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The TPP and the international investment regulation



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Master Oficial de Internacionalización

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15/05/2016

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Abbreviations

ASEAN: Association of South East Asian Nations

BIT: Bilateral Investment Treaty

ECT: Energy Charter Treaty

FET: Fair and Equitable Treatment

GATS: General Agreement on Trade in Services

GATT: General Agreement on Tariff and Trade

ICC: International Chamber of Commerce

ICSID: International Centre for Settlement of Investment Disputes

IIA: International Investment Agreement

IIWW: Second World War

ISDS: Investor-State Dispute Settlement

MIC: Middle Income Countries

NAFTA: North American Free Trade Agreement

NCM: Non-Conforming measures

OECD: Organisation for economic co-operation and development.

P4: Trans-Pacific Strategic Economic Partnership

SDG: Sustainable Development Goals

TPP: Trans-Pacific Partnership

TTIP: Transatlantic Trade and Investment Partnership

UNCITRAL: United Nation Commission on International Trade Law.

UNCTAD: United Nations Conference on Trade and Development

Introduction

“Change will not come if we wait for some other person, or if we wait for some other time. We are the ones we've been waiting for. We are the change that we seek.”

Barack Obama

Even if this quote properly belongs from the nominating contest of February the 5th 2008, it appears more actual than ever. The U.S. President Barack Obama has always emphasized his desire to change direction in a great variety of field: from foreign policy, with his rapprochement with U.S's historic enemies Iran and Cuba, to public health, with the famous Obama Care really appreciated by his supporters but hardly criticized by Republicans, until his commitment with environmental respect at all level of American policy.

For the happiness of his supporters, Obama decided to leave his mark also in foreign politics, giving new fresh air to the worldwide image of his country: indeed, on October the 4th 2015, he announced that 12 countries of the Pacific Rim¹ would have entered into a Trans-Pacific Partnership (TPP). Strongly desired and discussed during 5 years, the brand new TTP is a multilateral trade and investment treaty which, if ratified by the signatories, would give birth to the largest free trade area on the planet. Economically speaking, the 40% of global trade is accounted by these countries. The Trans-Pacific Partnership can be considered a development of the Trans-Pacific Strategic Economic Partnership (P4), an agreement originally created in 2005 between Brunei, Chile, Singapore, and New Zealand. The United States lately suggested an expanded and comprehensive P4 agreement along with several other countries which eventually turned into the TPP. First of all, it must be pointed out that this signature has been prompted by the stagnation of the Doha Round negotiations, where developing and developed countries were facing a thrilling conflict about if and how liberalise some sectors of their economies², that hasn't reached any satisfactory result yet. Hence, some countries started to look at regional trade agreements to boost their economies. Besides, they are also more useful to pursue geopolitical interests.

¹ Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam.

² Developing countries, like Brazil and India, were asking for more openness in agricultural trade while developed countries, like the US and the EU, were pretending advances in manufactural field.

Anyway, the main objective of the TPP is to “enhance trade and investment among the partner countries, to promote innovation, economic growth and development, supporting the creation and retention of jobs”³. More concretely, basic is the desire of incorporating all negotiating participants under one free trade agreement which eliminates tariffs and non-tariff barriers to goods, services, and agriculture in most Pacific Area. In fact, it has been estimated that more or less 18,000 tariff on goods flowing will be eliminated, which is especially important with regard to Japan and its notorious protections. Hence, this agreement will link the US and Japan closer in a region perennially stressed by their common rival: China. The TPP includes 30 chapters covering trade and trade-related issues, beginning with trade in goods and continuing through customs and trade facilitation; sanitary and phytosanitary measures; technical barriers to trade; trade remedies; services; electronic commerce; government procurement; intellectual property; labour; environment. In addition, we find also some ‘horizontal’ chapters which mean to ensure that TPP fulfils its potential for development, competitiveness and inclusiveness: we are referring to the dispute settlement, exceptions, and institutional provisions chapters.

In this essay, it will be underlined in particular the aspect related with the international investment policies, that this treaty may will change. In fact, one of Obama’s aim in signing this agreement is to provide meaningful protection for U.S. investors in Asia-Pacific region and establish a workable and transparent investor-state arbitration system for the enforcement of such protection⁴. He claimed the necessity of this agreement because U.S. businessmen operating abroad often face a high risk of bias and discrimination not only due to corruption or reduced efficiency of many foreign judicial system, in particular in developing countries, but mainly because of the missing existence of an international multilateral agreement on investment.

Actually, it must be point out that many parties from across the spectrum of international economy share a sharp frustration with the structural defects of the International Investment Regime: the quality of dispute resolution is quite dissimilar taking in account the various institution that have competence in this field, as do outcomes on substantive law matters, and even worse it doesn’t still exist a comprehensive institutional mechanism to promote quality or

³ Trans-Pacific Partnership Fact Sheet, United States Office of the Trade Representative (USTR), (November 2011), available at: www.ustr.gov/about-us/policy-office. Last visit (February the 11th 2015).

⁴ M. Cheek & N. Gore, “The Trans-Pacific Partnership Investment Chapter: Maintaining Important Protection for U.S. Investors Overseas”, 17 November 2015, available at: www.globalpolicywatch.com.

coherence⁵. Moreover, to complicate the situation, there are widely diverging views among stakeholders about the extent to which changes are really needed, what they should be and how they should be managed⁶.

As a result, we are assisting to a growing criticism toward all that issues related with Foreign Direct Investment in development and in global economy as a whole. This general sense of dissatisfaction demonstrates the necessity of a change in the management of the global investment system, which should involve far more than technical issues such as umbrella clauses and fair and equitable treatment standards⁷.

Nowadays, the investments move trillions of dollars per year and provide wealth and success to thousands of people every day. Notwithstanding, it remains a really delicate ambit, more than trade law, because it tends to touch so many social issues and responsibilities of host states, that it cannot be seen as a simple movement of capital. Indeed, the challenges generated by globalisation and the 2008's financial crisis bolded the need of a wider protection that must take into account states' responsibilities not only toward their citizens but also toward Civil Society, in the larger sense of the term. Hence, environmental issues and protection of Human and Labour Rights became a milestone over the public opinion and investment law is still taken care mostly of private investors, with few or at least less regard for these values.

Moreover, it mustn't be forgotten the debate arisen concerning the impact of the ISDS over the capacity of government to implement reforms and policy programmes related with those values, in particular with the appearance in the TPP of a chapter, for the first time in an international agreement, dedicated to environment. Case like the *Metalclad vs United States of Mexico*, underlined all the weakness of international investment regime in defending such kind of Public Goods. Furthermore, it's impressive the great distance between this set of rules and the International Trade Regime, which is much more institutionalized and effective thanks to the action of an institution in charge of setting, administering ad implementing policies, that is the WTO.

⁵ J. Alvarez, *Contemporary Foreign Investment Law: An 'Empire of Law' or the 'Law of Empire'?*, 60 *Alberta Law Review*, 943, (2008-2009).

⁶ K. P. Sauvart & F. Ortino: *The need for an International Investment consensus-building process*, Vale Columbia Center on Sustainable International Investment, No. 101, August 12th (2013).

⁷ T. Kawase, *The TPP as a set of international economic rules*, 10 January (2016), available at: www.voxeu.org/articles.

In conclusion, Akira Amari, Japan's state minister in charge of the TPP, called the TPP a "21st century agreement"⁸. In his view, the treaty will facilitate trade in parts and intermediate goods as well as the accompanying international movement of services, data, investment, people and know-how, prompting more companies to unbundle their production processes and leading to the creation of a new international supply chain⁹. The hope is that this "new way" in trade will involve also a convincing reshape of the foreign investment framework. Unfortunately, the lack of a multilateral level of governance and control, together with a forceful criticism toward the current investor-state dispute settlement, cast more than a shadow over the success of this project. Would the TPP be able to create a new landscape in international investment regimes and solve the crisis this set of rules is passing through or the critics will obey the policy-makers to delay another a time an everyday more urgent structural change?

The aim of this essay is trying to understand if Akira Amari is right, clearing off the real scope of the agreement, the reasons that moved these countries to bundle together and the implications it will have. Is the international investment reform and the economic facilitation it will involve the main explanation of the birth of this agreement or there are also some geo-political implications? Which is their importance? Will they influence the final result? And again, is this treaty truly an astonishing opportunity for the U.S., like Obama presented it or is it only just another brick in the wall?

In order to clarify this question, the work has been structured in 7 paragraphs: after a brief introduction, it's presented a chapter whose aim is to present what is the TPP and its geo-political implications (Chapter 1). It follows chapter 2, where we start to talk about international investment protection outlining its main features and its history. The investigation then enters into the main study field, analysing in chapter 3 the substantive part of TPP's chapter 9, the one that talks about the investment provisions and consequently, in chapter 4, the dispute resolution procedures. Afterwards, there is a chapter (chapter 5) which is comparing innovations and shortcomings of the treaty, trying to tiding up the ropes and arriving, in the conclusion, to a final answer to the question: could the investment chapter of the TPP be considered as a new Gold-Standard for the International Investment Regime or signatories' states' work has not been enough?

⁸ See: Note 2.

⁹ R. Baldwin calls it: "Trade-Investment-Services Intellectual Property Nexus". See: R. Baldwin: "21st Century Trade and the 21st Century WTO" (Baldwin, 2012).

The methodology applied in this work has been multidisciplinary: first of all, it was necessary a theoretical basis to understand all the political aspect described in the text. Hence, there have been taken into account various theories of International Relations and in particular the International Economy's models, which have been really useful. In addition, some research in law has been necessary: investigation on the cases, on the rule of law and on the principle of International Law and International Investment Law were driven by a juridical approach to the discipline. Moreover, an economic/statistical approach has been used in order to provide a deeper comprehension of the international trade relations, especially thanks to the use of economical indicators, like the GDP.

The sources taken in account are various: Primary Sources have been basic for this research. Resolution of the GA and Documents published by many International Organisations, together with different judicial decisions, have been a necessary instrument of study. But Secondary Sources have been even more important. In fact, many articles from famous International Reviews and Journals has been fundamental for a deep understanding of the current international investment framework. In addition, books about the history of investment and about international law could also be considered an important help toward the achievement of a complete presentation of the facts this work is talking about. Finally, it must be cited the use of the some blog website, in order to understand how public opinion perceives this brand-new agreement.

Chapter 1: Why the TPP?

“China is a sleeping giant.

Let her sleep, for when she wakes she will move the world.”

Napoleon, 1816

Even if this statement belongs from a very faraway period of our history, when international trade was based only on the exploitation of the wide overseas lands owned by European Powers, it appears quite appropriate to explain the current economic international landscape related with the signature of the Trans-Pacific Partnership.

Perfectly 200 years ago, in an official letter, the first English Ambassador in Beijing, George Macartney, described the surprising reality he found out in this faraway kingdom¹⁰. He faced with a wealthy society with a deep architectural and technical knowledge, a developed and organized trade system and also characterized by some scepticism toward “foreign barbarians products”¹¹. His reaction mustn’t be quite different from the one that would have occurred to the current American President Barack Obama in front of the last financial results: according to the World Bank, from 2011 to 2015, the direct foreign investment directed to China has been two times bigger than the one directed to the US. Moreover, the World Bank shows how the annual percentage growth rate of GDP is 5% higher in China than in the US, as well as the total reserves held by IMF, where China owns 40 times more gold than the US.

Having said that, it should be pointed out that from 1978 to the present date China’s GDP has increased fourfold, from the total absence of International Trade, under Mao’s leadership, until a top-three position in export of Good and Services¹². It’s an astonishing result for this country, making it the second world’s largest economy and addressing it to one day possibly overtake the gross national product of the US, taking in account population’s parity purchase power. In this complicated situation, four specific perspectives must be underlined, which are essential to deeply understand the decisions, the points of view and the development of this agreement.

¹⁰ Asia for Educators: “MacCartney and the Emperor”, Columbia University, (2009), available at: <http://afe.easia.columbia.edu/>.

¹¹ They were used to consider foreigners as “Barbarians”.

¹² See: www.WorldBank.org.

1.1. New Geopolitical role of China

First of all, we must consider the current challenge faced by the US due to the rising economic importance of the People's Republic of China. The U.S., ever since they emerged as a global power, after the Civil War, they have continuously pursued a strategy whose aim was not only reaching a quite intriguing hemispheric control¹³, but also preventing the Eurasian space from being dominated by any single power: Wilhelmine Germany, Nazi Germany, Japanese Empire and Soviet Union are just some example of Powers that had been neutralised in their attempt of threaten American security and its primacy in the international system. Hence, the possibility that China could emerge as the newest rival to the US, is scaring many politician and reinforces this idealism based on the importance of keeping the Eurasian Area free from any hegemonic domination¹⁴.

On the other hand, it shouldn't been forgotten that this great economical capability is also due to a conscious integration of China into the International Economic Order. Indeed, since 1945, the US has used its power to establish a rules-based global order, centred on an asymmetrically open economy combined with US aid project toward its war-torn allies in Europe and Asia. Also China has been progressively included in this plan. In 1979 the "Rapprochement", represented by the transfer from Taipei to Beijing of the American Diplomatic Representation in China, ended up with the "Normalisation" of the International Relations between these two countries. This integration, which began under president Carter, reached its peak with Bill Clinton who supported China's participation in the WTO (2001). This willingness to integrate China had a reason: firstly, the desire of containing the Soviet Union before and Russia afterwards, was clear¹⁵. This play wasn't so hard, considering the quite rough relations between the two Powers. Secondly, with Moscow's demise as a rival in 1991 and the US standing triumphant and alone, prompting China's economic growth would have generated new possibilities for investment in Far East Asia. Everybody viewed China as a largely underdeveloped state, whose integration into global trade would only have offered many opportunities to improve US gains from trade¹⁶. However, few policymakers expected China to grow so fast. Hence, year by year, the possibility of becoming the rival to the US in the new century is not just a nightmare anymore. In fact, China's exports and imports are more than 50%

¹³ S. Baru, S. Dogra: *Power Shift and New Blocs in the Global Trading System*, (London: International Institute of Strategic Studies, 2015), Chapter 5, p. 93 – 100.

¹⁴ A. L. Friedberg, *A contest for Supermacy: China, America, and the Struggle for Mastery in Asia*, (New York: W. W. Norton and Company, 2011).

¹⁵ A. J. Tellis, *Balancing without Containment: An American Strategy for Managing China*, (Washington DC: Carnegie Endowment for International Peace, 2014), pp. 11 – 14.

¹⁶ Jeffrey A. Frieden, *Global Capitalism: Its fall and rise in the Twentieth Century*, (New York: W. W. Norton, 2006).

of its GDP¹⁷: when its size and income level are taken into account, it can be considered a Mega-Trader, having trade percentages of GDP vastly bigger than the US ones, comparable only with the UK of the Age of the Empire.

To sum up, it should be pointed out that while the US has successfully confronted different rivals before, it has never faced a challenge like the one generated by China: a political antagonist committed to end American economic unipolarity while remaining deeply integrated in a trading framework with them.

1.2. Regionalism vs Multilateralism

Another aspect that must be underlined is the expanding importance of regionalism in International Agreements. On one hand, it must be pointed out that since the creation of the GATT in 1947, the multilateral trading system has been considered one of the shining successes of international cooperation. This System has been based on 3 principles¹⁸: opening trade increases economic efficiency, non-discrimination status (based on the principle of MFN) that allows each country to exploit its comparative advantages and stable trade rules, which provide a conducive framework for investment and development. All of them has been formalized in the WTO rules. The downfall of the Communist Powers brought an almost worldwide acceptance of these rules. Consequently, by creating a world that is driven by precise policies and conducts rather than by reactionary behaviour, it has been set a no-discriminatory field where power asymmetries were remarkably reduced.

Moreover, thanks to multilateralism, there has been a great effort in containing protectionism, in particular after the 2008 financial crisis. Indeed, it didn't appear anything comparable to the Depression of the early 1930s¹⁹.

However, with the stalling of the Doha Round and the failure of all the following trade negotiations, many countries considered it would have been easier to achieve trade and investment liberalization among smaller groups of trading partners, or on a bilateral basis. Therefore, these new agreements have often overlapped and interacted with the WTO rules

¹⁷ A. Subramanian, M. Kessler, *"The Hyper-Globalisation of Trade and Its Future"*, (Oxford: Oxford University Press, 2014).

¹⁸ P. Lamy, *Is trade Multilateralism being threatened by regionalism?*, (London: International Institute of Strategic Studies, 2015).

¹⁹ H. L. Kee & C. Neagu & A. Nicita, *Is protectionism on the Rise? Assessing National Trade Policies during the Crisis of 2008*, (Washington DC: The World Bank, April 2010).

outlining a complex interplay field where countries act according to this multilevel trade regime. As a matter of fact, the stalling of the Doha Round has probably been the most important incentive toward the signature of such a regional agreement.

Furthermore, it must be pointed out that treaties like NAFTA and TPP, claim an additional function²⁰: promoting a new standard of rules, in particular in all that fields where the WTO and the World Bank have never been able to settle down any particular innovation, like in investment field. Therefore, even if the US are actively participating in this new wave of agreements, it's impossible not to notice the failure in all that multilateral set of rules, so much desired and promoted in the previous decades, which is not as efficient as it was.

1.3. Global saving glut

From the beginning of the Twenty-First century, it has been noticed that the size of the External Imbalances, defined as the position of deficit or surplus in the balance of payment of a country, tended to substantively grow compared to the last decades²¹. On one hand, it must be underlined that the presence of a surplus or a deficit between different countries is a common practice in the world economy. Indeed, countries whose savings exceed the national needs have the opportunity to allocate this money abroad, through foreign investment. On the other hand, there are countries whose opportunity of investment overflows the national savings, so they must turn to foreign financing in order to pay the deficit they committed.

According to the IMF, there is an interesting fact: while the USA is the main net importer of capital in the world, the first net exporter nowadays is China. Therefore, the fact that the biggest debtor of the world is what it can be considered the most influencing country of the world while the biggest creditor is the country is trying to challenge and revert this situation, has a relevant geopolitical consequence.

In 2005, Ben Bernanke in his explanation of 2008's crisis²², gave a clear interpretation of what happened before the crisis's strike and there are some concepts useful to understand the actual geopolitical framework. First of all, the US enjoyed for many years of a "Global Saving Glut", which means that they could fund many investments at a really low interest rate because there was an

²⁰ See: note 38.

²¹ J. Tugores, "*Desequilibrios y crisis en la economía global*", (University of Barcelona, October 2013).

²² B. Bernanke, "*The Federal Reserve and the Financial Crisis*", (Princeton: *Princeton University Press*, 2013).

overabundance of Savings - the called Saving Glut – in another part of the world, which could be used to finance all their projects.

Therefore, the external imbalance of both China and the US reflects a complementary interest in the middle period: China needs modernization, a know-how that it doesn't own and a "favourable" exchange rate in order to export at lower prices. On the other side, the US can satisfy all these needs: their financing requirements could be provided by China's big Savings while American tolerance on the undervalued Reminbi's exchange rate would be widely accepted. In this way, they set out a system where Imbalances were cornerstones of the International Finance and basic for maintaining a high investment rate.

Unfortunately, according to Christian Broda's point of view, in these last 7 years, the world has experienced a "Global Savings Drain", that is a progressive decrease of World Savings, in particular in China²³. Hence, China is not financing American's investment anymore, or better, not at the rates of 5 years ago. This is mainly due to the economical re-orientation started by the Chinese's government in order to encourage internal consumption. In front of this situation, the American Government, which is being less supported by Chinese policies, understood that it wasn't so convenient supporting such an economic rival. Therefore, the possibility of signing a free trade and investment agreement between other Pacific Rim's countries, may have been a remarkable possibility to reduce China's competitive advantage in the area and thus gain a bigger slice of market in such a promising and developing area. Moreover, the appearance of new economic powers, like Brazil and India, with their less exploited markets, are attracting everyday more investment, taking it out from the American soil. Lastly, it mustn't be forgotten that many developed countries, with the 2008's crisis, incurred some important debts that has increased the demand of funding that often has been supplied by China's savings.

1.4. Militarization of China

An aspect that mustn't be underrated is the current process of militarization of China. The State has implemented a series of militarization options for its new South China Sea facilities, ranging from deploying intelligence, surveillance, and reconnaissance (ISR) assets, to missile batteries

²³ C. Broda & P. Ghezzi & E. Levy Yeyati: "*Financial De-Globalisation, saving drains and the U.S. Dollar*", (March 2009). Available at: www.voxeu.org.

following an alarming escalation²⁴. There have already been some confrontation with Japan and Taiwan over the possession of a couple of strip of land in the middle of the Chinese Sea where the government is constructing a mighty advanced military facility.

Therefore, here another reason that justify the desire of taking more control of the Far-East Geopolitics shows itself, considering also how painful this side of the Ocean had been for the US during the Second World War.

At any rate, the Trans-Pacific pact would strengthen US political and military leadership in the region, amid these escalating maritime disputes blazing between China and several of its neighbours. However, this is not something new: after all it appears as a new chapter in the perennial friction between China and Taiwan, which worries the American Foreign Policy experts together with the growing tensions over North Korea's nuclear adds. With the signature of the TPP, the US will be more inclined to intervene if a risky situation endangers its growing trade interests, reasserting in this way, their influence in the region in a long-term period. It's not just a case that the Nobel Prize-winning American economist Thomas Schelling affirms that "trade is what most of international relations is about. For that reason trade policy is national security policy"²⁵.

In the end, what it comes to light is obvious: Washington's aim is to inflict indirect costs on China by worsening its competitive position in international markets and in particular in the far-east ones, setting, with the TPP, a high standards of principle which would rewrite the rules of regional trade in a way that would boost the economies of the US and its allies in inverse proportion to the economy of Washington's primary geopolitical rival, China. About this issue, Benjamin Herscovitch, a research manager at China Policy, a Beijing-based research and advisory company, is convinced that the TPP agreement is first and foremost a massive diplomatic victory for the US: "The deal will obviously benefit the United States economically, but its real significance is the strategic signal it sends to Asia," he said. "In particular, it is a powerful demonstration of its commitment to leading the region and setting international norms."²⁶.

²⁴ C. Huang, "It's the geopolitics, stupid: US-led TPP trade pact less about boosting economies than about containing China's rise", (November 2015), available at: www.scmp.com.

²⁵ T. Schelling, "Arms and Influence", (New Heaven, Yale University Press, 1966).

²⁶ M. Kolsky Lewis, "The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?", 34, *Boston College International & Comparative Law Review*, 27 (2011), at 28.

Hence, it's always clearer that FTAs are not only instruments for international economic integration, but also a tool of international relations within the global economic order. In fact, Gary Hufbauer, an international trade expert at the US-based Peterson Institute for International Economics, estimated the pact would deprive China of about US\$100 billion of exports annually²⁷ while Ma Jun, chief economist of the People's Bank of China's research bureau, said China would lose 2.2 percentage points in GDP if it did not join²⁸. This is why some Chinese officials regard the pact as a US conspiracy aimed at containing China. So Beijing decided to respond to US's plan with its own regional initiatives. In addition, it has been started, in China, a quick process of domestic market reforms in order to adapt it to the economic structures of international trade.²⁹

To be clearer, with the US announcement in November 2013 not to accept entry of any new country until the negotiation were concluded, China has taken the lead in pushing for an intra-Asia economic and trade architecture. In fact, it actively promoted the negotiation for a Regional Comprehensive Economic Partnership (RCEP), involving members of the Association of Southeast Asian Nations plus China, Japan, South Korea, New Zealand, Australia, and India, but also excluding the US. Beijing is also leading the Asia-Pacific Economic Cooperation-based Free Trade Area of the Asia-Pacific, featuring Pacific Rim nations, both presented as an alternative to the TPP. China has also recently launched two multinational financial institutions, the New Development Bank and the Asian Infrastructure Investment Bank (AIIB), to help developing countries in Asia and elsewhere, financing their badly needed infrastructure projects³⁰. All these China-led institutions are a clear challenge to the post-second world war US-centric international institutions, such as the International Monetary Fund, the World Bank, and the regional bodies, like the Asian Development Bank³¹.

However, this solution is the only option considerable, because joining the Agreement would be quite difficult. Indeed, rules and standards from the TPP are apparently too politically sensitive for the Communist Party to make any compromise in order to accept them³². For instance, joining the

²⁷ G. C. Hufbauer: "How will TPP and TTIP change the WTO system", (London, *Oxford University Press*, 2015).

²⁸ T. Mitchell: "China lays out 'countermeasures' to offset exclusion from TPP", available at: www.ft.com.

²⁹ C. Huang, "It's the geopolitics, stupid: US-led TPP trade pact less about boosting economies than about containing China's rise", (November 2015), available at: www.scmp.com.

³⁰ L. Xiangyang, "Trans-Pacific Partnership: A Major Challenge to China's Rise", 2 *International Economic Review* (2012).

³¹ M. Du: "Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement", (*Journal of International Economic Law*, 2015), 18, 407 – 432.

³² I. Cheong, "Negotiations for the TTPA: Evaluation and Implications for East Asian Regionalism", Asian Development Bank Institute Working Paper Series No. 428 (July 2013) 4.

TPP would require opening up markets to foreign investors in areas such as the internet and media, which, up to now, have been under strict state-control. Moreover, we shouldn't forget the new environmental and social rights included in the TPP which could hardly be accepted by such a regulating government.

Hence, It could be argued that the TPP aims to redirect trade to the US and solidify America's economic position in Asia by pressuring China into adhering to Washington's rules and standards. Indeed, the TPP, more than a trade pact, also contains a variety of economic-policy matters that would force China to carry out radical reforms the government is not eager to implement³³.

Finally, it must be pointed out that the international environment we are living in, is deeply different from the one of 10 years ago: the "American Unipolarity" has undoubtedly ended, leaving behind an unravelled³⁴ scenery where no country is able to take the lead and draw a new set of legal rules to foster its new leadership. Nonetheless, many trials are taking place: the U.S. wants to hold their position launching the TPP on one side, while on the other lies China with its global influence gained through expanded trade, aid, investment and soft power (which is a news for its political regime) or Russia, with the solidification of its international role thanks to the successful military intervention in Syria, carried out to put down rebellions and terrorism. For sure, the U.S. won't let it go even if China, in particular, is getting along with its new partners and responding to the challenges placed by the US. To maintain the leadership in global economy, to gain the status of Pivot power in Far-East Asia, to limit the outstanding growth rate of China, will be this treaty enough? . Anyway, it must be pointed out that even if this agreement could reach some geopolitical results, the U.S. would never be able to isolate China. In fact, the WTO's rules are still in charge: low tariffs between states and most-favoured nation treatment are applied to all the trade exchange that are taking place between two WTO Parties. In addition, China has reacted to this trial of reducing its market possibilities in Far-East Asia, signing different Free-Trade Agreements with TPP Countries: with New Zealand already in 2008³⁵, in 2013 with Japan and South Korea³⁶ and finally in 2014 with Canada.³⁷

³³ An Bang Consulting: "China should be strategically alert to the U.S.-led TPP", available at: www.finance.jrj.com.

³⁴ H. Haass: "The Unraveling: How to respond to a Disordered World", (November 2014), available at: www.foreignaffairs.com.

³⁵ China-New Zealand free trade agreement, 2008. Available at: www.mfat.govt.nz/trade.

³⁶ S. Tiezzi, "China-Japan-South Korea Hold FTA Talks Despite Political Tension", The Diplomat, (2015).

³⁷ Canada-China Foreign Investment Promotion and Protection Agreement (FIPA), 2014. Available at: www.international.gc.ca.

To conclude, it appears clear that China is trying to face with a new situation: some of its best commercial partners are bounding themselves into a free trade agreement which is limiting China's trade opportunities in its neighbourhood. For this reason, the TPP ends to be not only a US trade policy tool, but it concerns also America's national security policy³⁸. It is a product of the Sino-US rivalry for control of trade and finance which eventually is the foundation of today's global politics, as well as the global economy.

³⁸ See: Note 29

Chapter 2: The investment protection and its historical development

2.1. Definition of investment protection

International investment and especially foreign direct investment, has become the most important vehicle to bring goods and services to foreign markets and to integrate the national production system of individual countries. Nowadays, the global economy is driven by around 100.000 multinational enterprise which control over 900.000 foreign affiliates and move a massive investment outflow, that was of US\$ 1.7 trillion during 2007-2011. States have all the desire that a part of this big amount of money passes through their soil, in order to foster growth and development or to increase tax collection, between various examples³⁹.

Therefore, ensuring legal protection has become a basic concern for any investor considering an investment in a foreign, or better, “host” country. Investors want to avoid that a change in government or in political priorities renders its activity totally worthless, on the other hand, Host-States are totally keen to encourage the entrance of new assets in their economy for the reasons described above. Hence, states have tried to liberalize their regulatory frameworks and provide the needed protection through different methods.

First of all, States have adapted their Investment Legislation to the changed circumstances of the last decade, ensuring special treatments toward investor. Such legislation may consist in exemption from taxation or in the provision of a specific fiscal regime for investor, in a particular industry sector, for example. The problem related with such decisions is its unpredictability: in fact, every protection contained in a country’s legislation still remains part of its national law, which is subject to revocation or modification by a subsequent government.

Secondly, investment contracts are another instrument used to reassure states’ concerns. Normally, they are employed with extractive industries and can consist in concession agreements or production sharing contracts under which investors receive certain protection for the exploitation of a foreign state’s national resources. Considering the fact that these kinds of contract involve a massive investment of capital, enterprises seek for robust assurances that may

³⁹ Ashurst Publications, *“The Changing Landscape of Investment Treaty in Asia”*, 2015.

crystallise into what is called a Stabilisation Clause. These sentences that can be found in many contracts, simply act as a higher standard of protection. For example, “Freezing Clauses” intends to freeze the national legislation affecting the investor for the life of its investment, with the result that subsequent legislation on the investment’s field won’t be binding. At any rate, the popularity of this protection has declined importantly.

Moreover, more common are the “Intangibility Clauses” which permit that a host government cannot unilaterally nationalise a project or modify the investment. Indeed, any change produced must be approved also by the investor.

Lastly, “Economic equilibrium clauses” and “Allocation of Burden Clauses” act with similarity toward the investor. In this case, the government ensures that the investor, in the event of the change of law which adversely affect him, won’t be disadvantaged (Economic equilibrium clause) and the burden of such change will be on the host-state’s charge (in the second case). Economic Equilibrium clauses also may involve specific mechanisms for agreeing a compensation to the investor by the host government⁴⁰.

Generally speaking, these kind of clauses have attracted widespread criticism, particularly from NGOs, which alleged that they affect the ability of states in producing legislation about environmental, health and safety and human rights field.

Thirdly, one of the most used mechanism to protect foreign investment has always been the bilateral investment agreement. These treaties, which were created to encourage foreign investment, commonly include provisions which establish specific protections for investors of both signatories states. Multilateral treaties involve the offering of these protection to a wider group of states. Although the over 2000 BITs in force can easily testify its success, it must be recognized that in the last decades Multilateral Trade Agreements have also enjoyed great popularity: the North American Free Trade Agreement (NAFTA) between Mexico, Canada and the US and the Association of South East Asian Nations (ASEAN) are the most famous⁴¹.

Nowadays, it doesn’t exist a standard form for a BIT but many countries have created “models” of BITs, like the U.S., which forms the basis for the negotiation of a new treaty. For example, every BIT almost always contain two fundamental parts: the first one, is what we could call the

⁴⁰ Ashurst Publications, *International Investment Protection – Quick Guide*, (2015). Available at: www.ashurst.com.

⁴¹ See: Note 4.

“Substantive Part”, where are listed all the protections that a foreign investor could claim to: Protection from expropriation without compensation, Most Favoured Nation provision and Fair and Equitable Treatment clauses, are just three remarkable example. The second one, is what it’s known as “Procedural Part” and it describes how to resolve a possible dispute between the Parties. The principal mechanism for resolving investment disputes is via the International Centre for the Settlement of Investment Dispute (ICSID). Also known as the Washington Convention, the 1965 ICSID Convention has been ratified by 150 states and is still the most used fora for investment disputes, but also the most criticised. Other Foras, like the Stockholm Chamber of Commerce or the Permanent Court of Arbitration in the Hague have also been chosen by parties for settle their dispute, but with lower percentages⁴².

Lastly, it mustn’t be forgotten that recently has been negotiated major trade agreements that involves nations controlling much of the world’s trade and investment. Obviously, we refer to the TPP. Even if it contains a long list of provision, this basic shape has not disappeared in it. In fact, TPP full text includes both of the parts described above in its Chapter 9, the one that mentions all the issues related with the investment protection, which is divided in two Section, that more or less representing this division. Anyway, all the features related with this two blocks will be precisely outlined in the following chapters.

2.2. History of Investment protection

The international legal framework governing foreign investment is not a monolithic creature but it is composed by a wide network of international investment agreements, supported by the general rules and values of international law. Hence, it appears clear that it mustn’t be easy managing such a complicate field: firstly we have to take into account the National level, because every State has its own regulation about admission, permanence and outflow of investment. Secondly, it could have been signed an international agreement, so a Supranational level and lastly it mustn’t be forgotten the role of International Customary Law, which have been important for many compensation in expropriation issues, for example. Moreover, customary international law developed in the past 150 years, has permitted the accordance of “Minimum Standard of Treatment” to foreign investors, such as the “Denial of Justice”, “Due Process” and “Non-

⁴² See: Note 4.

arbitrariness”⁴³. Lastly, it mustn’t be forgotten, as a resource in investment law disputes, many arbitral and judicial decision that have been rendered by international tribunals, which serve not only to determine the existence of customary law but also to interpret the often vague provisions in investment treaties⁴⁴. However, nowadays the IIAs are the main instrument for promotion and protection of foreign investment. Although these texts differ in many important points, it could be identified a common body, composed of a treaty-based standard of promotion and protection of investment followed by an investor-state arbitration-mechanism that allows the investor to enforce these standards against host states⁴⁵.

The current IIA network is a product of a long evolution started in the early history. To be clear, it must be remembered that with this abbreviation we refer to standalone bilateral investment treaties (BITs), bilateral and regional free trade agreements that include foreign investment obligations, such as the North American Free Trade Agreements (NAFTA) and sectoral treaties, such as the Energy Charter Treaty (ECT) and the more actual TTIP with the UE’s proposal that would create a new Investment Court which would really change the actual international investment disputes’ environment.

According to all these news, the history of investment protection could be divided in 5 great ages, characterized by remarkably different trends.

2.2.1. From early history to 19th century.

Historical records attest that early political communities normally denied legal capacity and rights to those who were originating from outside their community. These outsiders were called Aliens⁴⁶ and treated as enemies or barbarian. However, through the Middle Ages their status has remarkably improved, changing “from a complete outlawry, in the days of the early Roma and the Germanic tribes, to that of a practical assimilation with nationals”⁴⁷. By the commencement of the modern era, international legal scholars claimed that international law should have guaranteed

⁴³ See A. Newcombe & L. Paradell, “Law and Practice of Investment Treaties: Standards of Treatment”. (The Netherlands: *Kluwer Law International*), pp 235-253.

⁴⁴ K. P. Sauvant & F. Ortino, *Seminar on improving the International Investment Regime*, (Helsinki, April 10-11, 2013).

⁴⁵ With “Host State” we refer to the state in which a foreign investor or investment is located. On the other hand “Home State” is the state of which the investor is a national

⁴⁶ From the Latin word *alius* which means “other”

⁴⁷ E.M. Borchard, *Diplomatic Protection of Citizens Abroad or The Law of International Claims*, (New York: Banks Law Publishing CO., 1915) [Borchard, *Diplomatic Protection*] at 33.

aliens to travel and trade⁴⁸. For example, Hugo Grotius considered foreigners under the category “Of Things That Belong To Men In Common” and asserted a norm of non-discrimination in the treatment of foreigners.⁴⁹ Moreover, Emmerich de Vattel took a further step toward the definition of the status of foreigner. Firstly, he argued that a state “has the right to control and set conditions on the entry of foreigners”. Once admitted, he states they must be subjected to local laws but the State also has a duty to protect their property, which remains part of the wealth of the home nation⁵⁰. As a result, a state’s mistreatment of foreigners or their property becomes an injury to the foreigners’ home state. This view was clearly the theory on which it will be based the legal principle of diplomatic protection.

2.2.2. From 19th Century to 1950

Much of the expansion of international trade and investment in this period occurred within colonial political and legal regimes. For this reason, the attention to the legal status of foreign nationals abroad and the protection of their economic interest decisively increased. First of all, this period was characterised by a general agreement amongst international lawyers that must exist a minimum standard of treatment for foreigners, which started to be effective thanks to a huge amount of bilateral “Friendship and Commercial Treaties “ signed in this period. One of the most famous was the 1794 Treaty of Amity, Commerce and Navigation between Great Britain and United States⁵¹, which established an *ad hoc* commission whose aim was to take judicial decisions regarding the treatment of British and US nationals and their property during and after the American Revolution. Moreover, it must pointed out that many of these agreement were signed with the ex-colonies and tented to foster Western Powers’ role and so the foreign investor. The enforcement of the principles stated by the agreements was in the hand of the Home-States through the exercise of the diplomatic protection.

Indeed, the Second main characteristic of this period is evidently the broad use of Diplomatic protection⁵²: within an era of colonialism and imperialism, sates must exercise all possible ways – political, economic and military – to protect their nationals’ interests abroad. In fact, transnational

⁴⁸ F. de Vitoria, *De Indis et De Ivre Belli* : Relectiones (1696), E. Nys, ed., J.P. Bate, trans. (Washington, DC: Carnegie Institution of Washington, 1917) at 45-55 for a summary of the views of early international law publicists on the economic interests of aliens.

⁴⁹ H. Grotius, *De Jure Belli Ac Pacis Libri Tres* (1625), J. B. Scott, ed., F. W. Kelsey, trans. (Oxford: Clarendon Press, 1925), Book II, Chapter II, XXII.

⁵⁰ E. Vattel, *Law of Nations*, J. Chitty, trans. (Philadelphia: T. & J. W. Johnson & Co., 1858), Book II, Chapter VIII.

⁵¹ See Jay Treaty: 19 Nov. 1794, 52 Cons TS 243, entered into force 28 Oct. 1795

⁵² Diplomatic protection is based on the concept that an injury to a state’s national is an injury to the state itself, for which it may claim reparation from any responsible state.

business operations centred in Europe and later in the United States as well, penetrated Asia, Africa and Latin America and just in this period they reached their zenith. Hence, security of their nationals (and of course of their monetary interests) become an important concern for the governments⁵³. Therefore, during the nineteenth and early twentieth century, diplomatic protection started to be accompanied by what is known as “gun-boat diplomacy”⁵⁴ which consists in threatening or using the force in order to back up diplomatic protection claims. For instance, between 1820 and 1914, Great Britain intervened in Latin America at least forty times to enforce British claims and restore order and protect property⁵⁵. These claims were sometimes based on limited evidence and seldom led to unproportioned reprisals, compared to the injury suffered⁵⁶.

Thus, many Latin American states decided to resist to the abuse of diplomatic protection. Their opposition solidified for the first time after the intervention of German, English and Italian armies in Venezuela in 1902, which took place to enforce a claim related with state-issued bonds. In reaction, Luis Drago, the Argentine foreign minister, sent a diplomatic note to the US Prime Minister, arguing that the public debt of Latin American states mustn't give right to an armed intervention⁵⁷. This led to the birth of the “Drago Doctrine” which states that it mustn't be used the force to recovery of state debts unless there is a refusal to submit the claim to arbitration. However, the most known reaction to the abuse of Diplomatic Protection was put into effect by the “Calvo Doctrine”: in response to the pretention of a minimum standard of treatment, some states, particularly in Latin America, endorsed what we could call a “equality of treatment standard”. In fact, Calvo sustained the no intervention, diplomatic or otherwise, in the internal affairs of the others state, considering that foreigners were not entitled to better treatment than host state nationals.⁵⁸. Therefore, this Doctrine is based on two pillars: the absolute equality of foreigners with nationals and the principle of non-intervention. In the end, the Calvo Doctrine never became a principle of customary international law, considering that it could have abolished, at its extreme, the principle of diplomatic protection. Furthermore, it shouldn't be forgotten that

⁵³ H. J. Steiner & D. F. Vagts, *Transnational Legal Problems: Materials and Text*, 2nd ed. (Mineola, N.Y.: Foundation Press, 1976).

⁵⁴ J. Cable, *Gunboat Diplomacy 1919-1979: Political Applications of Limited Naval Force*, 2nd ed. (London: Macmillan, 1981)

⁵⁵ C. Lipson, *Protecting Foreign Capital in the Nineteenth and Twentieth Centuries*, (Berkeley: University of California Press, 1985) at 54.

⁵⁶ D. R. Shea, *The Calvo Clause* (Minneapolis: University of Minnesota Press, 1955)

⁵⁷ See D. Drago, *State Loans in Their Relation to International Policy* (1907) 1 AJIL 692.

⁵⁸ “It is certain that aliens who establish themselves in a country have the same rights to protection as nationals, but they ought not to lay claim to a protection more extended.” C. Calvo, “*Le droit international théorique et pratique*”, 5th ed., 1896, Vik VI at 231.

Western Countries didn't really fight against Calvo's claims, because Diplomatic Protection is not a personal right of every national, like this Doctrine seems to consider, but it is at the discretion of the espousing state. Thus, a state can decide to not grant the protection to a national, in particular if diplomatic, military or geo-political objectives might be compromised. Anyway, in the early twentieth, capital exporting states maintained the view that international law requires a minimum standard of protection, in particular with respect to compensation for expropriation.

Lastly, it must be underlined that this minimum standard of protection on expropriation finally crystallized in an international custom known as the "Hull Rule". It has been named so for the American Secretary of State of the Roosevelt Government, Cordell Hull, who in 1938, after the expropriation by Mexico of American-held oil interests, stated that every expropriation, according to international law, must be compensated and this compensation has to be adequate (it has to correspond to the market value of the confiscated property), effective (paid in a currency of exchange directly transferable, normally in dollars) and prompt (paid as soon as possible). Even if Mexico's view was strictly different, this Rule became quite common in the following decades.

2.2.3. From 1945 to 1970s

The end of the IIWW and the commencement of the process known as "Decolonisation" led to an impressive change on the treatment of foreign investment. First of all, many colonial territories, who ended up becoming states, adopted economic policies which involved large scale nationalizations, in particular of the key sectors of their economy. This happened both in socialist countries and more capitalists ones: we could use France as an example, considering that in 1950s and 1960s many important enterprises had been nationalized (Renault, just to mention one). This age is evidently characterized by the main role of the Host-States, which are less eager to succumb to foreign investors' interest, claiming a clear home-state's sovereignty field. But there was a reason: the devastation provoked by the 2nd World War and a widespread destruction of the productive fabric all over the continent, required a powerful authority to restore the previous activities, considering also colonies' rebellions and demands for more autonomy. This is why there had been an outstanding increase in number of disputes on investment, even if many developing countries viewed international arbitration with certain distrust. Disputes were focused mainly on two principal issues: the extent to which acquired rights, including natural resource concession granted by colonies, were to be respected; and the standard of compensation for the

expropriation of those acquired rights. Hence, throughout the 1950s, developing states intensified their efforts to affirm their economic independence through the United Nation General Assembly.

First of all, this period should be remembered also for the various initiatives to create a multicultural legal framework for investment which respected the interests of developing country (what is known as the Third World). The most famous attempt has been the Havana Charter for the International Trade Organization (Havana Charter⁵⁹). It only briefly addressed the issue of investment protection by providing a prohibition of “unreasonable and unjustifiable action” and permitting ITO making recommendation for bilateral or multilateral agreement⁶⁰. Unfortunately, its Keynesian feature led to a final withdrawal of United States’ Congress from the ratification process, thus the agreement has never been established⁶¹. Furthermore, in 1949, the ICC proposed an International Code of Fair Treatment for Foreign Investment⁶², which included national treatment, fair compensation according to international law in the event of expropriation and binding state-to-state dispute resolution before the ICC International Court of Arbitration. Obviously, almost all the states, both developed and developing, were reticent to accept such a broad investment regime, so also this document has never been adopted.

Nevertheless, there must be underlined also some more positive results: indeed, it should be quoted the Resolution 1803 (XVII)-1962, which was the result of a study of the UN commission on Permanent Sovereignty over Natural Resources on the field of national control over resources⁶³. It declares that “right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned”, which means that the admission of foreign investment is subject to the authorization, restriction and prohibition of the Home-State⁶⁴. Moreover, paragraph 4 of the Resolution affirm that a compensation shall be paid for

⁵⁹ *Havana Charter for an International Trade Organization*, 24 Mar. 1948, UN Conference on Trade and Employment, U.N. Doc. E/CONF.2/78, Sales No. 1948.II.D.4.

⁶⁰ C. Wilcox, *A Charter for World Trade*, (New York: Macmillan, 1949).

⁶¹ J.H. Jackson, *The World Trading System Law and Policy of International Economic Relations*, 2nd ed. (Cambridge, MA: MIT Press, 1997) at 38.

⁶² International Chamber of Commerce (ICC), *International Code of Fair Treatment of Foreign Investment*, ICC Pub. No. 129 (Paris: Lecraw Press, 1948) reprinted in UNCTAD, *International Investment Instruments: A Compendium*, Vol. 3 (New York: United Nations, 1996)[*IIA Compendium*]

⁶³ GA Res 1803, 14 Dec. 1962, reprinted in (1963) 2 ILM 223.

⁶⁴ A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Cambridge University Press, 2005) at 216-220.

expropriation⁶⁵. The US proposed using the same Hull Rule but the opposition of the USSR, historically and ideologically against colonisation, let the General Assembly vote for a compromise. The Resolution says it should be paid an “appropriate compensation” to expropriation, which outlines a new feature in international customary law, more favourable to the Home-State.

In addition, it must be mentioned a further attempt to construct a new legal framework for international economic relations. Amongst the 1970s the UN’s efforts culminated in a series of General Assembly resolutions⁶⁶, including the 1974 *Declaration on the Establishment of a New International Economic Order* (NIEO Declaration)⁶⁷ and the 1974 *Charter of Economic Rights and Duties of States*⁶⁸. The first one asserts that neo-colonialism and the inequitable distribution of income are obstacles to developing states, so it becomes necessary setting out more respectful principles for the international economic relations, including such items as the reform of the international monetary system, the financing of development and the transfer of technology. But a more important contribution belongs to the Charter. Indeed, according to the principles of the NIEO, it claims the right of the states to regulate foreign investment within their jurisdiction, with no “preferential treatment” to foreign investment and with compensation for expropriation only determined by national law principles, omitting any reference to international law and to a minimum standard of protection. Thus, it is clear that the Charter is in contrast with the Resolution 1803 on Permanent Sovereignty over Natural Resources. Nevertheless, it should be seen as a even powerful assertion of national sovereignty by developing state, which still weren’t able to go over their colonizer’s influence. Indeed, although the Charter was adopted by an overwhelming majority, as a result of the numerical preponderance of these states in the General Assembly, most developed countries voted against its adoption, which means that the resolution didn’t have enough force to make a real restatement of existing international law, considering that they were carrying on the largest part of current international trade.

⁶⁵ “Nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule”

⁶⁶ General Assembly Resolution on Permanent Sovereignty over Natural Resources”: GA Res 3171, 17 Dec 1973, (1974) 13 ILM 238. For commentary, see N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, (Cambridge: Cambridge University Press, 1997)

⁶⁷ “Declaration on the Establishment of a New International Economic Order”, GA Res 3201, 1 May 1974, (1974) 13 ILM 715. For commentary, see M. Bedjaoui, *Towards a New International Economic Order* (New York: Holmes & Meier, 1979),

⁶⁸ “Charter of Economic Rights and Duties of States”, GA Res 3281, 12 Dec. 1974, (1975) 14 ILM 251

Lastly, it must be pointed out, in 1965, the establishment of the *International Centre for Settlement of Investment Disputes* (ICSID)⁶⁹, under the auspices of the World Bank, provided an impartial forum for the settlement of international investment disputes, that will be precisely described later in the paper. In these firsts years of creation it barely received any case of discussion and just few states ratified it (Spain, for example, joined the ICSID only in '90s). In fact, there was a kind of general mistrust and sense of uselessness toward it together with the habit of signing contracts between the foreign investor and the Host-State in order to bring a potential dispute in front of this court. Nobody at the time considered the possibility of having Bilateral Trade Agreements dispute system based on the ICSID, since it was seen more as a contractual tool, where states, when they were suffering a dispute, should have signed a contract with the foreign investor to give the competence for solving the litigation to the ICSID tribunal. Therefore the number of potential dispute that could be solved by this court was definitely reduced.

2.2.4. From 1980 to 21st century

Although the date of birth of the modern concept of international investment agreement had been the 1959, with the bilateral investment treaty between Germany and Pakistan⁷⁰, this period was characterized by an impressive growth in the signature of bilateral investment agreements. By the end of the 1990s, 1857 BITs had been concluded, several industrializing states such as India, Argentina or Chile, had also signed their first investment agreement. The explosion of these IIA has two main explanation:

First of all, there have been experienced an increased political commitment by governments toward economic liberalism and a freer international flow of goods, service and investment. The collapse of the URSS and the communist ideology with the economic success of several Asian economies concreted the final success of the neoliberal theories, discrediting that import substitution policies which had been a stunning model during the immediate post-WWII era. In addition, the Washington Consensus prompted this new ideological basis: the agreement between the IMF, the World Bank and the US Treasury on the policies necessary for busting developing states' economic conditions, created quite a wide acceptance of practises like austerity, privatisation and market liberalisation. Moreover, at that time, there was a serious lack of

⁶⁹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 Mar. 1965, (1965) 4 ILM 524.

⁷⁰ 1959 Germany-Pakistan BIT, 25 November 1959, 457 UNTS 23. R. Dolzer & C. Schreuer, *Principles of International Investment Law*, 2ns ed. (2012), 6. United Nations Conference on Trade and Development (UNCTAD), "*Bilateral Investment Treaties 1959-1999*" (2000), 1 [UNCTAD, *Bilateral Investment Treaties 1959-1999*]

alternatives about how to handle underdevelopment throughout the world. On one hand, international lending and aid, with the 1973's crisis, started to be pretty scarce. So developing state indebtedness increased. On the other, the success of many south-east Asian countries which decided to adopt such policies, kind of justified the application of the neo-liberal policies promoted by IIAs. Hence, it was perceived as the best way for overcoming their economical powerlessness. For this reason, the World Bank in 1992 published a "*Guideline on the Treatment of Foreign Direct Investment*" which emphasized the importance and benefits of the foreign direct investment and set out a series of policies which ought to be employed by the countries to attract investment, with respect to admission, treatment, expropriation, transparency and control of corrupt business practices⁷¹. Thus, they were all based on the premise that "equal treatment of investor in similar circumstances and free competition among them are prerequisites of a positive investment environment"⁷²

On the other hand, it must be underlined also the shift in the U.S. approach to BITs. Previously, they were used to sign comprehensive FCN treaties⁷³ with its allies, which covered diverse areas of law, like trade navigation, intellectual properties and even human rights, in addition to investment disciplines. They were reflecting a spirit of reciprocity where the aim was to generate mutual benefits. But in the late 1970s, the US business community progressively began lobbying their government in order to get the implementation of a new kind of investment protection, similar to the one from other capital exporting states, which resulted in what is known as "US BIT programme"⁷⁴. In this way, a new standard of BITs entered into force: they were quite short, approximately five or six pages and focused on core protection such as national treatment, Most-Favoured Nation treatment, minimum standard of treatment, compensation for expropriation (the Hull Rule was adopted again) and right to transfer capital and returns. Furthermore, it must be pointed out that they were characterized for certain asymmetry where developed states tried to protect the economic interest of their nationals abroad defining high standard and facilitation of foreign investment, even if in the 1990s there also have been signed some between non-industrialized states. Advanced countries didn't trust developing country's justice and this is why protected their investor in this way. Lastly, it was in this period when the International Arbitration

⁷¹ World Bank, *Governance and Development*, (Washington DC: The World Bank, 1992).

⁷² World Bank, *Guidelines on the Treatment of Foreign Direct Investment*", in World Bank: *Legal Framework for the Treatment of Foreign Investment*, (Washington DC: The World Bank, 1992).

⁷³ Friendship, Commerce and Navigation Treaty.

⁷⁴ P. M. Robin, *The BIT won't Bite: The American Bilateral Investment Treaty Programme*, (1985) 21 SJIL 373.

became the main resource for dispute resolution as it was seen the most efficient weapon for foreign investors against Host-States.

2.2.5. From 2008's crisis to now.

Nowadays we are witnessing an interesting global policy shift toward a new generation of investment treaties, which tends again to be more in favour of the Host-State. Indeed, more and more countries are experiencing some frustration with the old BIT style and decided to re-consider their approach to investment treaties: some countries denounced their BITs and some even exited the ICSID Convention⁷⁵ claiming that it tends too much to look after the interests of the Western Powers, harming their state sovereignty⁷⁶. Because of this attitude, only 20 new BITs were signed in 2012⁷⁷. This decline in signing Bilateral Investment Agreements is due to many reasons:

On one hand, states realised that the brevity and simplicity of these treaties was a double-edged sword because it involves many difficulties to get a reliable interpretation of it: their brevity created apparent justification for judicial activism in order to clarify all that fields left blurry by the drafters, due to a vague treaty language. In addition, their focus on investment protection generated protest on their legitimacy, considering their incompatibility to other public policy objectives such as human rights or environmental protection, in particular when the foreign investor began to challenge general legislation in the public interest⁷⁸.

On the other hand, the economic patterns of investment has clearly experienced a significant change, making a police adjustment necessary:

Firstly, because of a remarkable change in the investment environment, considering that emerging economies have turned into sources of outward investment and many developed countries have become receptors of South's investment⁷⁹. This means that, the traditional distinction between Home and Host countries, capital importing or exporting country has become less sharp: in fact the emerging markets (roughly all non-members of the OECD) have come to attract more than half

⁷⁵ UNCTAD, *Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims*, IIA Issues Note No. 2 (10 December 2010), available at www.unctad.org.

⁷⁶ South Africa, for instance, denounced or declined to renew several BITs with EU COUNTRIES. See W. Wentzel, "S.A. Declines to Renew Bilateral Investment Treaties With European Union Member States" (1 October 2012), available at www.polity.org.

⁷⁷ UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*, (2013), 101.

⁷⁸ L. N. Skovgaard & E. Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65, *World Politics* (2013) 2, at 273.

⁷⁹ See M. Haider, *Bilateral Investment treaties need re-examination*, (last visited 31 January 2015); available at: www.thenews.com.

of all inward FDI flow (an average of US\$ 776 Billion during 2010-2012)⁸⁰. This change of patterns reshuffled also costs and benefits of investor-State arbitration with the result that with this new bi-directional investment flow no country can feel safe from investment claims. Name and prestige don't matter anymore and it has been experienced a proliferation in investor-state disputes. Furthermore, are becoming always more common investment agreement signed between developing states. In south Asia, for example, a tight net of agreements has emerged between countries with similar steps of development. So, we are moving toward a context of investment involving countries that share a similar level of development. EU and US negotiations of TTIP are another example of this, but among high income countries.

Secondly, the industrial and entrepreneurship field has considerably changed in this last decade. In fact, the emergence of a global value chain involved a remarkable revolution in production stage. What was previously "clustered in factories and offices" now it is produced all over the world. For example, an iPod is invented in the U.S. but its different parts are manufactured everyone in a different country of South-East Asia and the output assembled in China. Hence, different forms of investment has become to interact among themselves creating a "trade-investment-service-nexus"⁸¹. The problem lies in the fact that BITs were created to protect the private foreign investment of Western capital-exporting countries but this national element began to break down. Due to the different provenience of shareholders and to the multilateral nature of investment capital, BIT may potentially benefit capital that the Home-State doesn't want to protect⁸². To sum up, there is an obvious need to consider a wider form of investment in these treaties and to accept that the older structure of BITs is no longer so effective.

The situation painted above led many nations to take measures and renegotiate older IIAs. The first step toward this new age has been taken with the NAFTA. The symmetric level of development coupled with a bi-directional investment flow made a new approach necessary. In fact, NAFTA, inspired by the many FCN signed by the U.S. in the past decades is "a delicate balance agreement that regulates investment in contest, that takes in account environmental and labour issues, in addition to its substantive part"⁸³. Later many other agreements have been signed or

⁸⁰ UNCTAD: Global FDI Recovery Derails, "Global Investment Trends Monitor", No. 11, January 23, 2013 (New York and Geneva: UNCTAD, 2013), pp. 2-3, available at www.unctad.org. Note that both "developing economies" and "transition economies" are called "emerging markets".

⁸¹ R. E. Baldwin: "21st Century Regionalism : Filling the Gap Between 21st Century Trade and 20th Century Trade Rules" (April 2011), available at www.cepr.org (last visited 31 January 2015).

⁸² B. Legum, *Defining Investment and Investor: Who is Entitled to Claim?*, 22, *Arbitration International* (2006) 4, 521.

⁸³ Chapter 11 itself contains reference to environmental measures in Article 1114.

modified: these new approaches foster a reduced openness compared to the old BITs, implementing an intricate interplay of obligations and exceptions with the aim to balance a proper investment protection abroad with respecting the Home-State policy space⁸⁴. In addition, this new generation of IIAs expanded the treaty's coverage to a wider range of investment-related issues. Many of them included reference to trade law, intellectual property rights or even non-economic concerns like labour rights or environmental protection. A 2011 OECD Working Paper demonstrated that only 100 treaties over 1593 BITs contained references to environmental concerns⁸⁵. The UNCTAD⁸⁶ is also promoting this new approach in order to obtain a more sustainable development with more respect for national sovereignty and social responsibility⁸⁷. More specifically, it must be noted that in 2015 Investment Policy Framework for Sustainable Development, has been relaunched at the Financing for Development Conference in Addis Ababa, providing new guidance for policymakers in the evolution towards a New Generation of investment policies. Indeed, new insights thanks to policy debates and technical assistance experience, together with the great number of feedbacks received from the expertise allocated all over the world and the new economic and political environment, have now promoted the idea that an update of the Framework is appropriate. This new document sets out a group of Core Principles that should be employed as a design criteria in different operational levels: firstly for national investment policies, secondly as a guidance for the design and use of international investment agreements (IIAs) and lastly as an action menu for the promotion of investment in all that sectors related to the sustainable development goals⁸⁸. The change mostly lies in the re-elaboration of the old concept according to the "2014 World Investment Report" published by the UNCTAD and collecting all the international community's effort in reforming worldwide investment governance, according to the SDGs⁸⁹, which permits to get covered by investment protection also areas such as poverty reduction, food security and climate change.

⁸⁴ For example, a common exclusion is related with health and state security: "non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation". 2004 *Canada Model BIT*, Annex B.13 (1).

⁸⁵ K. Gordon & J. Pohl, *Environmental Concerns in International Investment Agreements: A Survey*, OECD Working Papers on International Investment No. 2011/1 (2011), available at www.oecd-library.org.

⁸⁶ UNCTAD: *World Investment Report 2011: "Non-Equity Modes of International Production and Development"* (2011), 102-103 [UNCTAD, *World Investment Report*]. And UNCTAD: United Nation Conference on Trade and Development: "Investment policy framework for sustainable development" (2012), available at: www.unctad.org/PublicationLibrary.

⁸⁷ Japan has constantly included anti-corruption standards in its BITs. For example: 2011 *Japan-Papua New Guinea BIT*, Art. 9; 2008 *Japan-Laos BIT*, Art. 10, 2008; *Japan-Peru BIT*, Art. 10, 2011.

⁸⁸ See: www.unctad.org.

⁸⁹ Sustainable Development Goals, available at: www.sustainabledevelopment.un.org.

In addition, there is another step forward in this long process, which has been taken just a few months ago by the European Union. In fact, on November 12th 2015, after extensive consultations with the Council and the European Parliament and under the framework of the negotiations for the Transatlantic Partnership, the EU Commission formally presented to the US a proposal which consists in a new approach on investment protection, carrying on a more transparent system for resolving disputes between investors and states: the Investment Court System.

The European Commission has today finalised its new and reformed approach on investment protection and investment dispute resolution for the Transatlantic Trade and Investment Partnership (TTIP)⁹⁰. This follows another round of extensive consultations with the Council and the European Parliament. The proposal for the Investment Court System has been formally transmitted to the United States and has been made public. Basically, what the UE wants is to avoid losing its own right to regulate and to do so, it suggested the creation of a court-like system with an appeal mechanism based on precise rules, enforced by qualified judges and transparent proceedings. The proposition also includes several improvements that ease the access to the new court to small and medium sized companies. On the other hand, the policy makers underlined that introducing the current ISDS system in TTIP would have allowed companies to settle their disputes with national governments before private arbitration courts, prompting fears among certain stakeholders that businesses would hold too much power over legislators. The new Investment Court System outlined has the aim to restore the credibility of dispute resolution mechanisms, ensuring that all actors can rely on a transparent system, with written and specified rules and based on public justice (as opposed to the current private system).

To sum up, it must be admitted that we find ourselves in a really crucial period: in fact, many aspects of the neoliberalist approach, characteristic of 1990s and first 2000s, are still in force while social justice and environmental protection themes have become a daily interest for public opinion and hence for law makers. On one side, we can say that in this time of reciprocal investment flows and more concern about environmental and social issues, the FCN philosophy of investment protection, which lies beyond this new age of IIAs, in particular with reference to the ones signed by Canada, United States and the EU, has proven a better adaptation to 21st century political challenges than the short and specialized BIT model⁹¹. Not only this, but also the language

⁹⁰ See: www.europa.eu/trade/policy/in-focus/TTIP.

⁹¹ W. Alschner, "Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law", *Goettingen Journal of International Law*, 5 (2013), 2, 455-486.

and the expression used in TPP's Investment Chapter and in its Annex 9-B show certain similarity with 2004 and 2012 US Model BITs, and has been employed in almost all the free trade agreements (FTA) and bilateral investment treaties (BIT) ratified by the US in the previous 10 years, such as the ones with Australia, Chile, Colombia, CAFTA-DR, Korea, Morocco, Oman, Panama, Peru, Singapore (all of them FTAs), and Rwanda and Uruguay (BITs)⁹². On the other side, it must be pointed out the uncertainty we are facing in international investment law, we don't know if this new regional agreements will enter effectively into force, hence we ignore the consequences that will occur in the field and which reaction states will have in this new environment, considering the criticism existing around the current arbitration mechanism.

Therefore, the debate between public and private dispute resolution supporters is going to experience an outstanding relevance in the following years. Indeed, besides the TTIP hasn't entered into force yet, on the other side of the ocean the Trans-Pacific Partnership has already reached 3 months of age and its dispute resolution system is going to produce its first sentences. What will involve the use of ISDS in investment litigations? Is there something new in the TPP's approach? Is it coherent with the current evolution of protection or is it taking step apart? The following chapters will try to "unravel the knot", the characteristics and implications this treaty is going to outline in this complicated world of Investment Protection.

⁹² Available at: www.kruegerarbitrationblog.com.

Chapter 3: The Trans-Pacific Partnership's investment protection

3.1. The TPP investment protection – Core Obligations

After having considered the historical and substantive aspect of the investment protection, a return to this day and age becomes essential. As a matter of fact, 2015 demonstrated this process of development is far from being stopped and new interesting features began to show up and shuffle the already complex foreign investment environment. The TPP is the most remarkable example.

This treaty refers to investment mainly in its Chapter 9, called indeed “Investment Chapter”. First of all, it must be noticed that it is consistent with many other U.S. Investment Agreements and, precisely, it mostly follows the “2004 U.S. Model BIT”⁹³, which defines the common frame that investment agreements should follow. This chapter includes meaningful protection (with some notable exception) for Party’s investors in the Pacific Area, settling a functional investor-state arbitration system in order to enforce such principles. Basically, the chapter has two objectives: first, protect foreign investors from political and economic risk when they invest in a foreign country, providing effective remedies in the event of a breach of their rights and, second, empower investment liberalization and market access, through pre-establishment provisions. Therefore, the TPP must be applied to actions of central, regional and local government or authority and also to State enterprises that act following a government’s authority but it does not provide any protection for acts taken by private parties that damage a foreign investor. In this case, national law will manage the issue.

In the first part of the chapter, it can be found a list of all the Core Protection the host state will provide to investors, in order to create a favourable investment environment for foreigners, which are common to many other BIT signed by the US:

⁹³ Available at: www.state.gov/documents.

3.1.1. Article 9.4: National Treatment.

“Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory”⁹⁴”

The national treatment principle is embodied in most bilateral investment treaties. For example, it can be found in Art. 10 (3) and (7) of ECT and in Art. 1102 of NAFTA. Basically, it permits that the foreign investor and its investment will be treated in the same given to the one of their own domestic investors. Nevertheless, a better treatment of the foreign investor remains possible and could even be required if the international standards are higher than the ones applying to nationals. Most national treatment clauses apply only once a business is established (post-entry national treatment). Some investment treaties, like this one, include provisions related with a right of access to a national market on the basis of national treatment (pre-entry national treatment).

3.1.2. Article 9.5: Most-Favoured-Nation Treatment

“Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory”⁹⁵”

This article is also reflected in Art. 10 (3) and (7) of ECT and in Art. 1103 NAFTA. The purpose of MFN clauses in treaties is to ensure that the signing parties treat each other in a manner at least as favourable as they treat third parties. For example, as soon as the State confers an Investment International Protection relevant benefit, this benefit is automatically extended to the State in whose favour the MFN clause operates. The host state, moreover, must not discriminate against foreign investor in favour of another contracting state or third-party state. In addition, normally, a MFN clause is a “*ejusdem generis*” principle, that is, it applies to all matters subject to the agreement. The exact scope of an MFN changes according to the wording of the clause. In this case, it is clear that exist an ambit of exclusion of the applicability of MFN: the international

⁹⁴ TPP Full text release, Chapter 9. Available at: www.state.gov/sites/default/files.

⁹⁵ See: note 93.

dispute resolution procedures, which means that if a state decides to choose this method of dispute resolution, the other states are not obliged to do the same. Generally speaking, the application of MFN clauses to substantive standards has been relatively uncontroversial.

3.1.3. Article 9.6: Minimum Standard of Treatment⁹⁶

This article basically provides a treatment according to the applicable customary international law principles which include “fair and equitable treatment” and “full protection and security”. The first one prevents host states to take any arbitrary, unfair or discriminatory measures against foreign investment. For example, transparency, consistency, stability, compliance with contractual obligations and action in “good faith” can be considered measures that supply a minimum treatment for investment. Therefore, it appears clear that this article could be treated as a “catch-all” protection and this is why it is the most invoked principle in current dispute resolution between state and investors. Consequently, the TPP participants decided to limit its influence and clarify which aspects are not equivalent to the minimum standard of treatment provided under customary international law. In practice, this means that not the mere violation of an investor’s legitimate “expectation” regarding the application of a particular regime neither a cancelled or a not renewed subsidy, could be considered a violation of the FET standard. In fact, with the TPP it must be necessary an additional element, such as a clear discriminatory behaviour or arbitrariness. Hence, it must be underlined that has emerged, in international investment law, certain tendency to delimit the power of this provision giving a detailed ambit of application. On the other side, the chapter considers also “full protection and security” as a minimum standard of treatment. It suggests that the host State is under an obligation to take active measures to protect the investment from adverse happenings. The duty to grant physical protection and police protection may be used against encroachments by State organs or in relation to private acts. Traditionally, the primary purpose of this standard was to protect the investor against physical violence, in particular against the invasion of the investment premises, but there is also authority that indicates that the principle of full protection and security goes over strict physical violence and includes also legal protection for the investor⁹⁷, even if the current trend is directed toward this more traditional vision. At any rate, it must be pointed out that the chapter acts under customary

⁹⁶ Article 9.6. (Minimum Standard of Treatment) shall be interpreted in accordance with Annex 9-A (Customary International Law).

⁹⁷ *Eltronica Sicula Case vs U.S.*: Available at: www.cij.org.

international law⁹⁸, which means that the host State is not placed under a strict obligation to prevent such violations. Rather, it is generally accepted that the Host State just have to supply with certain diligence the protection toward the foreign investment according to the circumstances. But whenever State organs act in violation of the standard, no issues of attribution or due diligence will be used to avoid States' direct responsibility.

Lastly, in the article 9.6bis, the Chapter describes the Treatment in Case of Armed Conflict or Civil Strife, underlining that a requisition or destruction of a covered investment during such an undesirable event must be managed through a compensation or restitution to the damaged part. In this case, Article 9.4 and 9.11.6 (b) should not be applied.

3.1.4. Article 9.7: Expropriation and Compensation

Protection against uncompensated expropriation is a cornerstone of international investment law. Indeed, it must be remembered that the original goal of these kind of treaty was to provide an instrument suitable for foreigners just in case a host government would have expropriated their plant or land and the domestic court system could would not provide a solution or a fair compensation. Therefore, this aspect of the Core Obligations is the most ancient and it could hardly be set apart by any kind of Investment agreement, TPP included. For example, the ECT talks about it in its Art. 13 meanwhile NAFTA deals with expropriation in Art. 1110.

In the TPP, expropriation is a very delicate issue to the point of adding an Annex⁹⁹ that clarifies all the possible misunderstandings that the Chapter could generate. The language used in Annex 9-B of the TPP Investment Chapter to distinguish between indirect expropriation and non-compensable measures is equal to the one used in the 2004 and 2012 US Model BITs, and has been replicated in almost all the free trade agreements (FTA) and bilateral investment treaties (BIT) ratified by the US in the last 10 years¹⁰⁰.

First of all, it must be said that all the signatories countries agree to not expropriate nor directly neither indirectly the investment of a foreign investor without a due process of law, a non-discriminatory behaviour and an adequate compensation.

⁹⁸ TPP, Article 9.6 (b).

⁹⁹ TPP, Annex 9B.

¹⁰⁰ See BITs signed by the US with Australia, Chile, Colombia, CAFTA-DR, Korea, Morocco, Oman, Panama, Peru, Singapore (all of them FTAs), and Rwanda and Uruguay (BITs).

As it was said before, the Annex describes when an action or a series of action by a party constitute an expropriation. On one side, direct expropriation is achieved when an investment is nationalized or taken through a formal transfer of titles. On the other side, the indirect expropriation is generated when a series of action taken by a party have the same effect of a direct one, but without transfer of title. As it can be imagined, the determination of whether an action is an expropriation or not, is complicated. Thus, the TPP requires an inquiry: tribunals must determine on a case-by-case basis whether or not the measures fall in one or another category considering, among other factors: first, the economic impact of the government decision and second, the extent to which the government interferes with distinct, reasonable investment-backed expectations. About this last point, it is made clear that frustration of investors' expectations are not a sufficient reason to claim a compensation for expropriation.

Nevertheless, the reasonability of these claims depends on different factors such as the signature, for example, of binding written assurances by the State which would enable the investor to claim a Party before an investment dispute tribunal. Thirdly, the character of the government action is also taken in account: an expropriation couldn't be done with the aim to favourite national enterprises, for example.

Moreover, the Chapter addresses the long controversial coverage of subsidies and grants¹⁰¹. Indeed, article 9.7.6. states that a Party's decision not to issue, renew, maintain, modify or reduce a subsidy or grant, standing alone, does not amount to an expropriation, if there is not a specific commitment or if the State acted in accordance with the terms and conditions of the subsidy or grant. About this aspect, it must be underlined that this clarification made in article 9.7.6. is a trial of the TPP to have more precise rules in a field that has been characterized by lot of claims throughout the years. A famous example is related with Spain, that suffered various demands when the Rajoy's government decided to quit all the subsidies Spain was giving to promote investment in renewable sources of energy. In fact, many foreign enterprises, in particular from the United Kingdom, invested impressive amounts of money here, hence they reacted against the Iberian country and started different disputes.

Notwithstanding, there is an exception: the expropriation of a covered investment is feasible when it is made for a Public Purpose. This concept belongs from the international customary law but it also lies in most national jurisprudence, maybe with a similar name¹⁰². It refers to all that regulatory action that protect public welfare objectives, like public health, public safety and the

¹⁰¹ See: Gold Reserve Inc. vs Venezuela case, ICSID Case No. ARB(AF)/09/1

¹⁰² Like "Public Interest" or "Public Use".

environment. For example, regulation about public health includes, among others, measures connected with vaccines, diagnostics, pharmaceutical, medical devices and health related aids. About this field, it should be remembered that there is a General Provision in Article 9.15 which states that nothing in the investment chapter shall be construed to prevent the State to adopt, maintain or enforce measures that it considers appropriate to ensure that the investment is consistent with environmental, health or other regulatory measures, provided that those measures are consistent with the chapter.

Lastly, the TPP talks also about the compensation issue. About this field, there are not many news, because the agreement states that a compensation must always be paid and the payment has to be prompt, adequate and effective, according to what the Hull Rule states¹⁰³. The amount will depend upon the loss suffered by the investor. It could consist in the value of the land expropriated or, if the project is in operation, it may be the fair market value of the investment at the expropriation date plus interests in a fully realisable and transferable currency. About this, it must be pointed out that some country that signed the treaty, like Vietnam, are not using a freely usable currency. In this case, a rightful conversion rate will be applied.

3.1.5. Article 9.8: Transfers

Nearly all bilateral investment treaties contain rules on the transfer of funds. These rules deal with the investor's right to make transfers, the types of payment allowed, with convertibility and exchange rates and with limitations on the free transfer. Clauses of this kind are also contained in Art. 14 ECT and in Art. 1109 NAFTA.

Treaties differ on whether the right to transfer funds concerns only the transfer out of the host country or also inward transfers. Most treaties cover both, but some treaties only address outward payments. In the TPP case, chapter 9.8 grants a "*freely and without delay transferring into and out of a Party's territory*"¹⁰⁴ of profits, dividends, interests and many other monetary transaction. Nevertheless, practically no treaty grants an absolute right to investors to make transfers and nor does the TPP. In fact, this freedom is subject to exception in all that cases where the Host State suffers a complicated financial situation and a massive capital flow would worsen its crisis-related circumstances.

¹⁰³ See: note 57.

¹⁰⁴ See: note 59.

3.1.6. Article 9.9 Performance Requirements.

First of all, it should be pointed out what does the term performance requirement (PR) refer to. Basically, PRs are rules used by host governments in order to influence the behaviour of foreign investors and secure certain benefits for their economies, imposing conditions on investors that are not related to market considerations. Normally, these legal obligations on foreign investors or their investments lead to penalties in the case of non-compliance. Therefore, according to the free-trade spirit of TPP, the participating country decided to not impose such limitation of trade and investment, taking the coherent decision of barring specified PRs from the treaty, like local hiring targets, export requirements, technology transfer or technology localization requirements, between others. However, article 3 (d) contains some exception to this general rule. In fact, provided that a PR is not applied in an arbitrary manner and it doesn't constitute a restriction on international trade or investment, PR are acceptable, if necessary, to secure compliance with national regulation, to protect human rights, life and health and to conserve living or non-living exhaustible natural resources.

3.2. *The TPP investment protection – Non-conforming measures*

TPP Parties adopt a “negative-list” basis, meaning that their markets are fully open to foreign investors, except where they have taken an exception (non-conforming measure) in one of two country-specific annexes. These measures have the effect of “locking in” current protections by prohibiting future reforms and preventing expansion of existing restrictive measures. Moreover, this chapter is completed by Annex I and Annex II, which lies at the end of the whole text. These extensions collect all the countries’ non-conforming measures and are introduced by a “Consolidated Formatted Noted” which specifies all the obligations of the chapter that could be amended¹⁰⁵. The first one exposes measures that can be amended but on which a Party accepts an obligation not to make them more restrictive in the future, both at central and national level of

¹⁰⁵ TPP, Annex I, article 9.4: The Schedule of a Party to this Annex sets out, referring to Article 9.11 (Non-Conforming Measures) a Party's existing measures that are not subject to some or all of the obligations imposed by:

- (a) Article 9.4 (National Treatment);
- (b) Article 9.5 (Most-Favoured-Nation Treatment);
- (c) Article 9.9 (Performance Requirements);
- (d) Article 9.10 (Senior Management and Boards of Directors);

government, as well as a “ratchet” which means that if a measure will be amended to a less restrictive one, the new more favorable treatment will be considered a benchmark for this specific requirement. Whereas, the Annex II collects all that measures and policies that can only be amended in the future in ways that increases their conformity with applicable TPP obligations. In this way, a country enables itself to have a full discretion on a non-conforming measure and so the possibility to adopt all the restriction it wants in this field, without any limitation given by the agreement. With the negative list NCM approach, governments ultimately forgo the right to introduce measures in the future if they implicate a discriminatory or access-impairing provision in the Chapter – even in sectors that do not exist yet or that are not regulated at the time of the Agreement’s entry into force. Lastly, it must be noted that NCMs are subject to negotiations, a Party cannot simply claim an NCM unilaterally without persuading other Parties to agree.

3.3. The TPP investment protection – Denial of Benefits

Many investment agreements maintain an article about denial of benefits and also the TPP does so. Denial-of-benefits clauses in investment treaties are generally designed to exclude from treaty protections nationals or third States nationals which, through mailbox or shell companies, seek to use the provisions that the treaty could grant them.¹⁰⁶ Normally, the denial come into force in certain circumstances such as when a person or enterprise establishes in a TPP country with lack of substantial business activities there. The chapter also allows the denial of benefits against companies that invest in a TPP country, but are owned by persons of non-Parties with whom a TPP Party prohibits certain transactions, such as under sanctions regimes. However, it should be remembered that Article 9.10 (Senior Management and Board of Directors) provides no limitation about investors’ nationality, hence the investment could be held by persons or enterprises of any particular provenience. Nevertheless, a Party may require that a majority of the panel of directors or of the headquarters of an enterprise, for example, belong from a particular nationality or have their residence in a Party territory.

At any rate, the importance of this chapter mustn’t be underrated because the language used in the TPP is pretty innovative since it provides governments a crucial tool to limit investor abuse of these rights. In fact, it has been common in other FTAs that multinationals often incorporate

¹⁰⁶ L. Gastrell & P.-J. Le Cannu: “Procedural Requirements of ‘Denial-of-Benefits’, Clauses in Investment Treaties: A Review of Arbitral Decisions”, ICSID Review (2015), 30: 78-97.

subsidiaries in diverse jurisdiction in order to minimize the exposure to their home country's tax and regulatory system. In the TPP, countries like Japan or U.S. have raised doubts about all that corporation that are claiming "Vietnamese" nationality to challenge U.S. or Japanese regulation and take advantage of a laxer tax policy. In order to fight against this practice, the Parties created a sort of two-stage process: the first, the legal hurdle, is passed if the allegedly foreign investor could be shown to be ultimately owned or controlled by U.S. persons. The second, the economic hurdle, is passed if the investor has greater business activities in the U.S. than in their allegedly home country (Vietnam for example). Lastly, it must be remembered that they are not cumulative steps but either can be disqualifying¹⁰⁷.

3.4. The TPP Investment Protection – Environment and Social Responsibility

In the last part of Section A, Article 9.15 gathers also a standards of protection related with environmental, health and other Regulatory Objective. This short article emphasize the aim of the chapter in which there is nothing constructed to put up any Party to enforce measures appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environment, health or other regulations. No article should oppose to a national measure made up to protect its environment, for example¹⁰⁸.

Consequently, this article gave birth to a different approach that has no precedent in other multilateral agreements like NAFTA. In fact, the absence of a general exception in this field has been a serious shortcoming for international investment law, with the consequence that many countries gave up in their project of legislations or just proposed milder versions of environmental and health regulations. Therefore, thanks to article 9.15, national legislator are likely to legislate in order to protect the environment without seen their state demanded in front of an investment court for this reason. Also an expropriation could be waived by this article. Anyway, there mustn't be any discriminatory or arbitrariness in the decision¹⁰⁹.

¹⁰⁷ Institute for Policy Studies, *Key Elements of Damaging U.S. Trade Agreement Investment Rules that Must Not Be Replicated in TPP*, (Washington DC, February 2012).

¹⁰⁸ TPP, Article 9.15.

¹⁰⁹ TPP, Annex II-B, Expropriation (3)(b).

Nevertheless, the provision itself does not seem to resolve the conflict, as the regulatory measure that is allowed must be “otherwise consistent with this Chapter”. In this way, it has been underlined that not every state legislation can be acceptable¹¹⁰.

According to what it is written in the article, it appears that the domestic regulatory measure is something subordinate to the other provisions of investment chapter. Hence, when does a measure become acceptable by the treaty?

The solution of this issue becomes a matter of judicial interpretation where one tribunal could decide one way or another. In fact, there is no certainty that an investment tribunal will interpret the substantive rules in a way that provides sufficient flexibility to safeguard the regulatory of the Host Government. As the treaty admits the settlement of a dispute in various tribunals and considering that has already happened that two courts have ruled differently on the same case, we can explicitly understand that this provision is not easing the job of arbitrators.

Even so, this core protection remains a great innovation for environmental policy and provides broader freedom to regulate compared to the one given by previous multilateral investment agreement’s chapters, maybe influenced by the 2014 reform of the UNCTAD which invites countries to be more aware of the climate change and thus promoting also through investment a more sustainable version of development.

On the other hand, article 9.16 put the focus on a different theme, always related with Human Right. As a matter of fact, investment treaties have face faced a long-time criticism on the areas of labour standards and social safety nets because, improving the international flow of investment, have in some sense accelerated that “Race to the Bottom” of job quality, in particular in all that underdeveloped country which, to be competitive in this ruthless world market, had to stimulate the attraction of foreign assets in one way or another, frequently promising low taxation or fewer environmental or cheaper labour markets, with lower protection (or lower state control) for workers.

Conversely, the TPP wants to take a step in a different direction, including in its Core Protection more awareness in international job quality, encouraging enterprises to voluntarily incorporate into their policies a bunch of recognised patterns about corporate social responsibility which are seldom not supplied by national law¹¹¹. Unfortunately, critics of the TPP can easily blame this

¹¹⁰ K. Y. Tung, “Investor-State Dispute Settlement under the Trans-Pacific Partnership”, *The California International Law Journal*, Vol. 23, 1, (July 2015).

¹¹¹ TPP, Article 9.16.

article of ineffectiveness: as a matter of fact, it still remains an encouragement, nothing that involves nor obligations neither sanctions in the case of its violation.

To conclude, it could be said that the innovation brought just with the existence of this article is remarkable and praiseworthy. Notwithstanding, it could have been even more protective and efficient. The phrase “otherwise consistent with this chapter” lets open so many interpretation and cause the dispute resolution to be pretty difficult and uncertain while the non-compulsory nature of article 9.16 transform a really innovative provision in just a weak recommendation.

Chapter 4: The TPP procedural part: The Dispute Resolution.

Section B of the TPP's chapter 9 is focused on a basic and irreplaceable element for investment agreements: the dispute resolution.

In fact, when companies invest in a foreign country they likely have to manage with some kind of legal and political risk, particularly if the investor's legal rights in relation to actions by the host state are unclear or hard to enforce in local courts. When investment protection is provided in a treaty, a mechanism to resolve disputes between the investor and the host state is indispensable: the mechanism used in the TPP is called ISDS. Investor-state dispute settlement (ISDS) is an instrument of public international law, that grants an investor the right to use dispute settlement proceedings against a foreign government. Provisions for ISDS are contained in a number of bilateral investment treaties, in certain international trade treaties, such as the North American Free Trade Agreement (Chapter 11) and the Trans-Pacific Partnership (Chapters 9 and 28). This system is something special and unusual in international law because it allows the foreign property owner to skip domestic courts, administrative procedures, city hall hearings and the typical procedures of national justice and it gives the possibility of suing the host-country government before a panel of private "arbitrators" while countries doesn't have the same advantage, since they can't sue a foreign investor in such a tribunal. Moreover, it must be pointed out that arbitrators have the power to make decisions in cases, but they are not democratically elected or appointed, and they are not subject to stringent conflict of interest rules. In addition, foreign property owners don't lose access to the national foreign court processes, that is they can "double dip" to get what they want.

The use of this system gives advantage both to States and Investors: first of all, it gives investors the access to independent tribunals, not influenced by the political and economic landscape of a country and to possible compensation when they are treated unfairly by host states. Secondly, ISDS deters the host state from acting unfairly, considering the high costs that arbitrations involve. Conversely, it should be pointed out that ISDS is a fundamental element for States to reinforce the credibility of the commitments they made in their international investment agreements. In

effect, the bilateral investment treaties that provide for international arbitration, about 93% of the total, allow for private enforcement of these commitments. If a State is found to be in breach of its treaty obligations, the harmed investor can receive monetary compensation or perhaps other forms of redress. In principle, the availability of such remedies creates powerful incentives for States to honour their commitments. Furthermore, from a different point of view, ISDS can be viewed as a progressive institutional innovation since it helps to reduce sources of international tension and recourse to military force. In fact, it gives the possibility to puzzle out all that litigations that couldn't be solved by direct investor-state dialogue or by proceedings in domestic courts that in the past could have turned into diplomatic protection actions or, at times, to the threat or use of military force.

Chapter 9 and 28 outline a detailed series of steps that must be taken by both Parties in the case of the arise of a dispute. They could be gathered in four big levels:

4.1. Negotiation

The TPP encourages the use of alternative dispute resolution's methods, previous to the proper arbitration. In fact, article 9.17 of TPP points out the need of a prior consultation between the parties. This means that the respondent should initially seek to resolve a dispute through negotiation to arrive at a mutual satisfactory resolution which could involve non-binding third-party procedures. Good offices, conciliation and mediation as methods of solving disputes are more diplomatic actions and mostly for settling political disputes than legal principles and fundamentals. These methods have not been mentioned in GATT 1947; however, in the Memorandum of Understanding of 1979¹¹², these have been presented and recommended to GATT as methods of solving disputes. Any party of a dispute may ask for good offices, compromise or mediation and the claimant party might ask for establishment of investigation council.

Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the Parties to the dispute so agree. The proceedings shall be confidential and without prejudice to the rights of either party in any further proceedings. The Director-General may, acting in an ex-officio capacity, offer good offices, conciliation or mediation with the view to assisting members to settle a dispute¹¹³.

¹¹² Memorandum of Understanding between the U.S. and Israel, (1979). Available at: www.jewishvirtuallibrary.com.

¹¹³ S.R. Myneni, World Trade Organization (WTO), *Asia law house*, second edition, 2003, p.126.

To be accurate, Good Offices involve the most restricted and limited interference of a third party. In fact, it makes efforts to establish a suitable atmosphere for the negotiation, preparing Parties to dispute to reach an agreement. In addition, third party might take good offices upon its own initiation or request of one or both parties.

Conversely, with the conciliation there is a deeper role of the Third Part: it participates in the negotiation as a communicator to inform the other party of its views and suggestions for settling the dispute and solving it, working on communication and relationship.

The conciliator focuses on reducing tension by clarifying facts between the parties and helps them to understand the value of good relationships. The conciliator is also useful because it informs the parties of all relevant facts or arranges for the meetings between them. Generally it is used prior to mediation.

Lastly, it must be taken in account the mediation process which is slightly different respect to conciliation: as a matter of fact, while conciliation is used almost preventively, as soon as a dispute or misunderstanding surfaces, mediation is closer to arbitration in the respect that it "intervenes" in a substantial dispute that has already surfaced which is very difficult to resolve without "professional" assistance. Mediator is a neutral third party that assists the litigants in reaching a mutual satisfactory resolution of the problem. In addition, a mediator is selected, they are professionals who possess specialized technical training in the resolution of disputes. Moreover, he plays a dual role during the mediation process: on one side, he is as a facilitator of the parties' positive relationship, on the other he could be considered an evaluator whose aim is analysing the different aspects of the dispute. After that, a mediator can also help the parties to articulate a final agreement and resolve their dispute. The agreement at the end of the mediation process is product of the parties' discussions and decisions.

4.2. Submission of a claim

The TPP gives to the negotiating party a period of 6 months to puzzle out the issue. This means, that mediation, good offices or conciliation could last maximum 180 days after the reception of a written request for consultation. Afterwards, if the claimant hasn't reach an agreement with the respondent, it could turn to arbitration. The submission of a claim could be done on behalf of a

physical person or of an enterprise (juridical person), normally owned by that physical person and it is motivated by a breach of one of the obligation listed in Section A of the TPP. Violation of the National Treatment or a non-regular expropriation could be considered a valid reason to start a litigation. Likewise, the breach of an investment authorisation or of an investment agreement are considered a sufficient reason, on the condition that the subject matter of the claim is directly related with the covered investment that was established or acquired or sought to be established.¹¹⁴ When one of this cases occurs, the claimant, at least 90 days before submitting a claim, needs to deliver to the respondent a written note which contains his name and address (or the corporation's one), the provision, the authorisation or agreement that he claims it has been breached with some factual basis that supports its position and finally his request of damages.

The TPP, differently to other international agreements, provides also a list of tribunal where the claimant can turn up in order to start the dispute. Hence, foreign investors are able to choose from a number of arbitration options: The ICSID Convention with its ICSID Rules of Procedure for Arbitration Proceedings, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or, if both parties agree, any other arbitral institution or any other arbitration rule¹¹⁵. This choice is highly important, and can have significant consequences. As such, investors should carefully consider their best option because every court has its own rules and procedures. Firstly, enforceability is an aspect that should be considered in choosing a court, for example, ICSID Arbitration awards are subject only to annulment proceedings under the ICSID Convention; national courts in states that are party to the Convention must recognise such an award as if it were a final judgment of a court in that state and may not refuse recognition. On the other hand, with non-ICSID arbitrations the national courts of the seat of the arbitration are generally able to vary or set aside the award on various grounds. This often covers where the court considers that the tribunal did not have jurisdiction or where there has been a serious procedural irregularity. Further, the recognition and enforcement of investor-state arbitrations other than ICSID Arbitrations will frequently be governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958¹¹⁶. It includes several grounds on which national courts may refuse to recognise and enforce an arbitral award, which covers most of the ICSID

¹¹⁴ TPP, Chapter 9.18.1 (b).

¹¹⁵ TPP, Chapter 9.18.4 (a),(b),(c),(d).

¹¹⁶ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Available at: www.uncitral.com/pdf/text/english/arbitration.

annulment grounds¹¹⁷. Secondly, if a party thinks transparency is an important indicator, he may probably choose the UNCITRAL Arbitration Rule. In fact, the addition to UNCITRAL Arbitration Rules (2010) new Rules on Transparency in April 2013, imposed the requirement that most of the key documents in an Ad Hoc UNCITRAL Arbitration, any oral hearings and the decisions of the tribunal, must be available to the public. There are exceptions that cover confidential and protected information. In addition, it must be taken in account that these rules are applicable only to agreements concluded after April the 1st 2013. Lastly, claimants also consider really important the cost of an arbitration, which is normally really high. It must be pointed out that arbitration costs include the fees and expenses charged by the tribunal and the arbitration institution. For example, the UNCITRAL Arbitration is used without an administering institution, consequently costs can be significantly reduced; however, doing so it will generally result in the parties and/or the arbitrators undertaking a higher proportion of administrative work, both of which will have cost and time-implication that some party may want to avoid. At the current date, according to the statistics¹¹⁸, ICSID tribunal is the most chosen with its 407 cases, followed by the Ad Hoc UNCITRAL Arbitration, with its 128 cases.

Thereafter, the parties must show its consent to the submission of the claim, together with the appointed arbitrator's name, through a Notice of Arbitration that is submitted to the chosen Arbitration tribunal. It must be remembered that no claim shall be submitted more than three years and six months after the date on which the claimant first acquired knowledge of the breach alleged.

4.3. Panel's composition and rules

4.3.1. Panel's creation.

Before the litigation's start, the parties, unless they agree differently, must elect three arbitrators in charge of solving the dispute, one appointed by each party and the third nominated by the Secretary-General, in order to maintain some balance in the decision process. In addition, if a tribunal is not created within a period of 75 days after the submission of the claim, the Secretary-General has the power to choose the missing arbitrators and get the dispute started. The process is a fundamental step in dispute resolution because parties try to appoint professionals that could

¹¹⁷ M. Coleman & H. Alaridge & T. Hinnes, Choosing an Arbitral Forum for Investor-State Arbitration, January 2015, available at: www.steptoe.com.

¹¹⁸ The ICSID Caseload – Statistics, available at: www.icsid.worldbank.org.

have more sympathy toward their position; therefore, there are some indicators that must be considered:

Firstly, it must be pointed out that nationality is always considered a positive aspect: choosing an arbitrator of the same nationality is often sensible because then at least one member of the tribunal will have a good understanding of the culture, business practices and customs of the country where the party comes from, without considering the fact the arbitrator could feel some “nationalism” which could push him to work harder for his country.¹¹⁹ However, in one arbitrator’s dispute, having the same nationality of one of the party is not allowed, because this could generate some bias.

Secondly, arbitrator caseload is another important aspect to consider: if he has a long and strong caseload it could be an advantage because this means it has a lot of experience but on the other side it is no secret that well-known arbitrators are highly sought after. Indeed, they may have months in their diary booked up far in advance. Choosing an arbitrator with a heavy caseload can lead to scheduling conflicts which may delay the proceedings and affect the parties’ right to a speedy resolution.

Thirdly, strong management skills are a cornerstone, considering the well-known arbitration’s flexibility. If not managed properly, the absence of procedural rules can lead to protracted disagreements between the parties, thereby causing delay and the incurrence of unnecessary costs. To ensure the arbitral process is administered in an efficient, cost-effective manner, the parties should choose a strong arbitrator capable of managing people as well as the process, able to deal with different cultures, legal systems and the tension which easily run high during disputes¹²⁰.

Lastly, the arbitrator’s expertise must be taken in account, for example in certain disputes an engineering background or experience in the oil and gas industry may be essential to achieve a satisfactory result and avoid the need to waste time explaining basic industry concepts and norms. To this end, parties should thoroughly investigate candidates. In particular, review CVs, conduct online research and consult with colleagues. To sum up, it is tendency to choose an arbitrator with

¹¹⁹ J. Stadwick, Four Factors to consider when selecting an arbitrator, Al Tamimi & Co., (2013). Available at: www.tamimi.com/magazine.

¹²⁰ See note above.

a formal legal education, but in special cases like disputes that involve niche industries, it becomes convenient appointing an arbitrator from a different educational background.

In the TPP, arbitrators are not the only ones that take part in the proceeding. If the Parties agree, a non-disputing Party may introduce an oral or written submission to the tribunal regarding the interpretation of the Agreement . This is called *Amicus Curiae* submission and it's normally based on a request of the arbitrator that wants to have a deeper knowledge regarding a matter of fact or law within the scope of the dispute that may support and help the tribunal in giving a fair evaluation of the submission. To be clearer, *Amicus curiae* is a legal Latin phrase, literally translated as "friend of the court", that refers to someone, not a party to a case, who volunteers to offer information on a point of law or some other aspect of the case to assist the court in deciding a matter before it. The information may be a legal opinion in the form of a brief, testimony that has not been solicited by any of the parties, or a learned treatise on a matter that bears on the case. The decision whether to admit the information depends on the discretion of the court. An *Amicus Curiae* could be a physical person (a doctor, a university professor), an NGO (like Emergency or Doctors without Borders) or other institution. Moreover, it must be underlined that each submission shall identify the author, disclose any affiliation with the disputing party and listing any person, government or entity that has provided a financial assistance in preparing the submission in order to avoid a possible bias. In fact, this rule becomes necessary since one of these institution could provide a testimony which may foster on purpose one of the party's position¹²¹.

The use of the *Amicus Curiae* is not the only component whose aim is to prompt the transparency of arbitral proceedings. Indeed, article 9.23 details a series of documents that the parties must make available for the public. Notice of intent, notice of arbitration, pleadings and memorials are just some examples of files that everybody could read and thus have a deeper comprehension of tribunal's functioning. In addition, all hearings are open to the public and the tribunal shall supply the appropriate logistical arrangement to let this be possible. Nevertheless, it should be pointed out that some information are kept secret but they must be a reason that justify this secrecy, in accordance with Article 29.2 (Security Exception) or Article 29.6 (Disclosure of Information).

¹²¹ *Amicus Curiae's* definition, *Tech Law Journal*, (2014). Available at: www.techlawjournal.com.

4.3.2. Main panel's rules

After the submission of a claim under Article 9.18.1, arbitrators must choose the governing law of the dispute, this means, the rules of law applicable to the pertinent investment authorisation or agreement that will be used as a basis to puzzle out the dispute. In this process, it must be taken in account also Article 9.25 about Interpretation of Annexes. In fact, it could happened one of the Parties alleges that the breach it was accused for, lies within the scope of a Non-Conforming Measure listed in Annex I or Annex II. When this happens, the Commission of Interpretation of the provisions¹²² will submit, within 90 days of delivery of the request, a definitive interpretation of the issue in order to let the dispute go on.

Moreover, we must consider the panel's work on consolidation of the claim. Actually, on request of a party, tribunals may consolidate claims raising common questions of fact and law or facts arising out of the same events, with the result that efficiency and litigation costs do decrease. To do so, a disputing party have to send a Consolidation Order Request to the Secretary-General which has 30 days to reject the document because clearly unfounded, if not a tribunal shall be established in order to understand if two or more claims that have been submitted to arbitration under Article 9.18.1 (Submission of a Claim to Arbitration) have a common question of law. The panel's creation is follows the same path described two paragraphs above, with the appoint of three arbitrators, two by the parties and one by the Secretary-General. Hence, if this tribunal states that this situation have happened, in the interest of a fair and efficient resolution and after hearing the Parties, it assumes this new jurisdiction over and gives it to the tribunal previously established, the one it was holding the first case dispute. That tribunal must have the same members except for the arbitrator appointed by the party it was claiming the consolidation order. In addition, it should be pointed out that the new cases could involve new hearings or the repeating of some old ones.

To conclude, we should point out that this last rule described is useful because it permits avoiding strategic initiation of duplicative litigation. On the other hand, it slows down the dispute process, worsen one of the biggest shortcoming of this institution: its habitual, everlasting slowness.

4.4. Awards

¹²² TPP, Article 27.2.2(f).

The final phase of the process could be divided in two parts:

Firstly, the Panel must present an initial report to the disputing Parties within 150 days after the last arbitrator is appointed or 120 days in cases of urgency. That report is normally confidential to allow the disputing Parties to review and submit any written comments to the panel¹²³. In addition, it contains all the submissions and arguments of the disputing Parties and any third Parties, and any information or advice received by any expert that helped to reach the final resolution. Normally, together with the description of the facts and the determination of the consistency or inconsistency of the claim, this report lists also a series of recommendation for an efficient resolution of the dispute and also the factual explanation on why the panel gave the reason to a party and not to the other. Therefore, after considering any written comments received, the panel could modify its report and make any further examination it considers appropriate, in order to reach a more comprehensive final award. Lastly, it is interesting to note that panellists may present separate opinions on matters not unanimously agreed¹²⁴.

Afterwards, the panel shall present a final report to the disputing Parties, including any separate opinions on matters not unanimously agreed. This happens no later than 30 days after presentation of the initial report, unless the disputing Parties agree otherwise¹²⁵. After taking any steps to protect confidential information, and no later than 15 days after the presentation of the final report, the disputing Parties must publish the report and make it known to everybody.

The final award is a text which basically states if the measure at issue is inconsistent with a Party's obligations in this Agreement or if a Party has failed to carry out its obligations in this Agreement; or if the measure at issue is causing nullification or impairment within the meaning of Article 28.3.1(c). If one of this breach is recognised, hence there is included a list monetary damages or restitution of property to the party that have suffered the violation. In addition, a tribunal may also award costs and attorney's fees incurred in the dispute and determine how and by whom those costs and attorney's fees shall be paid, always in accordance with applicable rules. Furthermore, the chapter 9.28.4 considers the possibility of providing monetary refund to the party who suffered a pecuniary loss due to a denied investment on a foreign country's soil. However, this party should be able to provide to the court all the proofs that demonstrate the

¹²³ Office of the United States Trade Representative, "What is ISDS?". Available at: www.ustr.gov.

¹²⁴ TPP, Chapter 28.17 (1), (2), (3), (4), (5), (6), (8).

¹²⁵ TPP, Chapter 28.18, (1).

breach was the proximate cause of those damages¹²⁶. If this does not happen, the tribunal will award to the claimant a reasonable cost and the attorney's fee. In addition, it must be pointed out that no award belonging from arbitration will involve punitive damages, like prison.

The enforcement of the award is responsibility of every party in its own territory but this is not a fast process¹²⁷. As a matter of fact, parties has the possibility to request a revision or an annulment of the award. This is why this process normally could start only 120 days after the date the award was rendered if the tribunal was following the ICSID Convention's Rules. Conversely, 90 days after under the ICSID Additional Facilities, UNCITRAL and other arbitration rules.

¹²⁶ TPP, Chapter 9.28.4.

¹²⁷ TPP, Chapter 9.28.9,10.

Chapter 5: TPP investment Chapter, “Success or Defeat”?

The previous chapter detailed the main features related with the Dispute Resolution in the TPP. As it was said in the introduction, one of the aim of this regional agreement will be trying to settle down a more coherent and integrated norms of international investment law. In fact, the TPP is representing an alternative track for the development of this governance framework, outlining itself as a stepping-stone toward multilateral reforms of the international investment regime.

It is generally recognized that the most vital innovation should belong from the ISDS' area, the most criticised field of this regime. The ISDS is worldwide considered one of the best mechanism to provide neutral international arbitration, permitting to investors of signing nations doing business abroad and receiving an impartial, law-based approach to resolve conflicts. However, investment law regime nowadays reveals key institutional and doctrinal deficiencies that many experts advocates.

There are few issue that receive more attention in international investment discussion than dispute-settlement mechanisms, which is broadly considered the most important guarantee for investment protection. At first glance, it appears that ISDS provision have undergone certain reform through TPP negotiation. Nonetheless, many voices has raised claiming that the expectation about this chapter hasn't been fulfilled. One example, could easily found in the European Union position toward it. As a matter of fact, one of the biggest issues in the negotiation of the TTIP lies in the EU's refusal of adding the current ISDS as a dispute resolution method. Conversely, the Union desires a TTIP's specific arbitration with its own appellate court. Anyway, hereunder there can be found a detailed analysis of what it was expected by the treaty, the innovation and the shortcoming of such a wide project.

5.1. What it has been done?

5.1.1. Transparency

Lack of transparency in investment dispute has always been an issue. The presence of a private arbitral dispute settlement model into investment international law has caused the development of a blurry system where it has been hard to determine also basic information like the number of dispute settled and their outcomes¹²⁸. This is mainly because, in the last decades, there was less willingness in publishing protected business information, in particular with reference to high income investments.

Anyway, during the last 20 years we experienced a continuous improvement of transparency into the ISDS, considering that the international community have continuously sought to implement a wide range of tools where transparency has been necessary in order to improve investment arbitration's accountability.

The peak has been reached with the establishment of 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration¹²⁹. These new UNCITRAL rules are a set of statements available not only for UNCITRAL or *ad hoc* arbitrations, but also for other arbitral proceedings initiated under other rules, if the parties opt into them. Although there is no general obligation of confidentiality, there has been a general presumption of respecting these principles in investment treaty arbitration procedures¹³⁰. To be clear, it must be underlined that the UNCITRAL Transparency Rules seek to establish a balance between protecting confidential business information and national interests on one hand, and openness on the other; they cover all stages of the arbitration proceedings, including elements like public disclosure of notices, pleadings and awards, arbitration hearing open to the public and the participation of non-disputing third parties such as the *Amicus Curiae*.

There are two great innovation in TPP about transparency: first, the inclusion of the rules listed above into the agreement. In fact, in the 90's nor NAFTA neither American BITs were including dispositions about transparency in their full text. This breakthrough appears even more prominent if we consider that all these rules weren't officially mandatory as an UNCITRAL statement, but with their inclusion in the TPP's body, things have changed. In the TPP the access to investment

¹²⁸ Like ICSID, UNCITRAL publishes arbitration results only with the consent of both parties, unless the newer more transparent 2014 Rules apply to post-2014 BiTs. UNCITRAL, UNCITRAL Arbitration Rules, Article 32(5), (1976).

¹²⁹ UNCITRAL, "2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration", (1st april 2014), available at: www.uncitral.org/arbitration.

¹³⁰ S.Schill, "Transparency as a Global Norm in International Investment Law", 15 Sept 2014, available at: <http://kluwerarbitrationblog.com>.

arbitration practice can take place also through case law publications and databases. In fact, both sources are going to have an important role for the transparency and accountability of investment treaty disputes¹³¹.

Second, it has been involved a stronger and more systematic approach to *Amicus Curiae* participation. This could be considered a way to bring arbitration into the public light, increasing the influence that civil society could have on investment arbitration, often perceived as something too far to get involved in. Therefore, NGOs and Foundations have the possibility to bring human rights, environmental and social issues into the court in order to let the arbitrators be more eager of social welfare implication of their decisions¹³².

To sum up, on one hand, increased transparency have reduced some critics towards the ISDS practice but on the other hand it has generated some problems: firstly, people could be more aware of controversial ISDS cases. Secondly, the absence of a real obligation for an *Amicus Curiae* submission doesn't provide any certainty. Indeed, every tribunal is in charge of deciding whether or not allowing amicus submission¹³³. The TPP Agreement just sets standards and procedures. The rest is up on the ICSID.

To conclude, it must be noticed that in spite of the critics, the system has never been so transparent and the criticism that alleges the existence of a serious lack of transparency in ISDS is not supported by the fact, since the developments and the improvements of the last decade has been worthy of consideration, in particular within the Trans-Pacific Partnership.

5.1.2. Coherence

Many scholars from across the spectrum agree that the investment arbitration system's legitimacy crisis is fuelled by an increasing number of inconsistent tribunal decision¹³⁴. In fact, in many IIAs there have been experiences that similar or identical facts has been interpreted in very different way: the fact of the "Lauder cases" are the most emblematic. Ronald Lauder, a U.S. businessman, was the owner of a Dutch company, CME Czech Republic BV, that controlled a Czech television

¹³¹ EFILA, A response to the criticism against ISDS, (17 May 2015), available at: www.efila.com.

¹³² L. Butler, "Effect and Outcomes of *Amicus Curiae* Briefs at the WTO: An Assessment of NGO Experiences", available at www.socrates.berkeley.edu.

¹³³ Chapter 9.17, TPP

¹³⁴ D. Schneiderman, "Judicial Politics and International Investment Arbitration: Seeking an Explanation for *Conflicting Outcomes*", 30 *Northwestern Journal of International Law & Business*, 383, (2010).

channel, TV Nova. In the first case, Mr. Lauder demanded Czech Republic in front of UNCITRAL arbitration proceeding, claiming he had suffered an expropriation under the U.S.-Czech BIT. Meanwhile, he also brought the case in front of the Stockholm Chamber of Commerce through the Dutch-Czech BIT (considering the nationality of the enterprise). What happened is just amazing, because on the same case, the London tribunal essentially ruled in favour of the Czech Republic¹³⁵ while the Stockholm tribunal, just 10 days later, ruled in favour of CME. Obviously the Czech Republic challenged the decision in the Swedish Appeal Court but with no result, because the tribunal confirmed the decision claiming that the parties were not technically identical and the claims were brought under two different BITs and before two separate tribunals¹³⁶.

Hence, even if this is just an instance, we could easily understand how difficult becomes the consolidation of a consistent body of law in the absence of certain provisions, that only a multilateral treaty base would give.

As a consequence, the TPP gains an important role in its attempt of tidying up this unravelled field, providing a set of provisions that tries to avoid situations similar to the Lauder cases. In fact, under the TPP, the example described above wouldn't have happened considering that *"If two or more claims have been submitted separately to arbitration under Article 9.19.1 (Submission of a Claim to Arbitration) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement"*¹³⁷. Consequently, the Secretary General of ICSID establishes a consolidation tribunal that will state the result of the litigation, as described in chapter 6¹³⁸. Nevertheless, it should be pointed out an aspect: this provision doesn't completely solve the problem of overlapping competence, since companies can demand states also through state-to-state tribunals, like the WTO's one. Indeed, this is what happened with the case "Philip Morris vs Australia" where Australia was demanded by Honduras and other American countries alleging a discrimination against them. It was obvious that Philip Morris, in one way or other, convinced them to stress out Australia's positions in order to have an additional way to succeed. Unfortunately, this behaviour could be repeated under the TPP, since WTO's tribunal couldn't be considered an "arbitration tribunal".

¹³⁵ CME vs Czech Republic, UNCITRAL Arbitration, Partial Award (Sept. 13, 2001), available at: www.italaw.com/sites/default/files/case-documents.

¹³⁶ UNCITRAL, *Ronald S. Lauder vs Czech Republic*, (September 3rd 2001), available at: www.italaw.com/sites/default/cases.

¹³⁷ TPP, Article 9.28, Paragraph 1.

¹³⁸ TPP, Article 9.28, Paragraph 2.

As a conclusion, it could be remarked that the current regime is characterized by an overlapping network of treaties that creates a number of problematic issues for governments: firstly, they don't really have the control of the full range of commitments that they have entered into and secondly, multinational companies, that control economic assets in a great number of jurisdictions, at the time of demanding a country for an alleged violation, have to face with a messy and blurry jurisdiction's matters, where they do not know how to act.

Therefore, in this web of broadly similar but not identical treaties on which investment law is based, the TPP could be seen as a trial, an encouragement to a worldwide harmonization of the field. In fact, now 40% of the world trade will be following its rules and many other entities, that desire to invest or exchange products with this area, may start to think about reforming their juridical basis, recognizing the need to develop a coherent mechanism that should address overlapping and "underlapping" jurisdiction toward a more balanced and coherent international protection of investment.

5.1.3. Progressive Development of Law

First of all, it must be remembered that one of the reasons that moved the creation of this agreement was trying to upgrade and improve substantive and ISDS provisions, basically in order to close loopholes and raise the previous standards of protection to higher levels.

One of the most highlighted innovations refers to Public Policy Exceptions. New generation BITs and TPP too have increased the number of exceptions included in their body. The TPP, for example, improves the language compared to previous agreements, such as NAFTA, making sure that nations would maintain their "*Right to Regulate*", that is the ability to make policy decisions based on what's best for its citizenship, what we would call Public Interest. Most of them, are measures related with the protection of health, environment and social security. The TPP is a clear example not only because it contains a whole chapter about environmental protection and even a substantial provision whose aim is to give national policies enough power to be defended in front of an ISDS tribunal, but also because of the important "carves out" that this agreement includes. Indeed, in Annex II, are gathered all the non-conforming measures set out by the parties: between others, investment and cross-border trade for Peru and Canada, Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 for the United States and "measure with respect to wholesale and retail

trade services of tobacco products”¹³⁹. The “tobacco Measure Issue” has been one of the most discussed theme of the TPP. Somebody sees it as a great success, because finally a measure whose aim is protecting public health has been even included into the Exception Chapter, which applies to all signatory countries. In fact, Article 29.5 gives great policy freedom to states because “*A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election*”. Consequently, no claim can be brought in front of the ICSID tribunal against a State’s Tobacco Control Measure, which refers to all norms related with the “*production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements*”¹⁴⁰.

However, many critics pointed out that, notwithstanding its validity, this clause is so much narrow if it’s considered the wide array of health and environmental issues the governments are dealing with nowadays. Why protection from deforestation measures would not deserve to being protected from arbitration proceedings just as much? Why just tobacco measures?

According to N. Bernasconi-Osterwalder, it could be a price the U.S. have to pay for a complete participation of Australia in the TPP. In fact, on one side Australia suffered a notorious challenge raised by Philip Morris against some measure taken by the State to reduce smoking and related health problems, that caused a certain mistrust toward ICSID tribunal at the point Australia didn’t want to sign Part B of Article 9, the one describing the procedural part of investment protection. Moreover, it should be underlined that Malaysia, Brunei and Singapore have also strong smoke-free policies consistent with initiatives across the ASEAN¹⁴¹, with the result that such a provision has been positively accepted also by other signatory countries.

Finally, carving out decisions on tobacco measure seems only to be a response to recent arbitration cases that made governments liable for damages when they made changes onto their body of law and not a real strategic plan to improve environmental and public health protection¹⁴².

¹³⁹ TPP, Annex II, Schedule of Australia, Paragraph 1.

¹⁴⁰ TPP, Chapter 29, Article 5.

¹⁴¹ J. Kelsey, “*The Trans-Pacific Partnership Agreement: A Gold-Plated Gift to the Global Tobacco Industry*”, *American Journal of Law & Medicine*, 39 (2013), pp. 237-264.

¹⁴² N. Bernasconi-Osterwalder, *How the Investment Chapter of the Trans-Pacific Partnership Falls Short*, November 6, (2015), available at: www.iisd.org.

Secondly, it should be mentioned the efforts made to provide governments the possibility to seek expedited review and dismiss all that claims that are manifestly without legal merit. First of all, the increase in international investment disputes in the last decades has raised the concern that investors may abuse ISDS provision. Moreover, it is clear that, with the ratification of such a widespread deal, more and more companies are given the ground to denounce a national government, in particular when they do interfere with company's project or expectations¹⁴³. It is within this context that many countries advocated a procedure to avoid frivolous claims in investment-related disputes. In order to respect this will, it has been attached a mechanism for expedited review and dismissal of frivolous claims on one side, and of claims that are not ISDS' tribunal jurisdiction. Between these provisions¹⁴⁴, the most important and innovative one bears the burden of lawyer and tribunal expenditures to the investor whose factual allegation has been consider frivolous or without merit.

Nevertheless, it must be pointed out that these mechanism are also included in some other recent IIAs and thus are not a delightful creation of the TPP¹⁴⁵.

Thirdly, the TPP starts a process of solution of one of the biggest investment law shortcomings: the lack of an organized structure to manage the progressive evolution of the law. In some way, the investment regime need a mechanism for unified doctrinal interpretation and innovation¹⁴⁶ and one of the proposal is the creation of an investment arbitration appellate court.

However, we have to consider that there is a great advantage in not having an appellate court: all arbitral award is final, hence resolution of dispute is faster and cheaper. At any rate, this is mostly seen as a great disadvantage, in particular in relation with problems arising from parallel arbitral proceedings and inconsistent legal findings by different arbitral tribunal, as seen in the *Lauder Cases*.

With these divergent arbitral decisions, it would be difficult for a sovereign state to devise public policies that would be uniform and assure that its measures do not breach international obligation toward investors. So, it is clear that with an appellate body for ISDS, it would be possible to review this award and solve the litigation, guaranteeing certainty and power to international investment law enforcements.

¹⁴³ J. Schmidt, www.morningconsult.com. circa.

¹⁴⁴ TPP, Article 9.22: Conduct of Arbitration, Paragraph 4.

¹⁴⁵ U.S.-Chile FTAs, Article 10.19, Paragraphs 4-5.

¹⁴⁶ A. Joubin-Bret, "Why we need a Global Appellate Mechanism for International Investment Law", Columbia FDI Perspectives No. 146, 1, 1 (April 27th 2015).

Even if this appellate body hasn't been created yet, the TPP Agreement, as says the 2012 U.S. Model BIT, places its creation in the Article 9.22, paragraph 11, where it is stated that in case of birth of such an institution, all the award rendered should be also "subject to that appellate mechanism".

To conclude, although this placeholder for an appellate body it must be considered a cornerstone for a real innovation in Investment law, it may be seen as regrettable that TPP members did not take the opportunity to establish such a mechanism, given the high-stakes issues involving not only large sums of money but also important public policy issues. Being honest, it could be considered the most valuable shortcoming of the treaty, this is why the European Commission is insisting in including such a method in the TTIP, dealing with a stark opposition by its North American counterpart.

5.2. What it hasn't been done

After this analysis, it appears quite clear that the signatory countries tried to implement some innovations in their project, with a clear desire of providing some improvement to international investment regime.

Albeit the efforts, these provisions can be barely considered satisfactory. In fact, according to many experts and to many slices of public opinion, there is still so much to do. Indeed, many delicate areas of interests haven't been touched, rather some issues has just been resolved allowing the States to carve out of their obligations just that particular provision they perceived as unfavourable for their interior policies or harming for their interests.

To be clearer, it could be said that the critics are gathered around five axis:

5.2.1. States' freedom to regulate

First of all, most critics argue that the ISDS provision allows investors (and "multinational corporations" too) to circumvent their Home-State juridical systems, thereby undermining national sovereignty. On one hand, it couldn't be denied that there is some truth in this statement, considering that ISDS provision is a tool created properly to protect foreign investor's interests. Moreover, the tribunals' decision cannot be appealed in a nation's courts, as the provision currently stands. Making matters worse, it also has been proved that foreign investors

do not even need to file a claim to secure a victory. The mere threat of bringing a claim has proven sufficient. Earlier this year, an article of “the Guardian”¹⁴⁷ talked about an American tobacco company that threatened the Canadian government to demand it in front of the ICSID tribunal. The challenge ended with the withdrawal of the proposal that would have require a more strict policy on tobacco products’ plain packages. In this way, states will be less eager to implement risky policies that could generate a claim in front of this tribunal.

5.2.2. Costs of Arbitration

To make the things worse, it should be considered the really high cost of arbitration demands. According to a research of the OECD¹⁴⁸, the average legal and arbitration cost for a claimant lies around \$8 million. The largest cost component, more or less the 82%, consists of the expenses incurred by each party (investor and state) for their own legal counsel and experts . Meanwhile, arbitrator fees average about 16% of costs. Furthermore, we must add what it’s called the “Institutional costs” which is the amount provided for paying the organisations that administer the arbitration (UNCITRAL or ICSID, for example). Lastly, it’s also up to the Parties the cost necessary to provide secretariat and administrators, but it is generally low.

Unfortunately, this is not enough. These are only the administrative costs of a litigation which doesn’t include its results, hence the possibility of a monetary compensation for the losing party. Indeed, although a complete overview is difficult because information on the amounts claimed and awarded is not always disclosed, according to the North Carolina Law Review n°10¹⁴⁹, looking at 82 ISDS cases, the average amount of damages awarded by tribunals is around 10.4 million dollars per case. And this is not so much, considering that the investors are on average granted only a small part of their original claim, which normally is fixed on a pretty impressive \$343 million average per case.

Therefore, it appears clear that the high costs that entails being sued in ISDS’ arbitration is affecting particularly less developed country, which doesn’t have the resources to cope with such an expenditure. Disputes through ISDS brought against them can be devastating to their government coffers, and in particular regarding environmental, health care and safety policies.

¹⁴⁷ O. Jonson, If the law favours Big Tobacco over taxpayers, then the law is a disgrace, The Guardian (May 2015), available at: www.theguardian.com/business/commentisfree/2015.

¹⁴⁸ D. Gaukrodger, K. Gordon: “Investor-State Dispute Settlement, a Scoping Paper for the Investment Policy Community”, available at: www.oecd.org/daf/investment/workingpapers.

¹⁴⁹ Susan D. Franck, *Empirically evaluating claims about investment treaty arbitration*, (Charlotte, North Carolina Law Review n°10, December 2007).

Even if the chapter 9.15 apparently preserves the full rights of governments to legislate and regulate in the public interest, including for public health and environmental reasons, Rachel Wellhausen¹⁵⁰, author of *Recent Trends in Investor-State Dispute Settlement*, supports a different idea: the possibility of being sued by a major corporation through ISDS may create a chilling effect that leads governments to think twice about updating their juridical rules, in order to avoid getting sued, but this is not a news. This was happening also with the NAFTA and other BITs signed in the past. Simply, the TPP falls short on this issue, since it doesn't provide an efficient solution.

However, there is also another interesting aspect: there are many underdeveloped countries that actually want ISDS systems¹⁵¹. Why? Mainly because of their corrupt court systems or their unpredictable political environment. In fact, no firm would invest its money in a country where a populist new government would decide the easiest way to make money is to tax foreign companies or where local judges and regulators would be bought off by domestic firms and weaponized against multinationals. Thus, ISDS gives them the certainty that they will be treated fairly. Instead, it would be really hard for developing countries attracting the foreign investment necessary to level up their economy.

5.2.3. International Position about the ISDS

It must be considered that also various industrialized country are quite critical toward this system of solution: first of all, Brazil has never signed an agreement containing ISDS provisions, claiming it limits too much government's freedom of action. In addition, countries like India, South Africa, and Indonesia have committed to let existing agreements expire and then end their use in the future, differently from Bolivia, Ecuador and Venezuela, that even decided to withdraw from the ICSID. Oppositely, Canada is moving in the other way, promoting over two-dozen new Foreign Investment Protection and Free Trade Agreements, the largest of which is the TPP. If Canada ratifies all pending agreements containing ISDS provisions, this will increase the share of foreign investment eligible for claims from 55% to 90%¹⁵². This happens even if Canada has the highest rate of demands of the industrialized world. In fact, according to a CSIS research, over 70 per cent of NAFTA claims have been made against Canadian government that paid out \$172 million in damages, with 35 outstanding cases that could add up to another \$6 billion.

¹⁵⁰ R. Wellhausen, "*Recent Trends in Investor-State Dispute Settlement*", *Journal of International Dispute Settlement* (2016), 7 (1), pp. 117-135.

¹⁵¹ E. Klein: "*What the most controversial part of Obama's trade deal really does*", November 10th, (2015), available at: www.vox.com.

¹⁵² J. Thirgood: "*What does the TPP deal mean for environmental protection?*", (Toronto, January 2016), available at: www.ppgreview.ca.

To sum up, people that oppose to the TPP glimpse a mighty future in front of them: the TPP will enable foreign corporations to bring claims against the government—at the state, federal, and local levels—claiming that domestic law are discriminatory. To put it another way, an Australian multinational company could bring a claim against the government of Blaise, Idaho because of a local ordinance that confers a marginal benefit on local manufacturers¹⁵³.

Supporters see things differently, considering ISDS an access to an impartial adjudicatory body to protect their interests. There is a long history of courts favouring the home team. This problem is only amplified when a nation's courts are charged with adjudicating between a domestic party and a foreign party, particularly when the domestic party happens to be the government. The solution? An independent tribunal. The ISDS provision is thus a means of ensuring that investors operating abroad have protection and recourse against discrimination, uncompensated expropriation of property, and denial of justice. About this theme, Mr. Obama's administration, great supporter of the treaty, has been really clear and strong: over 90% of the nearly 2400 BITs in force have operated without a single investor claim of a treaty breach¹⁵⁴. If It's taken NAFTA as an example, we couldn't avoid noticing that only 20 claims have been brought against the United States, none of which has been successful. And even if there has been an increase in the number of disputes filed in the past ten years, we should compare this rise with the increase of foreign capital stock, that has been proportional. This means that there are more disputes, but there are also more investors and more capital invested abroad. Moreover, it must be underlined that disputes are generally more frequent within weak legal institutions, like many of South America. In fact, Argentina (with 53 claims) and Venezuela (with 36 claims) are the leading respondent states.

Anyway, apart from the fact these government statements doesn't consider the threat many corporation had posed against state if they would have approved a particular unfair law, things would be different under the TPP. Countries like Australia and Japan, two TPP members, are home to corporations with the resources necessary to meaningfully pursue claims. The United States already has standing trade agreements, containing ISDS provisions, with six of the eleven other TPP members. This includes countries like Canada, Singapore and Mexico, which have their fair share of wealthy multinational companies. To conclude, it appears that the signature of the TPP could rise the rate of demands for all the TPP countries, with a serious threat for government

¹⁵³ EFILA, "Response to the criticism against ISDS", (May 2015), available at: www.efila.org.

¹⁵⁴ "Investor-State Dispute Settlement: A Reality Check", Scholl Chair in International Business at CSIS Report, (January 2016). Available at www.csis.org. NO SE COMO PONERLO, NO HAY QUIEN LO HA ESCRITO.

policy freedom. On the other hand, it must be remember that the FET provision of this treaty has been delimited a lot compared with previous agreements. Therefore, the increase in dispute described above could be palliated by the reduction of FET violation's demands, since they have always been the most alleged by foreign investors.

5.2.4. Arbitrators' independence

Furthermore, related with what described before, depolitisation and independence of arbitrators is still an open issue. Critics argue that the ISDS system is overly focused on safeguarding commercial concerns at the expense of the public interest with the result that many treaties now specifically exclude measures relating with public health or permits many "opting out". This is the case of the TPP, with Australia that didn't even want to sign the inclusion in investment-state arbitration. Finally, Australian government has been convinced thanks to the allowance of a great number of exception from an ISDS demand, including themes such as organisation of urban land, protection of Indigenous People, agribusiness and some Public Services. Moreover, it must be pointed out that in an investment arbitration participate 3 judges, 2 elected from the parts and one directly named by the Institution. As we can imagine, it is logical that parties will select persons they expect to be more sensitive to their positions, generating certain Bias. In fact, many authors sustain that judges tend to cater the interest of potential future appointers as arbitrators, considering the high income this job involves. As a matter of fact, according to the Corporate Europe Observatory, *"15 arbitrators have captured the decision making in 55% of the total investment treaty cases known today"*, with the result that arbitrations seldom is kept "into family".¹⁵⁵

However, the supporters of ISDS system argues that everything described above is fair according to the "Party Autonomy" principle, which means that these judges are selected by the same parties, nobody impose them doing it. In addition, both parts have the same right to choose, so the process is extremely fair. Nevertheless, the reality doesn't change the evidence that the decision-making in international investment dispute stays in the hand of a bunch of extremely expert lawyers, thing that can promote coherence but not sure about equality.

¹⁵⁵ Corporate Europe Observatory, "Chapter 4: Who guards the guardians? The conflicting interests of investment arbitrators", (November 2012), available at: www.corporateeurope.org.

5.2.5 Arbitration Timing

Lastly, it should be pointed out another criticism moved against the Arbitration Dispute Resolution chosen by the TPP: the slowness of the arbitration process.

In fact, proceedings before ICSID are frequently criticised for their excessive length. The 19 ICSID Convention awards issued in 2012 came after an average of nearly five years of proceedings. The tribunal can take more than a year to issue an award and a party that seeks annulment or other review of the award can drag the proceeding out for years more. Moreover, an award is often, to paraphrase Churchill, merely the end of the beginning, thanks to the annulment applications that so frequently follow. Generally speaking, delay can, and does, happen at every step of the ICSID process¹⁵⁶.

According to the UNCTAD¹⁵⁷, Excessive length is not an inevitable element of investment arbitration. Some straightforward modifications of ICSID's rules and practices can go a long way toward shortening the process and discouraging parties from stretching things out. However, the TPP wasn't able to get a reform started in this field. Conversely, it added even longer steps with the imposition of a "Cooling Off" period. Indeed, the TPP added a mandatory six month consultation and negotiation period before the submission of a claim. Supposedly, this is because the members wanted to reduce the number of litigation, which is increasing in the current decade, "promoting the use of non-binding, third party procedures, such as good offices, conciliation and mediation"¹⁵⁸. Furthermore, this decision may reflect the participation of many Asian states, which are culturally reluctant to resolve disputes through litigation and prefer a conciliatory process for dealing with disputes. Nevertheless, if you consider these 6 months, the time the parties spend to choose an arbitrator (more or less 120 days), the hearing phase, the heart of an ICSID arbitration, in which the primary pleadings on the merits of the case (and often on jurisdiction) and exchanges of evidence take place, the process itself, the award and later the enforcement of the award, we can easily reach a 5 year arbitration, which couldn't be considered an efficient timing. Some new proposal has already been published, such as halving the time the parties have to appoint a judge or imposing deadlines in the "Hearing Phase", but none of them has been launched in the TPP.

¹⁵⁶ EFILA, "Response to the criticism against ISDS", (May 2015), available at: www.efila.org.

¹⁵⁷ UNCTAD, "Recent Developments in Investor-State Dispute Settlement (ISDS)", 1, (May 2013).

¹⁵⁸ TPP, Article 9.17, Paragraph 1.

Conclusion

After this investigation on the investment chapter in the TPP, it becomes necessary tying up the loose ends, in order to understand which are the real objectives and the extent of this meaningful project.

First of all, it must be pointed out that the signatories parties and in particular the U.S. Government claim to have made a terrific number of improvements to the ISDS system and investment protection standards included in the TPP.

On one hand, there is great truth in this statement: as a matter of fact, as described in chapter 7, the treaty is including innovative provisions to address the problem of discriminatory measures that provide advantages to foreign SOEs or national investors, for example. At the same time, the chapter includes stronger safeguards to close loopholes and to raise the standard of investor-State dispute settlement respect to many other investment-related agreements into force throughout the globe. These firstly include the opportunity for State to regulate in the public interest, including on health, safety, financial stability and environmental protection, thanks to the provisions added in article 9.15. Generally speaking, together with Chapter 20 on Environmental Protection, this is a great step forward in the investment regime, because it's the first time in the history such an issue enters as a provision in an International Agreement. In addition, it can be experienced another remarkable development in the language used in the substantive part of the treaty: we refer to the Fair and Equitable Treatment, that has been added in almost all the BITs and FTAs from the '80s and also in wider agreements like NAFTA and ASEAN but in no one there is such a detailed and clear explanation of what this provision refers to and which specific ambit it properly protect. This is a reaction of the various demands states like Canada experienced due to vagueness of this provision (see case: Veolia vs Egypt). To sum up, after many protests from the Civil Society, it could be said that something has been made to give the state the Right to Regulate according to the "Sovereignty Principle", moving from the risk of being demanded for every national provision.

Furthermore, we shouldn't set apart all the improvements made for the ISDS: the rules to dismiss frivolous claims, the possibility of having an appellate court, the principles that bear to the claimant the burden of proving all elements of its claim, the rules to issue binding interpretations

of the agreement, making proceedings more open and transparent providing for the participation of civil society organizations and other parties which were not directly involved in the dispute resolution process.

Unfortunately, if we consider that one of the aim of the treaty was to promote an improvement of international investment law creating a new landscape in this regime and solving the legitimacy crises it is suffering, we can undoubtedly state that this has been reached only partially.

In fact, while reforms are of course welcome and appreciated, the changes that have been made into the TPP do no address the underlying fundamental concerns about ISDS and investment protection. First of all, we cannot forget the great critics toward the system: the important opposition it exists against the Investor-State dispute Settlement. In fact, it gives multinationals corporations a special, separate legal system just for them. Here, in fact, States could be demanded in front of ISDS' courts but they have to make use of State-State dispute settlement or National Justice if they want to start a litigation. This is why, it still exists this perception of untrustworthiness. A blurry "Elite" regime. Moreover, this chapter doesn't contain any provision against corruption, which is a deep-seated problem in many countries involved in the Agreement, primarily Mexico and Chile. If that isn't enough, critics observe the missing of a section that promotes responsible behaviour for investors and the weakness of a Corporate Social Responsibility provisions, mainly due to its non-binding nature.

Secondly, if a change of the world investment regime would have been a real concern, the steps that could have been taken would have brought toward different and deeper provisions to come over the above listed shortcomings. As a matter of fact, we mustn't forget that the development of a comprehensive framework for conceptualizing the international investment regime is still in its infancy: the TPP had the possibility to come over these issues and outline a new set of rules which could have provided a new path and maybe gaining a probable worldwide acceptance, considering that the lack of transparency and coherence in investment dispute is a severe issue not only for Western Countries but for the entire world.

Even if the prospect of an international investment court to replace the current system of investor-state arbitration was a remote possibility and characterized by certain complexity in its creation, it wouldn't have been hard putting into play an appeal facility. Considering also that ICSID's annulment process is being used increasingly, proponents of such a tool argue that its creation could provide a focal point to resolve the widespread questions of law and interpretation

that have generated during the last decades, empowering that coherence and legitimacy this system is missing. Obviously, there is some fear that the existing difficulties in arbitration mechanism would simply replicate, rather than solved: perceiving bias and conflict of interest persisting and rising of the disputes' cost are just two negative consequence of the creation of this tribunal. Nevertheless, the wide propaganda and the following unsatisfactory outcomes, have generated a feeling toward this agreement that could be described with an image of a tractor which is "ploughing the field forgetting to sow the seed"¹⁵⁹.

Thirdly, even at first sight, we could notice that the TPP has no particular difference with some existing BITs in its basic framework for rules. Chapter 7 on "Sanitary and Phytosanitary Measures and 8, on Technical Barriers to Trade, remain substantially WTO equivalent. We can notice it also in chapter 9: the substantive standards sets therein for the liberalisation and protection of investment generally follow the 2012 US Model Bilateral Investment Treaty, except for the new language used in the substantive part and for some elements in prohibition on "performance requirements", (for example restriction or limits on royalties charged by foreign investors for licensing their technologies).

As a conclusion, it may be claimed that nor innovation neither international investment shortcomings' solution are apparently the real aims of this treaty.

Maybe an extract of the speech that President Obama had on May the 8th, 2015 at Nike Inc. headquarter, Oregon, could be helpful:

"We have to make sure America writes the rules of the global economy. And we should do it today, while our economy is in the position of global strength. Because if we don't write the rules for trade around the world – guess what – China will. And they'll write those rules in a way that gives Chinese workers and Chinese businesses the upper hand, and locks American-made goods out"

Barack Obama

¹⁵⁹ T. Kawase, "The TPP as a set of international economic rules", 10 January 2016.

Thus, here we have the key. It's the same U.S. President that in front of a consistent crowd made clear what the TPP is searching for: buttress the dominant role of the United States in shaping the political and economic world order by fending off a formidable challenger like China¹⁶⁰.

Textbook knowledge on international economy will tell us that a nation must attain its balance of payment if it wishes to be politically and economically stable, if not prosperous. To achieve this goal, the US needs to reduce its trade deficits in an era where China has taken a huge market share – thanks originally to the US multinational corporations who shifted their productions to China as part of their profit maximization strategy. So, it appears logical that the U.S. strongly support the TPP to maintain their national interest in the global economy especially in emerging markets of Asia-Pacific where China too is competing for the market share. In fact, according to Robert Stiglitz¹⁶¹, this new flow of regional agreement is an American new strategy of “discordant managed trade regime” to offset the failure of WTO: it couldn't be noticed that the block of the Doha Round let the creators of the GATT/WTO system fell increasingly challenged by newly emerging exporting powers. In fact, the impossibility of implementing any improvement at a multilateral level has forced several developed economies to reassess their approach to free trade, pushing them toward the pursuit of a regional/preferential trade and investment agreement, which by nature discriminate against non-members.

Moreover, it must be taken into account the TPP's Geopolitical importance in two further aspects.

First of all, it is a useful tool for facing with the structural changes in global trade. As Richard Baldwin have already noticed, international trade is no longer an exchange of goods and services between nations but it is mostly based on intra-firm trade on a Global Value Chain¹⁶². This means that the flows of finished goods takes a lower percentage of trade, since the enterprises divide the production of goods in various steps, which often take place in different countries. According to Baldwin's idea, traditionally speaking, trade involves completion between national teams of labour, capital, know-how and institution. Now this doesn't happen anymore, considering that we are seeing large corporations mixing and matching these elements from several nations where

¹⁶⁰ W. Fayshal, *The Geopolitics of the Trans-Pacific Partnership Agreement (TPPA), a US Imperial Strategy*, Washington D.C., *Global Research*, (January 2016).

¹⁶¹ R. Stiglitz, “*The New Geo-Economics*”, Social Europe, 11 January 2016, Web. 12 Jan. 2016, available at: http://www.socialeurope.eu/2016/01/the-new-geo-economics/?utm_source=facebook&utm_medium=social&utm_campaign=SocialWarfare.

¹⁶² R. Baldwin, “*Globalisation, global supply chains and the implications of Megaregionalism*”, paper presented at the IISS Geo-economics and Strategy Programme's conference Trade and Flag: The Changing Balance of Power in the Multilateral Trading System”, IISS-Middle East, Bahrain, 6-8 April 2014.

ideas, technology, people and all the other details involved in production and distribution move across the borders, with the result that traditional sources of national comparative advantages now lies inside international production networks. The TPP results useful at this end because it promotes an harmonized system of rules and standards between countries really different one to each other¹⁶³. With the same rules is minimized one of the biggest impediments to trade unleashing a sort of “fast-track” liberalisation external from the impasse in the WTO’s Doha Round. In addition, American firms keeps on taking advantage of the low labour and production costs of countries like Vietnam and Malaysia and also they could contain China, which found itself surrounded by signatories countries that, with the abolition of more than 1.800 taxes, may not find trade with China so convenient anymore.

Furthermore, the TPP results to be an important geopolitical instrument for another reason: besides the over 6,000 pages of the agreement, we can find a comprehensive and brief declaration issued by the US Treasury that clears out many themes. Entitled as “*Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries*” (after this refers as “Joint Declaration”), it acts as a crucial mini-treaty that will binds all TPP members to remain in the ambit of the Washington Consensus by honouring and maintaining the role of US Dollar as international reserve currency¹⁶⁴.

In fact, it should be pointed out that the currency, for a country, is a considerable indicator of economic strength. Dominance in currency can only be achieved via strong balance of trade. Historically speaking, the U.S. were lucky to experience such a condition, since they were left untouched geographically by the world wars (except at the Pearl Harbour incident). Moreover, they found themselves the only industrialized nation capable and ready to reshape and rebuild the post-World War II international order. So they did. In this way, they have been able to outline an international financial system based not only on their numerous plans, initiatives (Plan Marshall for example)¹⁶⁵, trade blocks and institutions but also on their currency – the U.S. Dollar – which started to be used as an international reserve currency, not only by the Federal Bank but also by the rest of the World. In fact, it acts not only as the dominant medium of exchange, but also as the

¹⁶³ S. Baru & S. Dogra, *Economic Shocks and the geo-economics of world trade*, International Institute of Strategic Studies, London, (2015).

¹⁶⁴ A. Viotti & R. Paul, “The Dollar and National Security: The Monetary Component of Hard Power”, (Stanford: *Stanford University Press*, 2014).

¹⁶⁵ M. J. Hogan, “The Marshall Plan: America, Britain, and the Reconstruction of Western Europe”, 1947-1952”, (Cambridge: *Cambridge University Press*, 1987).

unit of account as well as the store of value of internationally traded-goods and services. To be upfront, you need to obtain US Dollar prior in order to take part in international trade¹⁶⁶.

Getting to the point, the Joint Declaration demands the TPP member states to adhere to strict and disciplined fiscal and monetary policies as stipulated by the IMF Articles of Agreements. Such a move as explained by the US Treasury is “to promote, through transparency and dialogue, market-determined and transparent exchange rate regimes that allow real exchange rates to adjust to reflect underlying economic fundamentals.”¹⁶⁷

In short, TPP member states must adhere to the laissez-faire economic doctrine that has shaped the international political economy, financial and monetary architecture erected by the US through IMF, World Bank and many other international institutions where the US wields a strong influence since the end of World War II. Hence, the TPP ends up as another legal conduit to retain the participating nations so that they will continue to remain in the orbit of US-led international rule of law, currency and trade.¹⁶⁸

All the reason listed above led us to conclude that the TPP, as a matter of fact, is definitely about Politics. It's a political instrument to consolidate the current international economics landscape, claiming great innovation in the investment regulations but gathering less than the expected, which notwithstanding should be received with positivity and hope. As the famous expression says: “Rome wasn't built in a day”. We cannot pretend that such an innovation occurs promoted by a country that has all the convenience in maintaining untouched the status-quo.

Finally, it must be pointed out a last but not least detail: all this essay has talked about a treaty has not officially been ratified. Indeed, since the governments of the 12 signatory countries has not officially do it, it is impossible to make conclusive statements as to how it will impact the language, the ISDS and the new environmental law. In many aspects, the TPP is essentially a new version NAFTA, and we can expect to have a similar experience with rampant ISDS claims and regulatory chill. This time however, 11 other countries have access to this legal right, instead of just the two other NAFTA members. Some preliminary reviews of the text indicate that marginal changes to the language may require proof of damages to reduce the amount of frivolous claims, but the success

¹⁶⁶ J. B. Eichengreen, *Exorbitant Privilege: The Rise and Fall of the Dollar and the Future of the International Monetary System*, (Oxford: *Oxford University Press*, 2011)

¹⁶⁷ See Joint Declaration, pp: 1-2.

¹⁶⁸ P. Sundhya, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality*, (Cambridge: *Cambridge University Press*, 2011).

of our government in these lawsuits still relies entirely on the tribunal's interpretation of investor protection rights outlined in Chapter 9.

Moreover, the role of the American Politics is key in this period. There is a remote but considerable possibility that such an agreement will never enter into force. In fact, its main supporters is the current U.S. President Barack Obama which is going to leave its charge next November and both Democrat candidates are apparently against it: Bernie Sanders, defined it as "*one of the worst mistakes America has ever made*". On the other hand, Hillary Clinton made an impressive U-turn about this theme. When she was Secretary of State, she worked to promote the negotiation describing it as a "great deal for recovering American Job". However, after the publication of the Full Text, she stated "I'm worried about currency manipulation not being part of the agreement," she told PBS. "We've lost American jobs to the manipulations that countries, particularly in Asia, have engaged in" or "I did say, when I was secretary of state, three years ago, that I hoped it would be the gold standard," "It was just finally negotiated last week, and in looking at it, it didn't meet my standards. My standards for more new, good jobs for Americans, for raising wages for Americans. And I want to make sure that I can look into the eyes of any middle-class American and say, 'this will help raise your wages.' And I concluded I could not"¹⁶⁹. If we could have expected such a position from a left-handed member of the Democratic Party like Bernie Sander, it's hard to understand why Hillary has become so hostile toward it. Many journalists just think it's a way to get support from the left wing of the Democrats' voters, who are mainly in favour of Sanders¹⁷⁰, other claims her need to appear more independent from the establishment, closer to the Civil Society's demands. Anyway, to be sincere, it must be underlined that it wasn't the first time she had made negative statements about the agreement: in her memoir, "Hard Choices", published last year, she wrote "It's safe to say the TPP won't be perfect – no deal negotiated among a dozen countries ever will be – but its higher standards, if implemented and enforced, should benefit American businesses and workers"¹⁷¹.

¹⁶⁹ L. Carrol, "What Hillary Clinton really said about TPP and the "Gold Standard", 15 October 2015, available at: www.politifact.com.

¹⁷⁰ S. Thielman, "Hillary Clinton's U-turn on TPP deal has team working overtime ahead of debate", The Guardian, New York, October 2015, available at: www.theguardian.com.

¹⁷¹ H. Rodham Clinton, *Hard Choices*, New York, Simon & Schuster, (2014).

With these positions of the Democratic party and the strong opposition of Trump between the Republicans (he defined the Agreement a “useless and terrible deal”)¹⁷² we can easily comprehend that its entry into force mustn’t been taken for granted.

To conclude, when Akira Amari described the TPP as a “21st Century Agreement” I think he chose a perfect expression to define it. But not in the majestic and propagandistic sense he was referring to. Indeed, the hope for a “new way” in trade that will involve also a convincing reshape of the foreign investment framework, for the most part, it remains a dream, since the U.S. have used the treaty mainly to strengthen their relative economic position in the world to avoid losing market with the advance of many BRICS and in particular China. However, it should be said that the TPP could become a Paradigm for the whole International Investment Regime, but only in a decade we will realise if this is going to happened or not. On the other hand, it is properly a 21st Century Agreement because it responds to the challenges placed by this historical period: the birth of a global value chain, the emergence of a new Economic Power which is consistently challenging America’s World Trade leadership and a Civil Society claiming a more reliable and social Regime, that should respond of the 21st Century’s issues, like Environmental Protection, Job Security and Trade in the World of Internet.

The TPP is about politics. The TPP is about economics. The TPP is about culture, environment and entrepreneurship. It’s an inclusive agreement. It contains a lot of themes and issues and giving a global opinion about it, it’s really hard. It’s a big project that required years and years of negotiation, previous agreements, talks and meetings and will need years to be judged: years of ISDS’ cases resolution will be the answer.

To conclude, it should be pointed that despite of the critics, despite of the various shortcomings, despite of the overwhelming propaganda, despite of the protests, at least something has been done and created. As the famous Latin poet Oratius was used to say:

“Dimidium facti, qui coepit, habet”, which means something that could be translated with the expression “Well begun it’s half done”.

¹⁷² Available at: https://ballotpedia.org/2016_presidential_candidates_on_the_Trans-Pacific_Partnership_trade_deal.

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