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TTIP AND INVESTMENT LAW – A WAY FORWARD?

SOMMARIO: I. Introduction. – II. What is TTIP? – 1. What exactly is TTIP? – 2. TTIP – what is new? – 3. Who are the competent bodies? a) EU; b) Ratification by EU member states; c) USA. – III. Opportunities and Risks. – 1. Opportunities: a) Supporters; b) What are the Benefits? – 2. Risks: a) Opponents; b) What are the risks? – IV. Hazards. – 1. Eroding Standards in Consumer and environmental safety: a) Scope of Application; b) Infringement; c) Justification of Restrictions; d) Principle of Proportionality. – 2. Procurement. – 3. Investment Protection, especially ISDS: a) What is arbitration and how is it designed in TTIP? b) Major Criticisms of ISDS; aa) Chill effect; bb) Lack of Transparency; c) Why is arbitration necessary? d) What are the advantages of an ISDS system? e) Are investment rules still contemporary? – V. Does TTIP still stand a chance? – TTIP light.

I – So far, negotiations on TTIP have provoked a public debate of unprecedented dimension and a lot of criticism. Newspaper articles, books, demonstrations: TTIP is omnipresent¹. Meanwhile, even a European citizens' initiative was organized. The number of opponents is high, well organized and ever growing: tens of thousands have declared 'war' on TTIP². An end is not in sight: as recently as October 2015, the media reported that there were 100.000-150.000³ people demonstrating against TTIP and CETA in Berlin, organizers even speak of 250.000 participants⁴. Only a few days later, Norbert Lammert, the president of the German Bundestag, threatens to vote against TTIP in one of Germany's largest newspapers⁵. Dutch voters are now demanding a referendum on TTIP; 100.000 voters have already signed the petition for the referendum⁶.

The protesters' main concerns are food and environmental safety – talk about „chlorine-chicken“ and „bovine-beef“ – and the inclusion of an Investor State Dispute Settlement mecha-

¹ All internet sources cited as of May 24th 2016.

² www.waronwant.org; <https://stop-ttip-org>; www.artistsagainsttip.org.

³ <http://ttip-demo.de/home/>; <http://www.tagesspiegel.de/wirtschaft/150-000-bei-ttip-demo-in-berlin-ein-massenprotest-fuer-fairen-welthandel/12434602.html>.

⁴ <http://ttip-demo.de/presse/pressemitteilungen/press-release-protest-march-stop-ttip-ceta-october-10th-2015/>.

⁵ <http://www.euractiv.com/sections/trade-society/germany-calls-more-ttip-transparency-318957>.

⁶ Crisp, Dutch voter now demanding referendum on TTIP, Euractiv 15.4.2016, available at: <http://www.euractiv.com/section/trade-society/news/dutch-voters-now-demanding-referendum-on-ttip/>.



nism. In addition, the secrecy of the negotiation has alarmed people, especially since Brussels conducts the negotiations, as the EU and its institutions do not have the confidence of the people⁷.

Protest rises in the US as well: environmentalists, consumer associations and trade unions, all traditionally supporters of the Democratic Party and their President Obama, oppose the agreement, which they call “TAFTA” with reference to NAFTA and is alleged failure⁸. Particularly, they fear that TTIP will lower standards in medicine, increase unemployment and introduce an Investor-State-Dispute-Settlement (ISDS) that will cost the taxpayer a fortune⁹.

Meanwhile, the Commission has started to advertise TTIP with all means: publishing plain and simple information, giving talks about the benefits and addressing fears¹⁰. Due to public pressure, the EU now conducts negotiations on TTIP more openly and transparently than on any other international trade agreement before¹¹. The European Commission even held a public consultation on investment protection in TTIP to which it received almost 150.000 responses, thus far the biggest consultation organized by the Commission¹². The Commission also publishes TTIP documents, an unprecedented novelty in the history of international trade agreements¹³. Negotiations are still not as transparent as promised: Greenpeace released TTIP negotiation documents during the 13th round of negotiations.¹⁴ While all parties downplay the leaks¹⁵; Malmström calls it a storm in a teacup¹⁶, they could mean the end for TTIP negotiations. The event casts serious doubts on the promised transparency. According to Greenpeace the documents reveal that TTIP “puts corporations at the center of policy making”¹⁷ lowering standards in environmental protection and public health. Officials of the U.S. government call these interpretations of the texts “flat-out wrong”¹⁸.

⁷ Dullien/Gracia/Janning, A Fresh Start for TTIP, ECFR 124, 02/2015, p. 6; Traynor, Crisis for Europe as trust hits record low, The Guardian 24.4.2013, available at: <http://www.theguardian.com/world/2013/apr/24/trust-eu-falls-record-low>; see also official statistics of Eurostat: <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tsdgo510&plugin=1>.

⁸ <http://www.citizen.org/tafta>.

⁹ See <http://www.citizen.org/tafta>.

¹⁰ See for example: Commission’s homepage: http://ec.europa.eu/index_de.htm.

¹¹ http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/process/index_de.htm#_transparency.

¹² The results of the consultation are available at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

¹³ Dullien/Gracia/Janning, A Fresh Start for TTIP, ECFR 124, 02/2015, p. 7.

¹⁴ All leaked documents available at: <https://ttip-leaks.org/>.

¹⁵ Duran, White House downplays leak of EU trade deal papers, Washington Examiner 5.3.2016, available at: <http://www.washingtonexaminer.com/white-house-downplays-leak-of-eu-trade-deal-papers/article/2590188>.

¹⁶ Johnson, Cecilia Malmström: TTIP leaks “a storm in a teacup”, The Parliament 2.5.2016, available at: <https://www.theparliamentmagazine.eu/articles/news/cecilia-malmstr%C3%B6m-ttip-leaks-storm-teacup>.

¹⁷ Chan, Greenpeace Leaks U.S.-E.U. Trade Deal Documents, The New York Times, 2.5.2016, available at: http://www.nytimes.com/2016/05/03/world/europe/ttip-greenpeace-leak-trade-deal.html?_r=0.

¹⁸ Matthew McAlvanah, assistant United States trade representative, cited in: Chan, Greenpeace Leaks U.S.-E.U.



No matter which position is “right”, these leaks will have a negative effect on the further negotiation process, and maybe they will even be the first step to the end.

The opposition was strengthened yet again by the leaks; an objective debate seems almost impossible. Goodwill and rational arguments might not change the tides towards TTIP. In fact, the parties have become even more entrenched in their positions since the European Commission has refused to register a European Citizens’ Initiative against TTIP for formal reasons¹⁹. In response, the initiators of the ECI have filed action for annulment with the European Court of Justice in November 2014²⁰.

I would like to take a step back and try to give us the chance to see what TTIP really is all about. First, I will see who is competent to lead the negotiations and then have a look at the key actors (I). Secondly, I will identify chances and risks of the treaty (II.), followed by a closer look on two main areas of concern: environmental and health safety as well as investor’s protection. For these two aspects, I would like to focus on the expressed critic and possible solutions (III.). Finally, I will risk a glance into the future (IV.).

II. – 1. – The Transatlantic Trade and Investment Partnership (TTIP) is a proposed bilateral trade agreement between the EU and US. Negotiations on TTIP have started in July 2013.

Furthermore, the EU negotiates two other trade agreements: CETA and TiSA.

At the end of 2014, the EU and Canada concluded the negotiations on the Comprehensive Economic and Trade Agreement (CETA)²¹, which is now awaiting its approval by the Council and the European Parliament²². However, CETA is more than just an economic agreement. It will serve as a benchmark and blueprint for future free trade agreements, especially TTIP²³. CETA is also the first agreement to include the new investment protection system²⁴.

The Trade in Services Agreement (TiSA) aims at liberalizing the market for services such as licensing, financial services and e-commerce²⁵. In addition, it could and should revive the current Doha Round that is sliding into irrelevance since it has not yet come to any results after 14 years²⁶.

Trade Deal Documents, The New York Times, 2.5.2016, available at: http://www.nytimes.com/2016/05/03/world/europe/ttip-greenpeace-leak-trade-deal.html?_r=0.

¹⁹ <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/2041>.

²⁰ Application (only in German) available at: https://stop-ttip.org/de/wp-content/uploads/sites/4/2014/11/EuGH-Klageschrift_Kempen_EBI.pdf.

²¹ Consolidated CETA text: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

²² <http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/>.

²³ http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147099.pdf.

²⁴ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468>.

²⁵ <http://ec.europa.eu/trade/policy/in-focus/tisa/>.

²⁶ Gosh, Doha round has run its course but new trade realities demand solutions, The Guardian 4.5.2011,



At the same time, the US have negotiated a Trans-Pacific Partnership (TPP)²⁷ with 11 other countries²⁸. A final agreement was reached in October 2015 and confirmed by a formal signing ceremony on February 4th 2016; however, Congress still has to approve the agreement within a two-year period.²⁹ This ratification is at stake, since opposition is rising and might even get stronger as elections in Canada and USA are forthcoming³⁰.

The EU is currently negotiating a trade agreement with Mercosur³¹, but they seem to run aground³².

The 13th round of negotiations for TTIP in New York was finished at the end of April 2016³³. Issues were market access, especially tariffs on the automotive sector, investment protection and agriculture³⁴.

2. – TTIP would establish the world's largest free-trade area. This area would account for half of the global production, 60 % of all foreign direct investment, a third of the global trade with goods and services as well as a third of all patent application³⁵. TTIP aims at removing tariffs, cutting red tape and reducing restrictions on investment³⁶.

TTIP is not the first agreement between the EU and the US, which is designed to remove existing trade barriers. Both already participate in the GATT Agreement and are long-term members of the WTO. Hence, both also have experiences with international arbitration: they partici-

<http://www.theguardian.com/global-development/poverty-matters/2011/may/04/doha-trade-realities-demand-solutions>; Stewart, Doha is dead. Hopes for fairer global trade shouldn't die, too, The Guardian, 20.12.2015, available at: <https://www.theguardian.com/business/2015/dec/20/doha-is-dead-hopes-for-fairer-global-trade-shouldnt-die-too>.

²⁷ Full text available at: <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

²⁸ Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam.

²⁹ Clames, Trans-Pacific Partnership Is Reached, but Faces Scrutiny in Congress, New York Times, 5.10.2015, <http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html>; McCartin/McClure, What's Next for TPP: Will Congress Ratify in 2016?, 21.1.2016, <https://www.globalpolicywatch.com/2016/01/whats-next-for-tpp-will-congress-ratify-in-2016/>.

³⁰ Politi/Shawn, Trade: Pacts of strife, Financial Times, 10.2.2013, <http://www.ft.com/intl/cms/s/0/c1254a20-8ff3-11e3-ae9-00144feab7de.html#axzz3xmK5sD6s>.

³¹ Argentina, Brazil, Uruguay, Paraguay and Venezuela.

³² Mander, Mercosur views Pacific Alliance with unease, Financial Times, 1.4.2014, <http://www.ft.com/intl/cms/s/0/cc788080-ae1-11e3-a088-00144feab7de.html#axzz3yXEfT48e>; N.N., Strategic patience runs out, The Economist, 14.12.2013, <http://www.economist.com/news/americas/21591629-last-brazil-keen-trade-deal-strategic-patience-runs-out>.

³³ All related documents available at: <http://ec.europa.eu/trade/policy/in-focus/ttip/>.

³⁴ Report are not available yet, but see statement by Bercero, EU Chief Negotiator for TTIP: http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154480.pdf.

³⁵ All numbers from: publication of the Federal Ministry for Economic Affairs and Energy, Germany: Transatlantische Handels- und Investitionspartnerschaft (TTIP) zwischen der EU und den USA, p. 11 (only in German), available at: <https://www.bmwi.de/BMWi/Redaktion/PDF/Publikationen/transatlantische-handels-und-investitionspartnerschaft-ttip,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>.

³⁶ <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/questions-and-answers/>.



pate in the multilateral system Dispute Settlement of Understanding (DSU) since 1995 and even longer in Investor-State Dispute Settlement according to the ICSID-Convention (International Centre for Settlement of Investment Disputes)³⁷.

Through the creation of an Internal Market, the EU itself has many experiences with removing barriers to trade and abolishing tariffs.

Since 1959, Germany alone has ratified 138 bilateral Investment Agreements³⁸. Investment- and Free Trade Agreements are an established and vital part of German and European foreign and economic policy.

The dimensions of the agreement, however, are new: the parties generate almost half of the global economic growth – every day the trade partners exchange services worth 1.6 billion Euro.³⁹ New is also the scope of the agreement: it applies to all sectors and fields of business unless they are expressly left out⁴⁰.

3. – a) The European Commission conducts negotiations for international agreements with third countries under the provision of art. 207 (3) TFEU read in conjunction with art. 218 (3) und (4) TEUF. The Commission makes recommendations to the Council, which then authorizes the Commission to open the necessary negotiations Art. 207 (4) TFEU. The Council adopted the directive for negotiation unanimously on June 17th 2013⁴¹. The Council may sign an agreement only after obtaining the consent of the European Parliament, art. 218 (6) 2 lit. a TFEUV.

On July 8th 2015, the European Parliament adopted a resolution on TTIP, while stressing the importance of such an agreement also urging the Commission to review the section on arbitration⁴².

b) It is crucial to determine whether TTIP is a bilateral agreement according to Art. 207 TFEU or a mixed agreement: bilateral agreements must only be ratified by the EU itself whereas mixed, multinational agreements need to be ratified by all 28 member states. An international agreement classifies as a mixed agreement where it regulates issues for which the Union and the

³⁷ The US ratified the convention in 1966; Germany, as well as all other EU Member states, followed in 1969; <https://icsid.worldbank.org/apps/ICSIDWEB/icsidocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>.

³⁸ <https://www.bmwi.de/DE/Themen/Aussenwirtschaft/Investitionsschutz/investitionsschutzvertraege.html>; 131 of these agreements have entered into force thus far.

³⁹ *N.N.*, What You Need to Know about TTIP, publication of the European American chamber of Commerce, available at: <http://www.eaccny.com/international-business-resources/what-you-need-to-know-about-ttip/>.

⁴⁰ *N.N.*, What You Need to Know about TTIP, publication of the European American chamber of Commerce, available at: <http://www.eaccny.com/international-business-resources/what-you-need-to-know-about-ttip/>.

⁴¹ EU-Dok.-Nr. 7399/13 LIMITE u. 7398/13 LIMITE; Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America 11103/13 DCL1, available at: <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

⁴² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN>.



member states share competences, art. 4 TFEU. The Union and the member states share competence especially in the field of common commercial policy, art. 207 TFEU. The nature of the agreement depends on the overall objective as well as the dominating elements⁴³. Furthermore, the mandate given by the member states and their objective of the negotiations are crucial, art. 207(3) read in conjunction with art. 218 (3) and (4) TFEU. If the member states explicitly want the agreement to be negotiated as a mixed agreement, this intention determines the nature of the agreement. They may even express this intention subsequently⁴⁴.

Germany and the European Union both want to negotiate TTIP as a mixed agreement⁴⁵.

c) In the US, the President has the authority under the Constitution to negotiate international agreements. Since international agreements typically require an implementing bill, Congress has to approve the agreement. Congress has granted the President „fast-track authority“ for TTIP⁴⁶. “Fast track“ enables the President to negotiate trade agreements with other countries without a further approval by Congress⁴⁷. Congress grants the “fast track mandate” or trade promotion authority (TPA) for a certain time and a defined scope of negotiations. The current TPA (TPA-2015) makes the procedure available until July 1st 2021, provided that an extension disapproval resolution will not have been introduced and passed by either chamber by July 1st 2018 (*Extension disapproval*)⁴⁸.

TPA is not only a mandate for the negotiation but also changes the congressional procedure⁴⁹:

The bill is introduced to House and Congress at the same time; debates and committee work is limited. Finally, House and Congress can only approve or disapprove but not amend or filibuster⁵⁰ the agreement⁵¹. Congress may withdraw a granted *trade promotion authority* in case information and consultations obligations are violated⁵².

⁴³ ECJ Case C-268/94 (Portugal/Council), para 35 et seq.; ECJ Opinion 2/00 of 6.12.2001 (Cartagena), para 20 et seq.

⁴⁴ Rathke, Fragen zur Zuständigkeitsverteilung zwischen EU und Mitgliedstaaten sowie zur Ratifikation des Abkommens über eine Transatlantische Handels- und Investitionspartnerschaft (TTIP), Ausarbeitung PE6-3000-49/1, p. 11. (only in German).

⁴⁵ <http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-7557-EN-F1-1.Pdf>.

⁴⁶ <http://www.newsweek.com/congress-votes-fast-tracking-controversial-tpp-trade-bill-342477>.

⁴⁷ See in detail: Fergusson, Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy, June 15, 2015, available at: <https://fas.org/sgp/crs/misc/RL33743.pdf>.

⁴⁸ Fergusson, Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy, June 15, 2015, available at: <https://fas.org/sgp/crs/misc/RL33743.pdf>.

⁴⁹ See in detail: Fergusson, Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy, June 15, 2015, available at: <https://fas.org/sgp/crs/misc/RL33743.pdf>.

⁵⁰ A filibuster is a parliamentary procedure where debate over a proposed piece of legislation is extended, allowing one or more members to delay or entirely prevent a vote on the proposal.

⁵¹ Fergusson, Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy, 15.06.2015, p. 10 et seq., <https://fas.org/sgp/crs/misc/RL33743.pdf>.

⁵² Fergusson, Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy, 15.06.2015, p. 14, <https://fas.org/sgp/crs/misc/RL33743.pdf>.



III – 1. Depending on the point of view, TTIP is considered either a great opportunity or a major risk. The debate so far is confusing. Every side produces and cites studies supporting their opinion.

a) The German economy, e.g. the automotive⁵³ Federation of German Industries (BDI)⁵⁴, are amongst the strongest advocates of the agreement. The German government is also in favor of TTIP⁵⁵.

b) The supporters focus on three benefits. Above all, they emphasize the expected economic growth TTIP will provide for all participating states. TTIP will abolish tariffs, quotas and other trade barriers⁵⁶. It will also level product standards and safety regulations, thus helping companies to save costs⁵⁷. Former EU Trade Commissioner *Karel de Gucht* promised an enormous growth spurt of 120 billion Euro and the creation of one million new jobs⁵⁸. These numbers seem a little overoptimistic; other sources speak of an increase of the European GDP of 0.5 % or 0.1%, depending on the scope of the agreement⁵⁹.

The aim is to reduce trade barriers and give more power to the market, which according to the theory of Adam Smith automatically with an “invisible hand” regulates the supply of goods⁶⁰. The elimination of customs duties alone may save companies billions⁶¹. While the av-

⁵³ <http://www.acea.be/industry-topics/tag/category/usa>.

⁵⁴ <http://bdi.eu/english/TTIP.htm>.

⁵⁵ <http://www.euractiv.com/sections/trade-society/german-government-hits-back-after-ttip-demo-318464>; see in detail: Die Bundesregierung, Freier Handel- gut für alle, available at: http://www.bundesregierung.de/Content/Infomaterial/BPA/Bestellservice/Freier_Handel_gut_fuer_alle_TTIP.pdf?__blob=publicationFile&v=4.

⁵⁶ See study of the Ifo Institute from January 2013: „Dimensions and Effects of a Transatlantic Free Trade Agreement Between the EU and US“, available at: <http://www.bmwi.de/EN/Service/publications,did=554970.html>; this study was widely criticized for its methodology and is based on assumptions that are judged as “clearly unrealistic”, *Dullien/Gracia/Janning*, A Fresh Start for TTIP, ECFR 124, 02/2015, p. 1, 2.

⁵⁷ See study of the Ifo Institute from January 2013: „Dimensions and Effects of a Transatlantic Free Trade Agreement Between the EU and US“, available at <http://www.bmwi.de/EN/Service/publications,did=554970.html>; this study was widely criticized for its methodology and is based on assumptions that are judged as “clearly unrealistic”, *Dullien/Gracia/Janning*, A Fresh Start for TTIP, ECFR 124, 02/2015, p. 1, 2.

⁵⁸ *de Gucht* at “The Future of Transatlantic Trade Conference of Washington Post and European Voice in Paris”, 10.4.2014, Speech/14/314, available at: http://trade.ec.europa.eu/doclib/docs/2014/april/tradoc_152343.pdf.

⁵⁹ *Dullien/Gracia/Janning*, A Fresh Start for TTIP, ECFR 124, 02/2015, p. FN. 2, citing studies by the French CEPII institute and the British CEPR Institute. See also <https://www.ceps.eu/system/files/No%2093%20Appraisal%20of%201A%20on%20TTIP.pdf>.

⁶⁰ <http://economictimes.indiatimes.com/definition/invisible-hand>.

⁶¹ European Commission of Trade, “Reducing Transatlantic Barriers to Trade and Investment – An Economic Assessment“, Final Project Report, March 2103, Prepared under implementing Framework Contract TRADE10/A2/A16, available at: http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf; TTIP only concerns tariffs not taxes which may also protect national markets and can be an obstacle for free trade; within the EU such taxes are not allowed, Art. 110 et seqq. TFEU.



erage tariff rate now is only 4%, it may be as high as 25%⁶². In 2013, Companies in the US and the EU have paid 3.5 billion Euro tariffs on trade with industry products alone⁶³. However, tariffs are not the only impediment of free trade but the customs procedure itself also costs time and money. The elimination of custom duties as such would simplify matters. Same technical standards and mutual recognition would help all exporting companies⁶⁴.

Companies as well as consumers would profit from the abolition of tariffs and other trade barriers: lower costs for companies ideally lead to lower prices. Furthermore, easier market access increases competition among market participants, resulting in a broader choice of products and again lower prices.

Through TTIP, the US and the EU can set standards and rules, which may also be binding for third countries, exporting into the free trade area⁶⁵.

Moreover, TTIP serves as a blueprint for all future free trade agreements and helps to position the US and EU as an economic counterpart for an increasingly strong Asia⁶⁶.

2. – a) The list of opponents is long, diverse and well organized. It includes political parties (Grüne and SPD), numerous NGOs (ranging from Attac and Campact to BUND), as well as churches⁶⁷ and even companies⁶⁸. *Thilo Bode*, founder of the consumer protection group “foodwatch”, has become an unofficial spokesperson of the protest with his bestselling book on TTIP (*Die Freihandelslüge*⁶⁹).

The European Citizens Initiative „Stop TTIP“, an alliance of more than 500 European organizations, has failed to be registered by the European Commission⁷⁰. Nevertheless, the ECI has collected more than 3 million signatures during the official one-year period, exceeding the minimum quorum of one million by far⁷¹. Furthermore, the initiators of the ECI have filed action

⁶² *European Commission of Trade*, Impact Assessment Report on the future of EU-US trade relations, Com 2013 136final, p. 17.

⁶³ *Kafsack*, Die Vorteile von TTIP, FAZ v. 15.7.2015, abrufbar unter: <http://www.faz.net/aktuell/wirtschaft/ttip-und-freihandel/die-vorteile-vom-freihandelsabkommen-ttip-13699199.html>.

⁶⁴ *Dulliens/Garcia/Janning*, A Fresh Start for TTIP, ECFR 124, 02/2015, p. 6.

⁶⁵ Interview with MEP *Daniel Caspary* 13.5.2015, available at: <http://www.eppgroup.eu/news/TTIP%3A-setting-common-standards-can-raise-overall-standards-and-speed-up-EU-US-trade>.

⁶⁶ *N.N.*, The TTIP of the spear, *The Economist*, 17.10.2015, available at: <http://www.economist.com/news/europe/21674772-selling-europes-trade-agreement-america-strategic-has-problems-ttip-spear>.

⁶⁷ Kardinal *Reinhard Marx* in Focus, 17.5.2014, available at http://www.focus.de/finanzen/news/wirtschaftsticker/kardinal-marx-bei-freihandelsabkommen-die-armen-nicht-vergessen_id_3851628.html.

⁶⁸ *Tost*, SME want a TTIP rethink, 25.11.2015, available at: <http://www.euractiv.com/sections/trade-society/smes-want-ttip-rethink-319822>.

⁶⁹ In English: *The Free-Trade-Lie*.

⁷⁰ Available at: <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/2041>.

⁷¹ Minimum number of signatories required: 1 Million; end result for the self-organized European Citizens' Initiative available at: https://stop-ttip.org/?noredirect=en_GB.



for annulment with the European Court of Justice in November 2014⁷². The Commission rejected the registration of the ECI for formal reasons. They claim that the negotiating mandates are not legal acts but only preparatory and thus do not fall within the scope of the Regulation on the Citizen's Initiative⁷³. According to Art. 11 (4) TFEU a citizens initiative may concern "matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties". In the case of international agreements these legal acts are the Councils decision on signature and conclusion of the treaty. The commission argues that consequently preparatory Council decisions do not fall within the scope of this regulations.⁷⁴ The initiators believe that this argument does not hold legal scrutiny.

The longer the protests last the more consent declines within the whole population: at the beginning of 2014, 55% of Germans were in favor of TTIP. Meanwhile, only 42% of the German population support the agreement whereas 36% are explicitly against the treaty⁷⁵.

b) Opponents particularly fear special privileges for multinational companies, enabling them to sue governments in a network of tribunals for billions of dollars⁷⁶. TTIP could also be used to lower consumer, employee and environmental protection standards. These fears are the same on both sides of the Atlantic Ocean: Europeans are afraid of genetically modified foods and obsessed with "chlorine-chicken"; Americans fear eroding standards in hygiene and inevitable lax drug approval⁷⁷. Negotiations were thus far conducted in secret, public representatives have only limited access to relevant documents.

Even members of the competent committees get information only with delay and under restrictions⁷⁸. Until today, members of the German Bundestag do not have access to the consolidated texts of the agreement⁷⁹. Just recently, Norbert Lammert, the president of the German Bundestag threatens to vote against TTIP in one of Germany's largest newspapers⁸⁰ if a proper

⁷² Text of the complaint (only in German) <https://stop-ttip.org/de/klage-vor-dem-eugh/>; Legal opinion available at: <https://stop-ttip.org/lawsuit-ecj/>.

⁷³ Available at: <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/2041>.

⁷⁴ <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/2041>.

⁷⁵ Pew Research 4.5.2015, available at: <http://www.pewglobal.org/2015/05/07/germany-and-the-united-states-reliable-allies/u-s-germany-relations-06/>.

⁷⁶ Instead of many sources: Eberhardt/Olivet, Profiting from injustice – How law firms, arbitrators and financiers are fueling an investment arbitration boom, available at: <https://www.tni.org/en/briefing/profitting-injustice>.

⁷⁷ Dulliens/Garcia/Janning, A Fresh Start for TTIP, ECFR 124, 02/2015, p. 6.

⁷⁸ Giegold, The promised 'transparency' around TTIP has been a sham, The Guardian, 31.8.2015, <http://www.theguardian.com/commentisfree/2015/aug/31/transparency-ttip-documents-big-business>.

⁷⁹ N.N., German frustration builds over TTIP secrecy from US, Deutsche Welle 31.10.2015, available at: <http://www.dw.com/en/german-frustration-builds-over-ttip-secrecy-from-us/a-18819097>.

⁸⁰ N.N., Bundestag president Lammert demands TTIP transparency, Deutsche Welle 28.10.2015, available at: <http://www.dw.com/en/bundestag-president-lammert-demands-ttip-transparency/a-18809494>.

JUS CIVILE



participation of the Bundestag is not guaranteed⁸¹. There is an urgent need for more transparency, emphasizes President of the EU Commission, Jean-Claude Juncker: all relevant documents, including the results of the negotiation, must be available to all governments and parliaments⁸². Especially if TTIP is a mixed agreement, easy access to documents is absolutely necessary⁸³. Karel de Gucht wants the ECJ to finally determine the question whether TTIP is a mixed agreement⁸⁴.

IV – 1. – Opponents fear the threat TTIP poses to consumer protection, employee rights and environmental safety⁸⁵. Europeans and Americans would both profit from a high common level of protection. Such common level could not only be ensured in trade between the members of the agreement but also in trade with third countries exporting into the free trade area. However, the process of agreeing on common standards could lead to a race to the bottom. It will be difficult to agree on such a common standard since the approach of the EU and US is fundamentally different: the EU policymaking is based on the precautionary principle whereas the US chooses the risk approach. Besides, the agreement codifies the current standards, possibly making it difficult to raise standards in the future. Technically, every protection clause interferes with free trade. This interference can, however, be justified. European and WTO law examines an interference in four steps, assessing whether or not it was justified and weighs the affected interests.

a) TTIP regulates the trade of goods between the EU and the USA (a separate agreement (TiSA) regulates the trade in services). Primarily, TTIP allows free trade with goods between the two trade areas. Therefore, there should be no obstacles such as tariffs or other non-tariff trade barriers. Non-tariff trade barriers are, for example, double authorization procedures or various security regulations, such as different colors for turn signals (orange in Europe, red in the US)⁸⁶.

⁸¹ *N.N.*, Bundestag president Lammert demands TTIP transparency, Deutsche Welle 28.10.2015, available at: <http://www.dw.com/en/bundestag-president-lammert-demands-ttip-transparency/a-18809494>.

⁸² *N.N.*, Germany calls for more TTIP transparency, 28.10.2015, available at: <http://www.euractiv.com/sections/trade-society/germany-calls-more-ttip-transparency-318957>.

⁸³ This opinion is shared by the European Parliament: Resolution of 8th July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), 2014/2228(INI), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN>.

⁸⁴ *Fox*, EU-US trade deal must have national approval, says MPs, EU Observer 2.7.2014, available at: <https://euobserver.com/institutional/124833>.

⁸⁵ For a summary of concerns see: https://stop-ttip.org/what-is-the-problem-ttip-ceta/?noredirect=en_GB.

⁸⁶ Definition: UNCTAD, Non-Tariff Measures to trade, Economic and Policy Issues for Developing Countries, p. 1, available at: http://unctad.org/en/PublicationsLibrary/ditctab20121_en.pdf; List of non-tariff barriers to trade, see *Herdegen*, Principles of International economic law, p. 54.

JUS CIVILE



Governments can no longer protect domestic products by making foreign products more expensive due to tariffs⁸⁷. Particularly, strong companies may profit from the elimination of tariffs. While, for example, German automotive industries gain easier access to the American market⁸⁸, other industries, such as Rumanian textile companies, which are not as well prepared to face more competition, will most likely get under enormous pressure by strong American competitors⁸⁹.

b) Free trade of goods cannot be granted without restriction. The state may set restrictions on the import of certain goods, which pose a risk to health, the environment or other sensitive goods⁹⁰. There are different possible measures for restrictions, such as import bans, statutory thresholds, declarations, proof of harmlessness, just to mention a few⁹¹.

c) It is possible and necessary to restrict free trade for legitimate reasons. Amongst others, these typically are health and environmental safety as well as consumer protection⁹². In practice, however, it is difficult to define the scope of the “legitimate reasons”. The assessment of a risk of health is different in every country and even scientist can rarely agree. For example, Americans do not see any danger in „chlorine chicken“, but are concerned about routinely giving chicken antibiotics as a prophylactic, and vice versa⁹³.

d) In many cases, a restriction of free trade is justified for one of the above-mentioned reasons. However, not every reason justifies the specific restriction. Conflicting and competing interests have to be reconciled. Some conflicts can be solved beforehand through adequate and foresighted legislation: countries could either mutually recognize their standards or harmonize their different requirements. However, it is impossible to foresee and solve all possible future conflicts. For those we need provisions, which guarantee a fair and clear court ruling.

2. – New obstacle in the negotiation is the Buy American Act and America’s refusal to make an exemption for TTIP. The U.S. have made exemption from the Buy American Clause for ex-

⁸⁷ *Morrissey/Graves*, International Sales Law and Arbitration: Problems, Cases and Commentary, 2008, p. 14.

⁸⁸ *Dullien/Gracia/Janning*, A Fresh Start for TTIP, ECFR 124, 02/2015, p. 3.

⁸⁹ *Dullien/Gracia/Janning*, A Fresh Start for TTIP, ECFR 124, 02/2015, p. 3.

⁹⁰ Art. 36 TFEU lists all legal restrictions of the principle of free movement of goods (Art. 34 TFEU).

⁹¹ *Haedicke*, US Imports, TRIPs and Section 337 of the Tariff Act, IIC 2000, p. 772 et seq.

⁹² See Art. 36 TFEU.

⁹³ *Sarmadi*, Nothing wrong with chlorine-washed chicken, say German backers of TTIP, EurActiv 19.9.2014, available at: <http://www.euractiv.com/sections/trade-industry/nothing-wrong-chlorine-washed-chicken-say-german-backers-ttip-308564>.

JUS CIVILE



ample for Mexico and Canada under Nafta⁹⁴⁻⁹⁵. These exemptions, however, only apply for most federal government entities but not for state or provincial entities⁹⁶.

The Buy American Act (BAA) was enacted in 1933 in the wake of the Great Depression. It directed federal governments to use only domestic materials and products in federal supply, service and construction contracts⁹⁷. The BAA does not prohibit the government from purchasing foreign material but must give competitive preference to domestic materials by raising the price of all foreign bids by a certain percentage (between 2 and 60%). The States followed the federal legislation and enacted their own Buy American/Buy Local laws some of which even completely prohibit state agencies from buying foreign goods⁹⁸.

Procurement is a giant market: \$1,876.3 billion were spent in 2014⁹⁹, which amounts to 11% of the total U.S. economy¹⁰⁰. Gabriel, who is also Germany's deputy chancellor, said: "If the Americans hold fast to this position, we don't need the free trade treaty. And TTIP will fail"¹⁰¹.

3. – a) When the protest against TTIP first started, it concentrated on the regulations on consumer protection. During the last year, the focus has shifted toward investment protection, especially arbitration. Upon requests of the European Commission and some member states TTIP includes sections on investment protection. Investment rules provide foreign investors protection against discrimination and uncompensated expropriation of property in foreign countries, plus secures the right to transfer capital there¹⁰². In this context, citizens fear most that arbitration will take place behind closed doors and result in rulings that cannot be revised by an ordinary court

Arbitration provides investors with the possibility to seek protection from government measures. Investment rules have a long tradition in international investment agreements and usually follow the Convention of the Settlement of Investment Disputes between States and Na-

⁹⁴ But NAFTA Chapter 10, covering government procurement only applies to federal purchase at a minimum price of \$ 50.000 for goods and services and \$6.5 million for construction projects; for further information see *Turi*, 35 Can.-U.S.L.J. 237.

⁹⁵ *Eyester*, 31 Pub.Cont.L.J. 695, 719.

⁹⁶ *Turi*, 35 Can.-U.S.L.J. 237, 243.

⁹⁷ *Lockhart*, 185 A.L.R. Fed. 253.

⁹⁸ *Blageff*, 1 Legal Aspects of Intl. Sourcing § 16:26.

⁹⁹ National and subnational combined in 2014; Numbers from the Office of Management and Budget, <http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/weoselgr.aspx>.

¹⁰⁰ http://www.oecd-ilibrary.org/sites/gov_glance-2011-en/09/01/index.html;jsessionid=7e2df3fur6bf.x-oecd-live-02?contentType=/ns/StatisticalPublication,/ns/Chapter&itemId=/content/chapter/gov_glance-2011-46-en&containerItemId=%2Fcontent%2Fchapter%2Fgov_glance-2011-46-en&accessItemIds=&mimeType=text/html&_csp_=77d8514adeb98ac7256ce46e50922e20.

¹⁰¹ Interview with *Sigmar Gabriel*, published in *Handelsblatt*, 25.4.2016, p.1-5.

¹⁰² <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-ids>.



tionals of other States called ICSID. Consequently, the EU first proposed a procedure heavily based on the ICSID-Convention¹⁰³: A panel of three arbitrators, agreed upon by the parties, should render a ruling¹⁰⁴. These rulings should not be subject to appeal. The hearing should be public, and third parties were allowed to participate as so-called *amicus curiae* unless the parties agreed otherwise¹⁰⁵.

In reaction to continuous critique and as a result of the public consultation, the Commission has presented a new proposal on ISDS in September 2016. The core of the new proposal is a two-tier legal system that includes an appellate mechanism¹⁰⁶. Judges shall be nominated permanently, serving a once renewable six year term¹⁰⁷. For each case, three judges (forming the so-called “Tribunal”) are appointed on a rotation basis, thus ensuring that the composition is random and unpredictable¹⁰⁸. Moreover, the Tribunal may not award punitive damages¹⁰⁹. The proposal also clarifies that nothing limits a state’s right to regulate¹¹⁰ within its territory to achieve legitimate policy objectives such as environmental or consumer protection. Furthermore, the UNCITRAL Transparency Rules apply to disputes under the proposal¹¹¹ whose effect, in essence, is that all submissions, starting with the registration, will be available on-line, hearings will be open to the public, and *amicus curiae* participation may not be excluded.

The new proposal deals with many of the important criticisms. The reform was more than welcome and considered a milestone in the history of investment rules, gaining praise from Liberals, Conservatives, and German Industries (BDI)¹¹². Critics have not fallen silent though¹¹³. The proposed rules still do not prohibit judges to serve as lawyers in other ISDS-proceedings. In

¹⁰³ See http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf.

¹⁰⁴ See http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf.

¹⁰⁵ See http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf.

¹⁰⁶ http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

¹⁰⁷ Chapter II Section 3 Art. 9 par. 5 Commission Draft text TTIP, available at: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

¹⁰⁸ Chapter II Section 3 Art. 9 par. 7 Commission Draft text TTIP, available at: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

¹⁰⁹ Chapter II Section 3 Art. 28 par. 3 Commission Draft text TTIP, available at: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

¹¹⁰ Chapter II Section 2 Art. 2 par. 1 Commission Draft text TTIP, available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

¹¹¹ Chapter II Section 3 Art. 18 Commission Draft text TTIP, available at: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

¹¹² *Malmström*, Proposing an Investment Court System, European Commission Blog Post, 16.9.2015, available at: https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en.

¹¹³ See for a constitutional perspective: *Schill*, The Proposed TTIP Tribunal and the Court of Justice: What Limits to Investor-State dispute Settlement under EU Constitutional Law, 29.9.2015, available at: <http://verfassungsblog.de/en/the-proposed-ttip-tribunal-and-the-court-of-justice-what-limits-to-investor-state-dispute-settlement-under-eu-constitutional-law/>.



addition, judges do not get paid a regular salary thus endangering their independence¹¹⁴. Furthermore, the proposal does not include a subsidiary clause, i.e. the requirement for foreign investors to exhaust all reasonably available domestic remedies¹¹⁵. Despite all reforms, ISDS remains a parallel legal system, favoring foreign investors over local companies¹¹⁶. US Undersecretary for International Trade at the Commerce Department, *Stefan Selig*, noted that Investor-State Dispute Settlement mechanisms already exist in international trade agreements and that the US rejects Europe's proposal to create an international investment court¹¹⁷.

b) There is a long list of criticisms against ISDS, which needs a further examination¹¹⁸. Above all, critics see ISDS as a way for investors to sue government outside the ordinary legal proceedings. Foreign investors are thereby possibly better-protected than local companies. High damages awarded by arbitral panels could have an impact on the government's ability to regulate, preventing higher standards in environmental safety or consumer protection from the start (Chill effect¹¹⁹). Since the proceedings not only lack in transparency but are also incontestable, they are even referred to as secret jurisdiction. Arbitration also raises suspicion since it is a very profitable industry for a small group of well-paid advocates¹²⁰. Discussing all points thoroughly goes beyond the scope of this article. Therefore, I would like to focus on the two, in my view, most important points of critics.

aa) Critics fear the so-called regulatory chill of ISDS. The notion of Regulatory Chill suggests that investment arbitration – as an institution and by its mere existence – may influence the course of policy development. Legislators may refrain from raising standards to avoid possible damage claims by disappointed investors¹²¹. A very vivid example for a possible chill effect is

¹¹⁴ *van Harten*, A Parade of Reforms: The European Commission's Latest Proposal for ISDS, Osgoode Legal Studies Research Paper No. 21/2015, p. 7, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2603077.

¹¹⁵ *van Harten*, A Parade of Reforms: The European Commission's Latest Proposal for ISDS, Osgoode Legal Studies Research Paper No. 21/2015, p. 7, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2603077.

¹¹⁶ *Malmström*, Proposing an Investment Court System, European Commission Blog Post, 16.9.2015, available at: https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en.

¹¹⁷ <http://canadians.org/blog/us-rejects-malmstroms-proposals-amend-ids-ttip>; <http://www.euractiv.com/sections/trade-society/us-rejects-eu-proposal-investment-court-insists%20-on-retaining-ids-314501>.

¹¹⁸ See overview at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf.

¹¹⁹ *Salazar*, NAFTA Chapter 11, Regulatory Expropriation, and Domestic Counter-Advertising Law, 27 *Ariz. J. Int'l & Comp. L.* 31.

¹²⁰ *Provost/Kennart*, The obscure legal system that lets corporations sue countries, *The Guardian* 10.6.2015, available at: <http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid>.

¹²¹ See Study for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, *The*



the case Vattenfall I, Hamburg Moorburg¹²². Vattenfall applied for a license to build and run a coal-fired power plant. The competent authorities granted a preliminary approval. One year later, they granted the final approval with restrictions on the supply and backflow of cooling water¹²³. Vattenfall filed a suit, claiming that these restrictions violate fair and equitable treatment (FET) and thus are an indirect expropriation¹²⁴. The proceeding led to a settlement not accessible to the public. However, as a result the competent authorities granted Vattenfall a new approval with lesser restrictions¹²⁵. It can be assumed, that after the ICSID proceedings, the competent authorities are more willing to waive certain restrictions¹²⁶, even though there is no way to prove this assumption¹²⁷⁻¹²⁸.

bb) Arbitrational courts are, from the critic's point of view, some sort of secret courts. Nobody has any reliable information on the actual caseloads, the names of the deciding judges are kept a secret and proceedings take place in camera. All this is true, but it is done for good reasons. Proceedings in camera give the parties the possibility to overcome political differences and solve the conflict unemotionally. Sensibly used, these general conditions provide the opportunity for a both practical and diplomatic solution¹²⁹. Most proceedings have indeed explosive political power; just think of Vattenfall II (phasing out nuclear energy¹³⁰), making sober ap-

Netherlands, The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership, MINBUZA-2014.78850, available at <https://www.rijksoverheid.nl/>.

¹²² ICSID case number ARB/09/6.

¹²³ ICSID case number ARB/09/6.

¹²⁴ ICSID case number ARB/09/6.

¹²⁵ In this case a settlement reached in the national court was affirmed by the arbitration panel and thus "protected" against appeal, *Provost/Kennart*, The obscure legal system that lets corporations sue countries, The Guardian 10.6.2015, available at: <http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid>.

¹²⁶ *Provost/Kennart*, The obscure legal system that lets corporations sue countries, The Guardian 10.6.2015, available at: <http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid>.

¹²⁷ This is a general problem concerning the chill effect, see in depth: Study for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership, MINBUZA-2014.78850, p. 40 ff., available at <https://www.rijksoverheid.nl/>.

¹²⁸ This Settlement, however, violates EU environmental law, says the European Commission and now sues Germany for infringement, http://europa.eu/rapid/press-release_IP-15-4669_en.htm; in detail (only in German) *Pinzler*, *Verrückt, verrückter, Moorburg*, Die Zeit 2.4.2015, available at: <http://www.zeit.de/wirtschaft/2015-04/private-schiedsgerichte-verfahren-ttip-deutschland-europa-aerger>.

¹²⁹ *Puig*, *Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law*, 44 GJIL 531, 547 (2013); *Shihata*, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, With Particular Reference to ICSID and MIGA*, 1 AUILR 97, 114 (1986).

¹³⁰ Vattenfall filed the case under the Energy Charta in May 2012 (ICSID Case No. Arb/12/12), it is still pending, see: <https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/12/12#>; Vattenfall demands a compensation of about € 4.7 billion, <http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf>.



proach and ruling difficult. On the other hand, claims asserted before an arbitral court often comprise enormously high damages which are technically paid by taxpayer money. Quite understandable, they have a legitimate interest in knowing why these damages were awarded and thus demand public trials.

As legitimate as these criticisms are on arbitration in general, they are partly outdated for investment protection under TTIP. The new Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL-Transparency Rules) apply to all investor state arbitration concluded after April 1st 2014, unless the parties agreed otherwise (opt-out)¹³¹.

The Commission's first draft for implementing arbitration in TTIP, however, limited public participation to a minimum. The parties could even agree on excluding third parties who want to participate as *Amicus Curiae*.

c) In this context, the question arises, why the negotiating parties deem it necessary to include a special legal remedy for foreign investors in the agreement. The German Government stated that it does not see a need for investment protection rules in the relations with the USA¹³². Legal protection by national law and courts is adequate and sufficient, German politicians say¹³³. However, the EU Commission and some countries urge to include rules on investment protection in TTIP. The USA share the German opinion but nevertheless want to include investment rules as a blueprint for future agreements. If once waived, it might be harder to insist on investment rules in future treaties with other countries where the US consider them necessary, especially in those with China¹³⁴.

The purpose of supranational arbitral tribunals is to provide an impartial legal remedy for foreign investors. International arbitration procedures are part of over 3.000 agreements worldwide¹³⁵ and are also used to resolve conflicts under WTO-law.

d) There are two main arguments for a separate investment court system: time and expertise.

Investment protection cases are usually complex cases with economic background. Judges in ordinary courts usually lack knowledge to understand highly complex subject matters, especially those concerning economic facts. German judges, for instance, are trained to decide all disputes under civil law but lack a specialization. Judges appointed to arbitral panels are specialized on commercial law and have profound knowledge and experiences in this field thus guaranteeing a fast and proper ruling.

¹³¹ Art.1 (1) UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

¹³² <http://www.bmwi.de/DE/Themen/Aussenwirtschaft/Freihandelsabkommen/TTIP/was-ist-ttip.html>.

¹³³ <http://www.bmwi.de/DE/Themen/Aussenwirtschaft/Freihandelsabkommen/TTIP/was-ist-ttip.html>.

¹³⁴ See Statement by Commissioner *Karel de Gucht* on TTIP at The European Parliament Plenary debate in Strasbourg on 15.7.2014, available at: http://europa.eu/rapid/press-release_SPEECH-14-549_en.htm.

¹³⁵ <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-ids>.



Proceedings in complex cases with economic backgrounds take very long. Exemplary for excessively long proceeding is the case of German Telekom. Here the court has to decide whether the company published a wrongful prospectus when first going public. This case was first filed in 2000, and has not been decided yet. Regardless of the court's final decision, it comes too late in a fast moving economy. The cases already had an impact on the price development and the future development of the company. Plus, investors have long lost their money. Proceeding before international arbitral tribunals are a lot faster than before national courts, due to the significant lower workload which also cannot get extended by appeal proceedings.

e) At this point it is time to take a step back and consider whether TTIP should include investment rules. Contrary to common assumption, there is no proof of any increase of foreign investments after the ratification of an investment agreement¹³⁶. Even without TTIP, foreign investments made in the EU and the US today come from the other country¹³⁷. In their new agreement the US and Australia waived almost all rules on investment protection. Brazil has not signed a single investment agreement. South Africa even terminates existing agreements. As the first European country, Italy has terminated an investment agreement and has announced to exit the European Energy Charter in 2016¹³⁸.

At the same time, the number of cases filed with the ICSID is skyrocketing: in 2013, investors initiated at least 57 Investor-State dispute settlement cases¹³⁹.

Other concerns derive from German constitutional law¹⁴⁰. Since time is too short for a long presentation of all concerns, so let me just mention this one point: investment protection grants monetary compensation for expropriation. In Germany this approach is known as „dulde und liquidiere“ (suffer and charge) and was already rejected by the Federal Constitutional Court already in 1981 in the famous Nassauskiesungsentscheidung¹⁴¹.

¹³⁶ “Studies undertaken by UNCTAD reveal that there is little correlation between receiving increased foreign investment and signing of a bilateral investment agreement.”, Cited in: *Singh*, Multilateral investment Agreement in the WTO – Issues and Illusions, Asia-Pacific Research Network, 2003, p. 15, available at: https://www.wto.org/english/forums_e/ngo_e/multi_invest_agree_july03_e.pdf.

¹³⁷ *Gerstetter/Meyer-Ohlendorf*, Investor-state dispute settlement under TTIP – a risk for environmental regulation?, Heinrich-Böll-Stiftung, Berlin 2013, p. 4, available at: <http://www.ecologic.eu/de/10400>.

¹³⁸ *N.N.*, Italy withdraws from Energy Charter Treaty, Global Arbitration News, 6.5.2015, available at: <http://globalarbitrationnews.com/italy-withdraws-from-energy-charter-treaty-20150507/>.

¹³⁹ UNCTAD, Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note (Geneva: UNCTAD, 2013), 1, http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

¹⁴⁰ See *Holterhus*, Transatlantische Investitionsgerichtsbarkeit: Ansätze der Gestaltung eines TTIP Gerichtshofs, Verfassungsblog of 11.3.2015, available at: <http://www.verfassungsblog.de/transatlantische-investitionsgerichtsbarkeit-ansatze-der-gestaltung-eines-ttip-gerichtshofs/#.VjszxUYyaUI>; *Flessner*, TTIP und Verfassungsrecht, Verfassungsblog of 13.5.2014, available at: <http://www.verfassungsblog.de/ttip-und-das-verfassungsrecht/#.VjsyckYYaUI>.

¹⁴¹ *Stoll*, Zur falschen Zeit am falschen Ort – Reform des Investitionsrecht auf Abwegen, Verfassungsblog of 13.5.2014, available at: <http://www.verfassungsblog.de/zur-falschen-zeit-falschen-ort-reform-des-investitionsrechts-auf-abwegen/#.Vjszy0YYaUI>.



ISDS is very expensive. The average legal cost amount to \$8 million, but may increase over \$30 million¹⁴². These numbers do not even include indemnities, which are awarded if the investor wins or the case is settled which happens in the majority of all cases¹⁴³. The average amount of the damage awarded is \$10.4¹⁴⁴. In the end, this is the taxpayer's money. It is thus only understandable that they have a legitimate interest in open and transparent proceedings. In their interest, negotiators must take a cheaper alternative into consideration; such an alternative is the due legal process¹⁴⁵.

Maybe ISDS as a parallel legal system has served its purpose but is no longer state of the art. At the beginning of TTIP negotiations, the German Government officially stated that it did not see a need for investment protection rules in the relation with the USA as effective access to justice was guaranteed by national courts¹⁴⁶. This statement is backed by the organization of German judges. They are concerned about the creation of special courts for certain groups of litigants and called it the wrong way forward¹⁴⁷. An investment court would be 'outside the institutional and judicial framework of the Union' and would 'deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply¹⁴⁸. Two democratic states should rather trust their respective independent courts more than they trust three individuals. Or to put it as bluntly as arbitrator *Juan Fernandez-Armesto*¹⁴⁹: „When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all [...] Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament“¹⁵⁰.

¹⁴² OECD: Investor-State dispute settlement, public consultation: 16 May – 9 July 2012, p. 19.

¹⁴³ In 2013, 31 % of the cases were decided in favor of the investor, 26 % were settled, the conditions of the settlements are not published; a complete overview of the statistics in 2013 are available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf. Statistics for earlier years are not representative, since only a fractions of all decisions were published. A critical review of the UNCTAD statistic is available at: <http://www.iisd.org/itn/wp-content/uploads/2015/06/itn-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf>.

¹⁴⁴ Data is hard to come by, since even in public cases awards are rarely disclosed, this number comes from the only scientific based analysis of the year 2007; *Franck*, Empirically evaluating claims about investment treaty arbitration, 86 NCLRev 2.

¹⁴⁵ In depth: *Franck*, Rationalizing Costs in Investment Treaty Arbitration, 88 WULR 769 et seqq. (2011).

¹⁴⁶ <http://www.bmwi.de/DE/Themen/Aussenwirtschaft/Freihandelsabkommen/TTIP/was-ist-ttip.html>.

¹⁴⁷ http://www.drb.de/fileadmin/docs/Stellungnahmen/2016/DRB_160201_Stn_Nr_04_Europaeisches_Investitions_gericht.pdf (only in German), commenting on this statement, see *N.N.*, TTIP trade talks: German judges oppose new investor courts, *bbc*, 5.2.2016, available at: <http://www.bbc.com/news/world-europe-35503885>.

¹⁴⁸ http://www.drb.de/fileadmin/docs/Stellungnahmen/2016/DRB_160201_Stn_Nr_04_Europaeisches_Investitions_gericht.pdf.

¹⁴⁹ Professional arbitrator, partner at Armesto & Asociados, and chaired professor for commercial law at Comillas University, Madrid.

¹⁵⁰ Cited in: *Eberhardt/Olivet*, Profiting from injustice – how law firms, arbitrators and financiers are fueling an investment arbitration boom, p. 34, available at: <https://www.tni.org/files/download/profittingfrominjustice.pdf>.



V. – Are the efforts on TTIP still worthwhile? Have objective arguments reached their limits? Can TTIP still be objectively discussed at all? France already threatens to pull out of TTIP negotiation as long as the agreement includes an Investor State Dispute Settlement mechanism¹⁵¹. France's trade minister, Matthias Fekl, even criticizes a lack of mutuality and requests serious compromise offers from the US¹⁵². Similar threats and request come from the German Parliament.

Abandoning negotiation could pass up a good chance to reform free trade between the EU and the US¹⁵³. A new free trade agreement would be unattainable in the near future. Abandoning negotiation so TTIP would also bring an end to TiSA and possibly even to CETA.

The 13th round of negotiations was finished at the end of April 2016. The U.S. signaled they would be willing to abolish tariffs on cars completely if in return the EU will lower taxes on agricultural products and soften standards on the import of genetically altered foods.

But after 13th rounds of negotiation America does not make serious offers; even the EU Commissions doubts that TTIP still can be signed this year. Time is running short, the deal needs to be done before President Obama leaves office this year. A revival of the negotiations after the electoral break will be difficult if not impossible depending on who the next president will be¹⁵⁴.

The negotiations have already gone too far for a break-off, too many efforts have already been made, and too many compromises have been found. However, there is still a lot to do.

The United States now suggest a "TTIP light". An agreement, which focusses on tariffs and excludes highly controversial fields like consumer protection and investment protection¹⁵⁵. Critics claim that TTIP light would miss the chance to thoroughly reform trade and set new standards¹⁵⁶. However, TTIP light is better than no TTIP at all and could be a good start for further agreements in the future Rome wasn't built in a day and this might be true for a free trade zone of this dimension. The EU itself is the best example: from a very modest start as the European Coal and Steel Community with 6 members a confederation of 28 member states with a common currency emerged.

¹⁵¹ *Sheffield*, TTIP: France threatens to walk away from negotiations, *The Independent*, 1.10.2015, available at: <http://www.independent.co.uk/news/business/news/ttip-france-threatens-to-walk-away-from-negotiations-a6675486.html>; <http://www.euractiv.com/sections/trade-society/french-government-will-not-sign-ttip-agreement-2015-310037>.

¹⁵² *Dive*, La France envisage l'arrêt des négociations, *Sud Ouest* 28.9.2015, available at: <http://matthiasfekl.fr/sud-ouest-traite-transatlantique-la-france-envisage-larret-des-negociations/>.

¹⁵³ *Myant*, TTIP: what it will mean for us and what is the alternative?, briefing paper of the Observatoire social européen (OSE) No. 11/November 2015, p. 15, available at: http://www.ose.be/files/publication/OSEPaperSeries/Myant_2015_OSEBriefingPaper11_nov2015.pdf.

¹⁵⁴ *N.N.*, EU-Kommission befürchtet Scheitern von TTIP, *FAZ* 3.5.2016, <http://www.faz.net/aktuell/wirtschaft/ttip-und-freihandel/freihandel-eu-kommission-befuerchtet-scheitern-von-ttip-14212805.html>.

¹⁵⁵ *Sarmadi*, Verbraucherschützer Klaus Müller: Wir brauchen ein "TTIP light", *EurActiv* 8.5.2015, available at: <http://www.euractiv.de/section/eu-aussenpolitik/interview/verbraucherschutz-klaus-muller-wir-brauchen-ein-ttip-light/>.

¹⁵⁶ *N.N.*, EU, US Negotiators Push for 2016 Deal, Though „TTIP Light“ Not an Option, *Bridges*, Volume 20 – Number 16, 4.5.2016, available at: <http://www.ictsd.org/bridges-news/bridges/news/eu-us-negotiators-push-for-2016-deal-though-ttip-light-not-an-option>.