunctive environment, and many commentators would agree that

[f]rom the information available so far, the workings of the TTIP institutions and the overriding legal force to be granted to them may well lead to the control of regulations being largely removed from effective democratic control. With an apparent likely core position for large businesses and their associations in these TTIP regulatory processes, and an incentive to push for regulating in their private interest, regulating in the broader public interest appears under threat. This in itself could be the most problematic outcome of the TTIP.⁴⁵⁶

Current differences in regulation between the EU and US arise because of a range of factors, but importantly they include the different will of the majority of the respective populations. Nevertheless, businesses operating across the Atlantic must therefore simultaneously satisfy two sets of regulations some of which overlap in terms of their function, leading to opportunities for business to save on costs if these are harmonised. The general approach in TTIP has been a regular economic approach focusing on eliminating regulatory differences, duplication and financial costs. It has not, generally speaking, taken a social approach to regulation that would alternatively focus on the social benefits of regulatory behaviour. It can easily be seen how this approach may conflict with democratic ideals. Social aspects have been addressed in a 'negative' or 'passive' fashion, in the sense that the public interest and other social aims of regulation are to be considered or defended as best they can through existing mechanisms, relative to the positive and active force of negotiations to enhance cross-border economic activity and to institute new rules and institutions based on common economic rationales. The social is peripheral in comparison to the economic drive to lower financial costs for transatlantic business, which it is hoped will spur greater economic activity and growth. For negotiators under these structural conditions "the normative commitment to free trade and open markets will tend to shove other normative concerns to a secondary status – reinterpreting these as a "by-product" of the primary normative concern".⁴⁵⁷

The understandable preoccupation within a broad section of civil society is that such a logic will underpin the operation of any new regulatory institutions created under this general approach to TTIP, despite the regular assurances that the public interest and other social concerns will be adequately

⁴⁵⁶ Martin Mynant and Ronan O'Brien, 'The TTIP's Impact: Bringing in the Missing Issue', European Trade Union Institute, Working Paper 2015.01, Brussels 2015, p. 6.

⁴⁵⁷ Marija Bartl and Elaine Fahey, 'A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)', in Elaine Fahey and Deirdre Curtin (eds.), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (Cambridge University Press, Cambridge, 2014).

protected, 'as they always have been' under existing arrangements. The tale of TRIPS and TRIPS-plus above is precautionary in this respect. If the general approach does foundationally inform any new institution then there is a high probability that the social benefits of any given regulation will be underestimated or even ignored in the processes of risk assessment and risk management, crucial processes in the formulation and evaluation of any given regulation.⁴⁵⁸

What is often lost in discussions of transatlantic regulatory harmonisation is that this very process will institute yet another new and additional regulatory regime, as there is no intention or possibility that this new regime could entirely replace those in existence in the EU and US, at least for the foreseeable future. On a very fundamental level then, the whole enterprise is somewhat contradictory. Furthermore, it is hard to avoid the conclusion that a regulatory cooperation chapter as envisaged above "will result in adaptation of regulatory frameworks that apply in the US and the EU following procedures outside the normal democratic processes" and that "negotiating powers have been entrusted to non-elected officials, which imply a shift of legislative power from the elected to the non-elected."⁴⁵⁹

Compatibility of regulations and regulatory approaches between the EU and the US is to be achieved in three ways. The first mode is thorough a harmonisation of standards and tests, which would apply to future regulations and methods. The other modes operate through the 'recognition of equivalence' between standards and the 'mutual recognition' of those pertaining in the jurisdictions of both parties, which apply mostly to present regulations and standards. In the absence of clear rules that 'harmonisation' must be upward to the highest level currently established and 'recognition' must not impinge on the democratic choices of the people of each State to exclude or include goods or services according to the criteria they independently set, these methods of dealing with regulatory differences effectively put different regulatory preferences in competition with each other. Again, in the absence of such rules, this competition will occur under the rules of economic and market logic described, which accord no significant initial place in considerations to the social value of regulation. What may easily result is then a 'race to the bottom' as popularly phrased. But to be clear, this would not represent the bottom according to common economic criteria, but the top. It would only represent the bottom in terms of social criteria; the social criteria that TTIP attends to only in a negative or exceptional manner.

While regulatory coherence is most often presented by the Commission and the supporters of TTIP as primarily, if not purely, a technical endeavour, seeking to adjust differences relating only to small and minor variations such as the colour of electrical wiring, due simply to the extremely broad nature of the subject matter this will often not be the case. Within one study identifying a range of regulatory differences between the EU and US there are many that are technical and reflect only formal differences between the two, like the example of electrical wiring and the duplication of paperwork.⁴⁶⁰ However, there are also many that represent significant divergences that, if subsequently converged or harmonised, would have non-trivial effects on public health and welfare, particularly in the areas of chemicals, automobiles, food and beverages, pharmaceuticals, insurance services and transportation.

⁴⁵⁸ Martin Mynant and Ronan O'Brien, 'The TTIP's Impact: Bringing in the Missing Issue', European Trade Union Institute, Working Paper 2015.01, Brussels 2015.

⁴⁵⁹ Transatlantic Consumer Dialogue, 'Resolution on Regulatory Coherence in the Transatlantic Trade and Investment Partnership', DOC NO: 16/13, December 2013.

⁴⁶⁰ ECORYS, 'Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis Reference', OJ 2007/S 180-219493, Final Report, Rotterdam, 11 December 2009. For commentary see, Ronan O'Brien, 'Regulatory cooperation at the core of TTIP and its likely consequences', Brussels, October 2014, pp. 5-6, http://www2.euromemorandum.eu/uploads/regulatory_cooperation_obrien_rev_oct_2014_1.pdf.

There are very significant differences in the areas of food, beverages and chemicals,⁴⁶¹ where regulations are far more lax in the US, which has led to a number of well publicised international disputes at the WTO over genetically modified organisms,⁴⁶² the washing of poultry⁴⁶³ and beef hormones.⁴⁶⁴ These cases clearly underscore the levels of divergence in understandings of scientific evidence, scientifically proven risk and the precautionary principle between the US and EU.⁴⁶⁵ In addition there are very significant differences between the US Toxic Substances Control Act and the EU's REACH regulations on the chemical industry, with US regulations being widely criticised for their ineffectiveness.⁴⁶⁶ Yet in the compiling or regulations there are no objective measures in place to clearly sort the two groups out according to social criteria, and therefore all these regulations, trivial and non-trivial, are treated the same in the economic analysis.

This situation is likely to be reflected in the operation of any future transatlantic regulatory body. The sorts of regulations that will be subject to future harmonisation will often be of high significance to many public interests, yet there is no clear mechanism in the Commission's proposals for sorting out innocuous elimination of difference from the potentially far reaching and dangerous. There is only provision for the groping of regulations according to sectors.⁴⁶⁷ It may be argued that some sectors are 'obviously' more relevant to the public interest than others, but this would be difficult to reliably substantiate. The formulation of regulations even in 'non-obvious' areas may still have detrimental external effects that will not be known in advance unless the social dimension is structurally incorporated from the start. In addition, the institution is designed to include future regulatory areas for attention that will not be acknowledged in the TTIP text. This is the purpose of the 'living instrument' notion. Inevitably the reach of the TTIP will then expand over time with no mechanism for democratic oversight or mechanism for rejection of any proposed expansions that the public disagrees with.

There is therefore a legitimate concern that important issues will slip 'under the radar' and be decided in the dark and on solely economic and highly technical criteria, producing a result that may be socially sub-optimal but highly difficult to reverse once in place. The issue of clinical data protection is a good example. Its relevance to public health is orders of magnitude greater than the issue of coloured electrical wiring, however, in the process of regulatory harmonisation outlined by the Commission there is no prior or structural mechanism to necessarily distinguish between the two, or to ensure that social criteria are adequately accounted for in the impact assessment procedures agreed to by the new institution created.

⁴⁶¹ Erica Smith, David Azoulay and Baskut Tuncak, 'Lowest Common Denominator: How the proposed EU-US Trade Deal threatens to lower standards of protection from toxic chemicals', Center For International Environmental Law, 2015.

⁴⁶² WTO Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006.

⁴⁶³ WTO Appellate Body Report, *European Communities – Measures Affecting Importation of Certain Poultry Products*, WT/DS69/AB/R, 13 July 1998.

⁴⁶⁴ WTO Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998.

⁴⁶⁵ Echoing what many regard as common sense, one study concludes that "[c]oncrete shared norms for standard-setting, certainly substantive ones, are one bridge too far for EU-U.S. regulatory cooperation." Anne Meuwese, 'EU-U.S. Horizontal Regulatory Cooperation Two global regulatory powers converging on how to assess regulatory impacts?', Paper for the California-EU Regulatory Cooperation Project Leuven, Conference Brussels 10 June 2009, Draft version, April 2009, p. 32. See also, Jacques Pelkmans and Anabela Correia de Brito, 'Transatlantic MRAs: Lessons for TTIP?', CEPS Special Report No. 101, March 2015.

⁴⁶⁶ US Government Accountability Office, 'Chemical Regulation: Comparison of U.S. and Recently Enacted European Union Approaches to Protect against the Risks of Toxic Chemicals', GAO-07-825, August 2007.

⁴⁶⁷ European Commission, 'Transatlantic Trade and Investment Partnership (TTIP): Chapter on Regulatory Cooperation - Detailed Explanation on the EU proposal for a Chapter on Regulatory Cooperation' (as per revised version made public on 4 May 2015), 6 May 2015, p. 8.

The only indirect mechanism would be the transparency of the process and the operation of a vigilant and well-funded civil society. Yet it is easy to see how the structure of the process places those whose health and safety is most directly affected by government regulation one or two steps behind the ball. There is not likely to be much opportunity for substantial influence through ‘submissions’ of participation in a single annual event that will inevitably, by nature of the size and unwieldy nature of the subject matter, be superficial. Notably, an “EU-US multi-stakeholder advisory committee” that “would regularly meet with and work with EU competent authorities and US regulators in crafting regulatory measures or taking decisions” that was mentioned in an earlier leaked Commission position paper has since disappeared.⁴⁶⁸ The replacement is the far less impressive ‘Civil Society Contact Group’.

It could be argued that business interests are equally behind, but this would be to ignore the fact that the entire process itself is not created with public health at the forefront of intent, business occupies that forefront position. Regulatory harmonisation is a creation for business. Therefore, even if it is equally excluded from the process in a formal sense this will make no difference in fact, as its interests are structurally included. They are the very foundation of the process. In this respect it is of concern that the inclusion of social criteria in existing impact assessments on both sides of the Atlantic may be watered down, when there would evidently be a need for them to be expanded and strengthened.

The issue of participation in the institution proposed is of course yet to be settled,⁴⁶⁹ however, it all but goes without saying that if the public interest and civil society are not structurally placed on a *substantively or factually* equal level, as compared to a merely formal equality, then the process will be disproportionately influenced by multinational corporations. They have the connections, power, finances and by nature well-defined structural linkages across the Atlantic through subsidiaries. In any formally equal system their ‘voice’ will inevitably crowd out that of local communities and disparate pressure groups that are still organised largely at a national level. This new institution then may amount to a new forum for multinationals to push their agenda where they have the ‘ear’ of powerful official standard-setters capable of significantly shaping the regulatory framework in the largest market in the world. This is a forum that is far out of reach for most civil society actors, which are under-funded, over-stretched and localised.

The fate of the EU’s precautionary principle is central to the debate. The Commission and others point to the fact that it is enshrined in EU law and cannot be removed by TTIP. Yet others argue that this is a mere formalisation and that everyone really knows that decisions on when and if the precautionary principle is invoked are political decisions not legal ones, making them subject to significant influence in practice.⁴⁷⁰ Some note the significance of the omission of the term ‘precautionary principle’ from all of the EU’s draft texts.⁴⁷¹ There has been significant pressure from the US government and US multinationals for many years on the EU to weaken the precautionary principle and to introduce more ‘scientifically based cost-benefit’ assessment methods that are by most measures more risky. This has

⁴⁶⁸ ‘TTIP: Cross-cutting disciplines and Institutional provisions - Position paper – Chapter on Regulatory Coherence’, (draft EC proposal, Dec 2013), p. 4.

⁴⁶⁹ However the previous experience with CETA is not encouraging in this respect. See, Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood (eds.), ‘Making Sense of the CETA: An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement’, Canadian Centre for Policy Alternatives, September 2014, p. 10.

⁴⁷⁰ For a sample of the academic commentary in this regard see, Susan Rose-Ackerman, ‘Precaution, Proportionality, and Cost/Benefit Analysis: False Analogies’ 4 *European Journal of Risk Regulation* 2 (2013); David Vogel, *The Politics of Precaution: Regulating Health, Safety and Environmental Risks in Europe and the United States* (Princeton University Press, Princeton, 2012); Adam Burgess, ‘Missing the Wood for the Trees’ 4 *European Journal of Risk Regulation* (2013).

⁴⁷¹ Ronan O’Brien, ‘Regulatory cooperation at the core of TTIP and its likely consequences’, Brussels, October 2014, p. 14, http://www2.euromemorandum.eu/uploads/regulatory_cooperation_obrien_rev_oct_2014_1.pdf.

had some results in that the EU has begun to change its methods to some degree and in some areas.⁴⁷² Although the extent and significance of this change is disputed,⁴⁷³ and many believe it to be minimal.

TTIP has heightened this pressure, sometimes explicitly through the comments of US officials,⁴⁷⁴ which scholars have shown to effectively allow the European Commission to in turn push Member State legislatures for reform through appeal to 'international pressures'.⁴⁷⁵ Reports suggest, for instance, that planned EU regulation on certain chemicals linked to cancer and male infertility were shelved due to insistence from US trade officials at the behest of the American Chamber of Commerce.⁴⁷⁶ The US interests pushed for 'scientific' cost-benefit assessments that would "set looser thresholds for acceptable exposure" to the chemical than those set by the EU.⁴⁷⁷ While the regulation was delayed until 2016, estimates of the health costs incurred by the delay stand at € 150 billion per year. Scholars argue that US style cost-benefit assessment can have many direct benefits for business,⁴⁷⁸ as it opens up a process of regulation that would otherwise be more closed to powerful interest groups, providing ample opportunities for manipulation of the process. Again it can be argued that NGOs and other non-business constituencies have the same opportunities. But they do not have the same means, especially in the transnational context.

It is for these reasons that large sections of civil society remain unconvinced by the quite glib statements from the Commission in its fact sheet written in response to such serious concerns, that this will all occur without "lowering our levels of protection for people's health, their wellbeing or rights as consumers, the environment, [or] other things that benefit society as a whole."⁴⁷⁹

There is a fundamental problem in converging between what are widely agreed to be a higher set of current standards in the EU and a lower set of current standards in the US; that the most likely endpoint will be in between, that is it will represent a raising of standards for the US and a lowering of standards for the EU. It is highly unlikely that the US will accept the EU standards across the board, thereby ensuring a total upward harmonisation to the highest standards currently enforced. Regulatory convergence in and of itself would seem, on the face of it, to essentially be all but defined as a lowering of EU standards, in at least some areas, as is confirmed by a study done for the European Parliament in the food sector.⁴⁸⁰ This is the central dilemma for the EU people and a fundamental point that brings the entire TTIP endeavour into question from a public European viewpoint. The dilemma has been met by the European Parliament by a statement which "emphasises that an alignment of EU and US regulatory standards should aim at reaching the highest common standard".⁴⁸¹ However, it seems that the Parliament will have very little say over this issue. The new supra-national institution to be set up

⁴⁷² David Vogel, *The Politics of Precaution: Regulating Health, Safety and Environmental Risks in Europe and the United States* (Princeton University Press, Princeton, 2012).

⁴⁷³ Adam Burgess, 'Missing the Wood for the Trees' 4 *European Journal of Risk Regulation* (2013).

⁴⁷⁴ Euractiv, 'US wants 'science' to settle GMO debate in trade deal with EU', Euractiv.com, 18 June 2014.

⁴⁷⁵ Mark Pollack and Gregory Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford University Press, Oxford, 2009), p. 82.

⁴⁷⁶ Arthur Neslen, 'EU dropped pesticide laws due to US pressure over TTIP, documents reveal', Guardian, 22 May 2015; Elizabeth Grossman, 'Report: transatlantic trade agreement could increase toxic pesticide use' Guardian, 7 January 2015; Arthur Neslen, 'Suppressed' EU report could have banned pesticides worth billions', Guardian, 2 February 2015.

⁴⁷⁷ Arthur Neslen, 'EU dropped pesticide laws due to US pressure over TTIP, documents reveal', Guardian, 22 May 2015.

⁴⁷⁸ Fabrizio De Francesco, Claudio Radaelli and Vera Troeger, 'Implementing Regulatory Innovations in Europe: The Case of Impact Assessment' 19 *Journal of European Public Policy* (2012).

⁴⁷⁹ European Commission, 'Regulatory Cooperation in TTIP: Cutting red tape for EU firms – without cutting corners', http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153002.1%20RegCo.pdf.

⁴⁸⁰ Jean-Cristophe Bureau et al, 'Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement: Study for European Parliament', DG for Internal Policies, Policy Department, Structural and Cohesion Policies, July 2014.

⁴⁸¹ European Parliament, Resolution of 23 October 2012 on trade and economic relations with the United States, (2012/2149(INI)), (P7_TA(2012)0388), para 11.

will be comprised of regulators not parliamentarians, and it has been pointed out that in current drafts there is no provision for the involvement of the European Parliament in the subsequent inclusion of the results of the institutions deliberations into the EU legal order.⁴⁸²

In any event, it must be ultimately asked how likely is overall upward harmonisation? And is it worth the risk. The fact remains that the benefits from regulation are large, in many respects essential to human wellbeing and easily identified, while the expected economic gains from TTIP are small to non-existent and at best hard to distinguish. Even a small lowering of standards across the EU would easily outweigh the economic gains that can be foreseen.

The issue of regulatory coherence is also tied very closely with the rarely mentioned peak of ambition regarding TTIP. This ‘TTIP crescendo’, is, as Commissioner Malmstrom puts it:

to strengthen our voice in the world” and “to project European values on a global scale”, because “who else is there with us at the international top table of the future, along with China, Russia, and India? Who, like us, firmly believes that globalisation needs to be framed by a clear set of rules on everything from product safety to human rights? Which of those other top five world economies will share our high standards of regulation, democracy, and the rule of law? And that’s why we need the Transatlantic Trade and Investment Partnership. To strengthen our transatlantic partnership for long term! The clue is in the name.⁴⁸³

Yet the crucial question is, whose voice will the ‘voice’ of TTIP be? If ‘our voice’ means a European voice pre TTIP, will TTIP change that? After a process of regulatory harmonisation will it ultimately be ‘European values’ that are in the end projected upon the world? This would seem highly unlikely. Tens of thousands who have peacefully demonstrated in Europe’s streets and squares would argue that ‘European values’ are already being compromised in the process of *negotiating* TTIP. It is anyone’s guess what these values will be after TTIP or who they will belong to. Some fear that whatever the EU’s intentions may be, it could nevertheless be used by US interests to downgrade average standards in the world’s largest market and then export these to the rest of the world. This is a simplification of an argument returned to below.

To summarise, we conclude that the risks of lowered standards through the operation of the mechanisms foreseen in the Commissions latest draft are high and most likely to outweigh any perceived economic gain. Although it would no doubt disappoint many who have been working hard for regulatory convergence between the EU and US for years, and who have been hoping that TTIP and a new institution with wide influence would be a quantum leap in this field, the loss of democratic control over the convergence process that would seem to underlie the whole of this chapter in TTIP is too great to allow its inclusion in the present form. Even if it has been slow the regulatory convergence process has moved forward over the years, and most importantly it has done so under regimes of democratic accountability. Perhaps in this area slow convergence that the people are clearly aware of, can follow and can more easily control is best given the degree of difference in approaches. As the Commission and others state, there are clearly identified current areas where steps could be taken without any controversy, such as the standardisation of inspections of pharmaceutical manufacturing plants to avoid unnecessary flights across the Atlantic and the unnecessary duplication of paperwork. The chapter should be limited to commitments on these ‘easy’ issues in the traditional manner of trade

⁴⁸² Alberto Alemanno, ‘The Transatlantic Trade and Investment Partnership (TTIP) and Parliamentary Regulatory Cooperation’, European Parliament, DG for External Policies, Policy Department, EXPO/B/AFET/2013/32, April 2014, p. 51.

⁴⁸³ Speech by Commissioner Cecilia Malmström, ‘TTIP: Subsidiarity and other shared transatlantic principles’, delivered to the Plenary Session of the Committee on the Regions, Brussels, 12 February 2015.

negotiations. In the end, if so many of the divergences creating economic loss are really so small, insignificant, technical and uncontroversial, as the Commission and others argue, it is difficult to see why there is a need for a new supra-national regulatory oversight regime to overcome them.

In the event that a drive towards establishment of this new regime proves too strong, we would recommend some specific adaptations to the Commission's proposal. Firstly, the Commission should clarify that 'regulatory exchanges' between the EU and US under the agreement remain clearly voluntary at all levels, central and non-central, by amending the language in Articles 9 and 11 as suggested above, replacing the words 'will' and 'shall' with 'may', to align with the statements made by the Commission in this respect. Secondly, the text should establish, or re-establish, a multi-stakeholder advisory committee in addition to the Civil Society Contact Groups proposed. This advisory committee should have a permanent, fully integrated and formal place in the structure of any new institution with continuous engagement in deliberations, and be comprised of four equal parts representing business, consumers, trade unions and civil society.

Third, the European Parliament and the US Congress must be given a formal role in the modalities by which 1) the existing regulatory agenda of the institution is expanded, and 2) any adaptations to existing regulations and regulatory processes are incorporated into law. Fourth, the complete transparency of the institution must be ensured, and clear clauses adopted to ensure that processes will not take inordinate time and delay the making of necessary decisions in haste to protect public health and other established public interests. Fifth, it should be ensured that the institution does not have any final authority, but be limited to making recommendations. There should be no requirement to wait for such recommendations beyond a reasonable and clearly specified time, and there should be safeguards against abusive delaying practices of whatever origin.

Sixth, clear provisions must be added that require regulatory convergence to be in an upward direction, the precautionary principle should be expressly set out as a principle that is to be protected, and there should be a clear expectation that the bias should be towards the US incorporating the precautionary principle into regulatory analysis. In addition, there should be an early warning mechanism in place to distinguish which regulations have a significant social benefit or costs, to group them accordingly and to treat them differently. Finally, it should be specified that any form of impact assessment that is adopted must include not only the highest standards of social criteria but also must apply human rights standards and be conducted in the light of the human rights obligations of all levels of government. Specifically, assessment should be based on established methodologies of human rights impact assessment that, in particular, take into account the progressive nature of socio-economic rights.

It is advised that civil society pay very close attention to the precise definitions of key terms in any final agreement, such as 'mutual recognition', 'convergence', 'regulatory coherence' and 'harmonisation', because the devil is, as always, in the details. These terms should at least be as clearly and concisely defined as possible, allowing minimal room for extensive interpretation.

4.4 – Trade in Services

According to the European Commission's mandate;

The aim of negotiations on trade in services will be to bind the existing autonomous level of liberalisation of both Parties at the highest level of liberalisation captured in existing FTAs, in line with Article V of GATS, *covering substantially all sectors* and all modes of supply, while achieving

new market access by tackling remaining long-standing market access barriers, *recognising the sensitive nature of certain sectors*. ... The high quality of the EU's public utilities *should be preserved*.⁴⁸⁴

Given the conflicting aims represented here, and given that there is no assurance that the quality of the EU's public services and utilities *will be preserved*, there is significant concern that TTIP could lead to greater privatisation of the health services sector and an increasing loss of government control, service quality and democratic accountability in this area. These concerns persist despite regular protestations from politicians, diplomats and negotiators that they are overblown and that health services will assuredly be protected in the agreement.⁴⁸⁵ The experience of the UK with regard to the latest amendments made to its Health and Social Care Act 2012, whereby even the conservative government has been somewhat surprised at the apparently unintended consequences of creating a competitive market in health services, has sparked a loud debate within that country on the perhaps equally unintended consequences of TTIP.⁴⁸⁶

Section 75 of the Act relates to requirements for opening up the provision of health services to a "competitive tendering" process, which has resulted in progressively more contracts being won by private operators, and subsequently to fears that the UK's National Health Service (NHS) is being slowly privatised and that "[v]ital cash from NHS budgets is flowing ... into private companies seeking profits from health care."⁴⁸⁷ A motion was even tabled in the UK House of Lords to annul Section 75, but failed.⁴⁸⁸ The reduction of public health budgets under conditions of austerity has also contributed to widespread anger. This has spilled over into a negative perception of TTIP's consequences for the national health services that are the pride of many British people, and worries that the amendments to the Health and Social Care Act were a planned prelude to the creation of a market based health care system along US lines through the action of TTIP.⁴⁸⁹

These concerns are not limited to the UK. The European Commission has reported that 17 million people were employed in the health sector Europe-wide in 2010, constituting 8% of jobs in the EU at that time.⁴⁹⁰ There is a general perception, supported by in depth studies,⁴⁹¹ that privatisation and forced competition with US health providers will drive down wages and working conditions, as well as the quality of care.

It remains to be seen whether some of these fears may be overblown, however, even if perhaps somewhat exaggerated they do rest on highly valid concerns. Unilateral liberalisation or privatisation of a certain sector, or in other words the decision of a government to liberalise outside of the context of negotiations with another country, can be locked in by a subsequent international trade agreement.

⁴⁸⁴ Council of the European Union, 'Directives for the negotiations on the Transatlantic Trade and Investment Partnership between the European Union and the United States', Brussels, 11103/13, 17 June 2013, <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> (emphasis added).

⁴⁸⁵ Vince Cable, 'Letter to all members of parliament: the Transatlantic Trade and Investment Partnership', UK Department of Business, Innovation and Skills, 22 September 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360261/bis-14-1109-Vince-Cable-letter-dated-22-September-2014-to-All-MPs-TTIP.pdf; Cecilia Malmström, 'NHS and TTIP: letter from EU trade commissioner Cecilia Malmström, 2015', Department for Business, Innovation and Skills, 2015.

⁴⁸⁶ Lucy Reynolds and Martin McKee, 'Is the NHS really safe from international trade agreements?', *The BMJ*, 28 April 2015.

⁴⁸⁷ Jackie Davis, John Lister and David Wrigley, *NHS For Sale* (Merlin Press, London, 2015).

⁴⁸⁸ Caroline Molloy, 'After Section 75 - where next for NHS campaigners?', *Open Democracy*, 8 May 2013.

⁴⁸⁹ Linda Kaucher, 'The real force behind the NHS Act: The EU-US trade agreement', *Open Democracy*, 19 February 2013.

⁴⁹⁰ European Commission, 'Staff Working Document on an Action Plan for the EU Health Workforce', SWD(2012) 93 final, Strasbourg, 18 April 2012, p. 2.

⁴⁹¹ Christoph Hermann and Jörg Flecker, 'Privatisation of Public Services and the Impact on Quality, Employment and Productivity (PIQUE) – Final Report', Vienna, 2009; Jane Lethbridge, 'Empty Promises: The Impact of Outsourcing on the Delivery of NHS Services', Public Services International Research Unit, February 2012.

This is the meaning of the phrase “to bind the existing autonomous level of liberalisation of both Parties at the highest level of liberalisation” in its mandate. In the absence of specific undertakings, the services section of the agreement would act to bar moves by a government to increase interference in the market by winding back liberalisation and returning certain services or aspects of the services sector to public control. Indeed this is one of the central purposes of trade agreements, to make such moves towards greater liberalisation effectively irreversible, either through legal sanction or financial cost. Again, *unless specific undertaking are made*, which are addressed below, the trade regime will operate in the same way as the investment regime as discussed above in regard to the attempted reversal of privatised health insurance markets in Slovakia. That is, by design it will prevent ‘backsliding’ into public control and accountability. However, there are specific actions governments can take to prevent this from occurring.

The General Agreement on Trade in Services (GATS), on which any services section in TTIP will be modelled, may possibly deal with this issue through its own general exception clause, Article XIV, which is virtually the same as Article XX GATT. It has a similar structure and is routinely applied in the same way by WTO dispute panels. The WTO Appellate body frequently looks to the jurisprudence on GATT XX when applying GATS XIV and vice versa. The crucial terms that the articles have in common, such as ‘arbitrary or unjustifiable discrimination’, ‘necessary’, and ‘disguised restriction on trade’, are all interpreted in the same manner, and there are no significant differences between the articles in terminology.⁴⁹² Therefore, the analysis applied to the case study of plain packaging and GATT Article XX applies equally to an exceptions clause in the case of services.

Many measures that a government may wish to legitimately take in the interests of public health may not rise to the same levels of ‘necessity’ as plain packaging and may involve necessary discrimination. The reversal of imprudent or failed privatisation measures regarding health services would be a good example of a legitimate government measure that would only pass a necessity test with very great difficulty. As such, it would be wise to seek methods for lowering this standard such as those mentioned above. This conclusion is reinforced by a consideration of the importance of retaining the precautionary principle and not having it eroded, especially in such an important area as public health. In this respect, States could take note of the Doha Declaration on TRIPS and Public Health and incorporate that understanding throughout the interpretation process of all trade provisions, not just those on intellectual property. This would aid significantly in protecting the State’s right to regulate or to reverse ineffective, inefficient and wasteful privatisation.

Providing the most security and clarity, public services in general, and health services in particular, may simply be excluded or ‘carved-out’ of the entire services chapter of a prospective agreement.⁴⁹³ For example, Article I.3(b) of GATS defines the word ‘services’ for the purpose of the agreement and states that “‘services’ includes any service in any sector except services supplied in the exercise of governmental authority”. As such, the only services that are explicitly carved out from the entire agreement are those related to the exercise of governmental authority. Despite the broad sound of this phrase its meaning is quite narrow. It is generally understood as applying only to those services relating

⁴⁹² Tania Voon, ‘Flexibilities in WTO Law to Support Tobacco Control Regulation’ 39 *American Journal of Law and Medicine* (2013), pp 208-209.

⁴⁹³ Markus Krajewski and Britta Kynast, ‘Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Legal Framework for Public Services in Europe’, Hans-Böckler-Stiftung, Friedrich-Alexander University Erlangen-Nürnberg, 1 October 2014, p. 20.

directly to the core of State sovereignty and State power,⁴⁹⁴ such as the penal system and justice administration, and police and military activities.

This means that most public services, including health, education, post and telecommunications for example, are not covered by this form of broad exception. Nevertheless, this demonstrates that it would be possible in theory to exclude particular services of high sensitivity through express exclusion from the definition of services for the purposes of a given agreement. For example, Article 135(2) of the EU–Chile Association Agreement of 2002 states that the “provisions of this Title shall not apply to the Parties' respective social security systems or to activities in the territory of each Party which are connected, even occasionally, with the exercise of official authority.” This explicitly carves out social security in addition to the scope of Article I.3(b) GATS.

Given the controversy surrounding health services in the EU this is an option that the Commission may wish to consider. On the other hand, some Member States may not wish to have their health services entirely excluded, which may make this broad exclusion in the TTIP technically difficult, even if other Member States favoured this approach. This was not the case in CETA however, and would represent a departure in the practice of the EU. In CETA it is up to the Member States to each enter their own preferences relating to exclusion of their public services.

More flexible alternatives are provided in the body of the agreement. The most important substantive obligations in services agreements are the non-discrimination obligations of most-favoured nation and national treatment and obligations of market access. National treatment and most-favoured nation treatment operate in the same way as described above with respect to investment. Market access provisions potentially restrict the regulation of public services by barring public monopolies and the ability of governments to confer exclusive rights and capacities on particular service providers. These provisions also prevent the operation of ‘economic needs tests’, which can restrict the number of service providers in a given market in accordance with public interests that require the maintenance of a high quality and security of access to certain services through the prevention of the negative effects of competition.

Market access provisions therefore are aimed at preventing the most common and traditional ways in which governments regulate public services. Within the context of the agreement the presumption is that these provisions will apply to all services (with the usual exception of those pursuant to governmental authority) unless specific undertakings are made to expressly limit the services to which these provisions apply. In the absence of these undertakings the agreement will make it difficult to introduce or reintroduce measures regulating public services. The EU and the Member States each have significant latitude in determining their own limitations and the extent of market access provided. This may be delineated as finely as is desired, specifically excluding particular sectors, aspects of sectors and degrees of market access by declaring certain regulatory measures to be allowed under the agreement. Given the consequences of not ensuring that proper limitations are expressly included in the text, the phrasing of commitments by the EU and by each Member State in relation to public services is of crucial importance, as is the position of the limitation in the text of the agreement.

With regard to the structure of services agreements there are two critical distinctions; the first is between a ‘positive list’ and a ‘negative list’ approach, and the second is between Annex I and Annex II exceptions. On the first distinction, liberalisation and increased market access may occur in two ways. In the positive list approach it is only the specific sectors and areas that are nominated in a particular

⁴⁹⁴ Eric Leroux, ‘What Is a ‘Service Supplied in the Exercise of Governmental Authority’ under Article I:3(b) and (c) of the General Agreement on Trade in Services?’ 40 *Journal of World Trade* (2006).

list included in the agreement that are taken as subject to the provisions of the agreement. This is generally regarded as the slower or more restrictive approach to liberalisation of services. Liberalisation will not occur except in relation to the sectors and services expressly listed. In the negative list approach liberalisation is assumed to apply to *all* services except for those expressly nominated in the list. This is usually understood as the faster or more open approach to liberalisation. Only those services on the list will be protected. Basically, a negative list approach makes it far more difficult for governments to ensure appropriate levels of protection for given services. A prior determination of which services are sensitive and in need of protection and exclusion, or, more importantly, those which *may become sensitive in the future*, is not an easy task. Furthermore, the very definition of terms such as ‘services’, ‘public services’, ‘public utilities’ and ‘health services’ are far from clear and settled. These factors mean that a positive list approach is clearly the safest as it does not assume liberalisation and market control, and makes it far easier for governments to maintain control over services. In fact, under the positive list approach democratically accountable government control is the default assumption.

The EU has typically followed the positive list approach not least because of the complexity of specifying all of the services to be exempted at the level of the EU as a whole and at the level of each of the 28 Member States.⁴⁹⁵ However, in CETA it changed direction and applied a negative list approach. This prompted a resolution from the European Parliament demanding that this divergence from usual practice in CETA “be seen as a mere exception and not serve as a precedent for future negotiations”.⁴⁹⁶ Despite this resolution it is highly probably that another ‘exception’ will be made in the case of TTIP. The US has always followed a negative list approach in its bilateral agreements and the EU will find it very difficult to reverse from CETA in negotiations with the US. For the purposes here it is assumed that a negative list approach will be followed. This ensures preparation for the ‘worst case scenario’. If a positive list is in the end adopted the methods of excluding health services will be much simpler, and will essentially amount to not mentioning them at all, except in the context of a general exclusion clause for good measure.

On the second distinction, there will be two annexes included in the agreement. Under a negative list approach Annex I specifies existing measures that are currently in operation in relation to particular services which contravene the substantive obligations of the agreement. These ‘existing non-conforming measures’ may only be retained if they are listed in Annex I. This may be a very difficult enterprise, to accurately list every measure that a government or public authority at any national level currently uses to regulate particular services and wishes to retain. To be properly excluded there needs to be a description of the relevant sector or sub-sector, a declaration of which substantive obligations of the agreement the measure should be protected from, and a description of the measure at issue.

With respect to the EU it is important to stress that measures may be both to the EU as a whole and each Member State individually. Each Member State therefore has the ability to formulate its own exceptions and commitments. If an individual Member State wishes to exclude all public services from the agreement, for example, it is not necessary for the EU to do so at the supra-national level, however the given Member State must be sure to enter the limitation itself in an appropriate and clear manner in consciousness that anything not expressly mentioned is subject to the terms of the agreement.

Importantly, Annex I measures are subject to a ‘ratchet clause’. Only changes in these measures that involve equal or greater degrees of liberalisation are allowed. This means that changes to the measures

⁴⁹⁵ Markus Krajewski and Britta Kynast, ‘Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Legal Framework for Public Services in Europe’, Hans-Böckler-Stiftung, Friedrich-Alexander University Erlangen-Nürnberg, 1 October 2014, p. 26.

⁴⁹⁶ European Parliament, European Parliament resolution of 8 June 2011 on EU-Canada trade relations, P7_TA(2011)0257, para 5.

listed in Annex I that are in a more liberal direction cannot be reversed. Measures that are taken in order to regulate health services that are listed here, for example maintaining a certain level of privatisation or rules excluding for-profit health insurance providers from the market, and which are later liberalised, for example increasing private access to the health services market or allowing for-profit health insurance providers to operate, cannot then be undone. This is the case even though the measure remains listed in Annex I. Clearly the ‘ratchet clause’ has a particularly negative effect on the scope of the State’s right to regulate. Of particular concern in the case of Ireland, which is now debating the privatisation and marketization of its water supply, is the fact that in a number of European States water supplies and services have had to be re-municipalised as a result of poor private performance and widespread public dissatisfaction, thereby reversing previous liberalisation in this sector. Therefore, such measures “could be prevented in principle using a ratchet clause. Thus in particular with regard to reforms that are likely to lead to less competition this can have a restrictive effect.”⁴⁹⁷

Annex II also contains a list of measures that do not comply with the provisions of the agreement. However, Annex II also applies to new or future measures, and importantly, the ‘ratchet clause’ does not apply to Annex II. Therefore, as Krajewski and Kynast conclude,

it is clear that states have significant autonomy only in relation to public services that are listed in Annex II. In order to ensure that autonomy concerning the provision and organisation of public services is not restricted by the liberalisation obligations of TTIP these would have to be listed in Annex II.⁴⁹⁸

Here again, measures must be specified carefully, setting out the sector or subsector, the provisions in the agreement from which measures are to be excepted, and providing a clear description of the nature of the exception, perhaps with examples of measures currently adopted and those that may be taken in the future, for added clarity. Protection for certain services may be provided through either or both horizontal exceptions or through sector-specific exceptions. A horizontal exception for public services, for example, will apply to all measures, present and future, that apply to all sectors relevant to all public services. Alternatively, sector-specific exceptions may be listed on an individual basis, such as for all health services.

Given that the definition of ‘public services’ is not settled, it would be safest to include both a horizontal exception for public services *and* specific sectoral exceptions, particularly in the case of health services, which should be defined broadly. Furthermore, care should be taken to ensure that the exceptions apply to all of the substantive obligations of the agreement, national treatment, most-favoured nation treatment and market access. This dual approach, ensuring detailed textual coverage of each sector to be protected, provides the greatest level of protection in the body of the agreement for sensitive service sectors. Roughly speaking, this was the approach taken by the EU in CETA, and according to Krajewski and Kynast it is also the approach currently being taken in TTIP; whereby there is a planned horizontal exception for ‘public utilities’ and “sector-specific exceptions for environmental services, as well as publically funded education, health and social services, *although they refer only to national treatment.*”⁴⁹⁹

This last point could be of importance, and indicates an improvement that could be made to better protect health services. They should be excluded also from the other major provisions of the agreement

⁴⁹⁷ Markus Krajewski and Britta Kynast, ‘Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Legal Framework for Public Services in Europe’, Hans-Böckler-Stiftung, Friedrich-Alexander University Erlangen-Nürnberg, 1 October 2014, p. 28.

⁴⁹⁸ Ibid, p. 28.

⁴⁹⁹ Ibid, p. 28 (emphasis added).

relating to most-favoured nation treatment and market access, with the last being the most important. Member States would be free to ensure such exclusion individually in their own entries to Annex II.

Despite these relatively clear options to exclude public services completely, and health services specifically, reports persist that the European Commission has not decisively removed health services from the scope of the final agreement.⁵⁰⁰ As noted elsewhere,

there remains a clearly articulated view coming from industry and some elements of Member State governments resistant to a blanket exemption for health and keen to consider the potential benefits that could accrue to health from greater levels of market liberalisation. One of the most recent comments by a government Minister in the UK was quoted as saying that they “should be included because Britain’s healthcare industry is a major exporter and would benefit from more open trade.”⁵⁰¹

This leads to understandable confusion in the public domain, particularly around certain services such as hospital, medical and dental services. Given the lack of clarity there is a need to maintain a focus on the details of the negotiations and to pay close attention to the scheduled annexes of the final services chapter to ensure that the health sector is properly excluded. What is of prime importance is that the ultimate decision may be made by the Member States of the EU independently. The EU may make a blanket exclusion, however, if this does not occur each Member State has the power to ensure that its own health services are clearly excluded by use of their own entries into Annex II of the agreement, taking care that they apply to all of the substantive obligations of the agreement by naming each specifically.⁵⁰² This is the safest method of ensuring that health services will remain under local public control.

⁵⁰⁰ John Hillary, ‘The Transatlantic Trade and Investment Partnership and UK Healthcare’, *The BMJ*, 4 November 2014.

⁵⁰¹ Usman Khan, Robert Pallot, David Taylor and Panos Kanavos, ‘The Transatlantic Trade and Investment Partnership: International Trade Law, Health Systems and Public Health’, London School of Economics and Political Science, January 2015, pp. 41-42.

⁵⁰² A concise wording is suggested by Krajewski and Kynast; “With regard to public services the party shall reserve the right to restrict the number of services and service providers, to impose specific obligations on service providers and to regulate the provision of these services in the general interest”. Markus Krajewski and Britta Kynast, ‘Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Legal Framework for Public Services in Europe’, Hans-Böckler-Stiftung, Friedrich-Alexander University Erlangen-Nürnberg, 1 October 2014, p. 32.

5. CONCLUSIONS AND RECOMMENDATIONS

The clear conclusion to be drawn from this study is that the predicted economic benefits from TTIP are too small or speculative to justify the associated social risks. The underlying structural causes of the 2008 global financial crisis—and its ongoing impacts—were defined and exacerbated in large part by excessive power being granted to the market, and by failures to foreground the social effects of government policy and regulation or (more importantly) the social effects of a lack of government regulation. The TTIP process ultimately risks the further disintegration of social fabrics, rather than their restitution.

One of the other main justifications put forward for TTIP is that it will consolidate the transatlantic marketplace and fortify the economic dominance of the global North in the face of increasingly multipolar axes of ‘globalisation’ tilting towards Asia and the global South. This is a dubious justification at best, and is again rooted in the projected economic effects of TTIP. Any such economic benefits will be exclusionary of the global South and will pose threats to social protections within the EU and US. As such, this study finds that the economic, social, legal and democratic cases for the imperative of TTIP are weak overall, and as such that available political avenues should be pursued to bring about the suspension of its negotiation.

Given the stated and, for now, apparently irreversible commitment to concluding the TTIP negotiations, however, civil society groups and the public health community should maintain an engaged and proactive approach to ensure that at the least, a precautionary approach underpinned by holistic societal perspectives forms the basis for the agreement’s formulation.

With this in mind, and on the basis of the analysis presented in the study, we make the following recommendations. Where necessary the recommendations are graded, from those measures appropriate to best ensure the security of public health, to those measures viewed as minimal safeguards for public health within the framework of the agreement as it is currently being negotiated.

5.1 – European Commission

We recommend that the European Commission, **with respect to the Transatlantic Trade and Investment Partnership agreement as a whole:**

- Provide for the conduct of a fully independent *ex ante* human rights impact assessment (HRIA), in addition to, but not as a part of, a social impact assessment and an environmental impact assessment, as soon as possible to guide and inform future negotiations, including assessment of the investor-State dispute settlement mechanism and the proposed Regulatory Cooperation Body. The HRIA should conform

to the framework set out by the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements.⁵⁰³

- Provide all the necessary information, assistance and openness to each Member State in the conduct of their own human rights, social and environmental impact assessments at the national level.
- Provide complete transparency to the public in the conduct of negotiations, with respect to all documents and communications.
- Not reopen negotiations on investment until there is a clear public consensus on the future direction and shape of this chapter.
- Include a general clause that establishes the State's right to regulate, which applies to the entire agreement, and which is modelled on such previous clauses in the Havana Charter and Protocol 1 of the European Convention on Human Rights. This clause should also incorporate the principles of the Doha Declaration on TRIPS and Public Health and apply them to the whole agreement.
- Include a general exceptions clause, and if so this clause should not adopt a test of necessity, but should employ a lower standard of proof as indicated by phrases connecting government measures to the stated public aims such as 'related to' or 'reasonably understood as required for'. This clause must expressly refer to the fulfilment of States' human rights obligations under international and domestic law as one of these stated aims.
- Include a provision that recognises the obligations of States and the responsibilities of corporations and investors under the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, requiring the provisions of the agreement to be read in consistency with these international instruments, in addition to further international instruments detailing the specific obligations of States under international human rights law, as well as any future treaties or instruments relating to human rights and business enterprises.
- Include a general exception clause that specifically excludes measures related to tobacco control in alignment with the Framework Convention on Tobacco Control from the scope of the whole agreement.

We recommend that the European Commission, **with respect to the investment chapter** of the agreement:

- Exclude investor-State dispute settlement (ISDS) from the terms of future negotiations.

⁵⁰³ United Nations Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, Guiding principles on human rights impact assessments of trade and investment agreements, UN Doc. A/HRC/19/59/Add.5, 19 December 2011.

If this does not occur, we recommend that with respect to the procedural provisions of the chapter:

- There be a provision requiring the exhaustion of domestic remedies
- The adjudication process be fully judicialised in line with the structure of WTO dispute settlement, including full transparency, a rule of precedent, ethical guidelines on the conduct of adjudicators, and criteria for appointment equal to that of domestic judges.
- An appellate body be established and operate in the same manner as the WTO Appellate Body.
- In the case of claims involving human rights issues, a communications mechanism be established between the investment courts and the UN and regional human rights treaty bodies such that recommendations may be made and advice given on the scope and application of human rights norms, to better inform the investment court's decision.
- There be provision for the acceptance of amicus curiae, with directions that this acceptance be allowed broadly, in the public interest.

With respect to the substantive provisions of the chapter we recommend:-

- The substantive provisions of the investment chapter be restricted to national treatment and most-favoured nation treatment, excluding provisions on minimum standards of treatment and indirect expropriation.

If this does not occur, we recommend that:

- The right to regulate be set out clearly as a separate clause in the substantive body of the text.
- There be a provision setting out clearly that the treatment to be accorded to foreign investors under the agreement cannot exceed the level of treatment afforded to domestic investors.
- Provisions establishing pre-establishment rights be excluded, and that if they are included it be set out clearly that such rights do not come within the understanding of and dispute settlement institution created or foreseen by the agreement.
- The FET provision be limited to the understanding in customary law, and if a closed list approach to the FET standard is taken then it must be specified clearly that the list is certainly exhaustive.
- The clause on indirect expropriation set out clearly that non-discriminatory measures taken in the public interest through the appropriate legal channels *never* amount to compensable expropriation.
- The MFN clause cannot justify the importation of higher standards of protection or the existence or standards of dispute settlement provisions from other treaties.

- That an exceptions clause be included and be worded in such a way as to replace ‘necessity’ with a lower standard of causation as set out above, reflecting the need to protect the right to regulate broadly not narrowly, and including reference to States’ human rights obligations as specified grounds.
- That there be attention paid to a balance of substantive obligations and rights of both States and foreign investors to be reflected in the text.
- That there be a provision barring foreign investors from the protections of the chapter where there is sufficient evidence of direct or indirect violation of national laws and international human rights obligations and responsibilities, both their own and those of the State in which they operate.
- That there be a provision barring foreign investors from the protections of the chapter where a contribution to the economic development of the host State cannot be sufficiently demonstrated.
- That there be a provision allowing for States to initiate counter-claims in cases where foreign investors are suspected to have failed to meet their own obligations and responsibilities under national and international law.

We recommend that the European Commission, **with respect to the chapter of the agreement on technical barriers to trade:**

- Exclude a Regulatory Cooperation Body (RCB) from the terms of future negotiations.

If this does not occur, we recommend that the Commission:

- Ensure the inclusion of a clause making clear that regulatory harmonisation must be in an upward direction to the level of the highest standards of safety and security of the public interest currently adopted.⁵⁰⁴
- Ensure that entry into ‘regulatory exchanges’ be clearly specified as a voluntary and not a mandatory endeavour.
- Allow for the establishment of a multi-stakeholder advisory committee, in addition to the Civil Society Contact Groups proposed, which would have a permanent and fully integrated place in the structure of the RCB, with continuous engagement in deliberations, and be comprised of four equal parts representing business, consumers, trade unions and civil society.

⁵⁰⁴ European Parliament, Resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), Provisional Text, P8_TA-PROV(2015)0252, (2014/2228(INI)), para 2(b)(x).

- Ensure that the European Parliament be given a clear role in the modalities by which the existing regulatory agenda of the RCB is expanded, and by which any adaptations to existing regulations and regulatory processes are incorporated into law.
- Ensure that any form of impact assessment adopted includes not only the highest standards of social criteria but also applies human rights standards.
- Ensure that the precautionary principle is clearly mentioned and protected.
- Ensure that the RCB is completely transparent, does not hamper timely regulation and is limited to a recommendatory capacity.

We recommend that the European Commission, **with respect to the intellectual property chapter of the agreement:**

- Ensure that the provisions of this chapter do not extend further than the level of protection in the TRIPS agreement, and that the flexibilities included in the TRIPS agreement are not jeopardised, and are indeed reflected in TTIP and enhanced if and where possible.

We recommend that the European Commission, **with respect to the services chapter of the agreement:**

- Exclude public services from the agreement as a whole through express exclusion of 'public services' from the definition of 'services' for the purpose of the agreement, for greatest certainty.

If this does not occur we recommend that the Commission:-

- Ensure that public services, and health services in particular, are appropriately protected in the Annex's of the services chapter through a horizontal exception as well as a clear entry of exclusion in Annex 2.⁵⁰⁵
- Adopt a positive list approach to the structure of the Annexes in the service chapter, and only adopt a negative list approach if significant concessions are gained in other parts of the agreement, such as the investment chapter and with respect to the express inclusion and protection of the precautionary principle in the section of regulatory cooperation.
- Ensure that exclusions for public services and health services apply to all of the clauses of the services section and not only national treatment obligations.

⁵⁰⁵ Ibid, para 2(b)(vii).

5.2 – European Parliament

We recommend that the European Parliament:

- Take all available measure to ensure that the concerns of the people have the greatest positive impact possible on the course of negotiations, and to this end seek to reflect the clear opposition to the inclusion of ISDS in TTIP evident from the response to the Commission’s consultation in any votes regarding the future scope of negotiations, specifically those relating to ISDS.
- Ensure that any dispute settlement system in TTIP mandates the prior exhaustion of domestic remedies, as indicated by the Parliament’s own resolution of 8 July 2015 requiring that “the jurisdiction of courts of the EU and of the Member States is respected”.⁵⁰⁶
- Closely attend to the text of any final agreement, considering all of the specific points made above, to ensure the security of public health in Europe.
- Reject any final text that does not meet the minimum safeguards for the public interest and public health as set out above.

5.3 – EU Member States

We recommend that all EU Member States including Ireland:

- Conduct their own *ex ante*, and separate, human rights, social and environmental impact assessments, according to established methodologies and the Guiding Principles on Human Rights Impact Assessments, as soon as possible, in order to provide greater detail and to verify the assessments of the European Commission at the EU-wide level.
- Communicate the results of these assessments to the Commission such that negotiations may be better informed and guided.

5.4 – Irish Government

We recommend that the Irish government, in addition to the timely conduct of the impact assessments already mentioned:

⁵⁰⁶ European Parliament, Resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), Provisional Text, P8_TA-PROV(2015)0252, (2014/2228(INI)), para 2(d)(xv).

- Formulate a clear policy advocating exclusion of ISDS (in any form) from TTIP, given the country's high risk of incurring serious costs from ISDS and its evident success in attracting US investment without taking this risk.
- Begin a cross-departmental discussion regarding the costs and benefits of TTIP, equally including government departments concerned with health, social issues and the environment.
- Foster and engage with a broader public discussion on the costs and benefits of TTIP, engaging with the full range of political parties, social partners and civil society.
- Closely attend to the text of any final agreement, considering all of the specific points made above in the recommendations to the European Commission on specific issues and aspects, to ensure the security of public health in Ireland.
- Ensure that Irish public and health services are properly protected by entry of the necessary exclusions in the appropriate Annex's of the services chapter of TTIP (Annex 2), and are covered also by a horizontal exclusion.
- Ensure that exclusions for public services and health services apply to all of the clauses of the services section and not only national treatment obligations.
- Reject any final text that does not meet the minimum safeguards set out above.

5.5 – Civil Society

We recommend that civil society:

- Remains vigilant and vocal regarding the progress of negotiations and endeavours to utilise the information presented here pursue the recommendations outlined above at the relevant institutional levels and to influence local, national and regional institutions in the interests of public health, democratic self-determination and broader understanding of the potential implications of TTIP.
- Pay special attention to the details of any prospective final text in the areas of possible TRIPS-plus provisions, the precise wording and positioning of exclusions for public services and health services, and any provisions that may expand the terms of the agreement in the future without democratic control, such as provisions relating to investment and regulatory cooperation.
- Consider creating a broad alliance aimed specifically at achieving a two-tiered goal: Firstly, to press for a halt to the negotiations and a thorough re-evaluation of the purpose and rationale of a TTIP in light of the severe imbalance between minimal economic benefits and significant social costs; Secondly, if the first goal is not attained, to press for the exclusion of the two main threats to social wellbeing that are contained in TTIP, the ISDS mechanism and the establishment of a Regulatory Cooperation Body.

