Contribution to the EU Commission's "Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)"

Christiane Gerstetter, Max Grünig, Senior Fellows, Ecologic Institute

July 2014

Question 1

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the objectives and approach taken in relation to the scope of the substantive investment protection provisions in TTIP?

As explained in Question 13 below, we do not think that provisions on investment protection should be included in TTIP. However, generally, in international investment agreements the term investment should be defined narrowly. The Commission's approach of only protecting investments already and not extending the protection to the pre-establishment stage is adequate. Moreover, a substantial investment should indeed be required to prevent "treaty shopping" in (eventual) investment arbitration. It is also adequate that only investments in accordance with the applicable law are protected; if, e.g. an investor engages in bribery to obtain certain licenses, this investor should certainly not be afforded any protection by an international investment treaty.

It is doubtful whether mere portfolio investments should be protected, as is the case in the CETA text. The costs of the investor for mere portfolio investments are typically much lower than for a "real-word" investment; as a consequence, there is no similar need for protection in an international investment agreement.

Question 2: Taking into account the above explanations and the text provided in annex as a reference, what is your opinion of the EU approach to non-discrimination in relation to the TTIP? Please explain.

As explained in Question 13 below, we do not think that provisions on investment protection should be included in TTIP. Generally, international investment agreements should be phrased in a way that ensures that foreign investors are not treated any better than domestic investors.

Question 3: Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the approach to fair and equitable treatment of investors and their investments in relation to the TTIP?

We do not think that provisions on investment protection in general should be included in TTIP, as explained in Question 13 below. However, if the EU was to negotiate agreements with countries where there are serious rule of law issues, a fair and equitable treatment clause may be warranted.

In this case (and *only* in this case), the suggestions made by the Commission point in the right direction. Without containing further details on what is meant by FET and what not, the FET clause is very vague. As a consequence, it is largely unpredictable how an arbitrator or court would interpret the clause in a judicial dispute. This creates highly undesirable risks for national regulation and may

produce chilling effects on such regulation. A reference to customary international law would not help remedy this situation, as what constitutes customary international law is often unclear.

The Commission's approach of positively defining what can constitute a violation of the FET requirement indeed seems the most appropriate approach and is more pertinent than alternative approaches, such as defining what FET is *not* or general exception provisions.

There should be no umbrella clause in any of the EU's investment agreement. Contractual disputes between a foreign investor and its host state should be adjudicated by national courts, as other contractual disputes. A narrowly defined FET clause provides investors with a sufficient degree of protection; no additional umbrella clause is needed.

Question 4

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the approach to dealing with expropriation in relation to the TTIP? Please explain.

We do not think that provisions on investment protection should be included in TTIP, as explained in our answer to Question 13. However, if the EU was to negotiate agreements with other countries where there are serious rule of law and good governance issues and there may thus be a rationale for including investment related provisions, defining well what can and more importantly cannot be considered an expropriation is important.

As a starting point, provisions against expropriation should only be included in an international investment agreement if there is strong evidence that the domestic systems do not protect sufficiently against such measures. In any case, it must be ensured that investment protection provisions do not prevent governments from adopting regulatory measures of general application that they consider necessary and pursuing the economic approach they consider appropriate and in the best interest of their country. Nationalizing certain industries (e.g. in the field of exploitation of natural resources) may be an important part of such policies, notably in developing countries.

Clauses on indirect expropriation are the most problematic ones, as they could be interpreted broadly to include regulatory measures of states. The EU Commission's proposals for defining expropriation point in the right direction for preventing such a broad interpretation of indirect expropriation. In particular, it is essential to clarify in any investment agreement that non-discriminatory measures taken for legitimate public purpose cannot be considered equivalent to an expropriation or an indirect expropriation. In this regard, there should not be a closed list of public policy objectives, given that policy objectives change over time. At best, some examples can be given, similar to the approach in Art. 2.2 of the World Trade Organization's Agreement on Technical Barriers to Trade (TBT). Moreover, when mentioning policy objectives the text of the agreement should clarify that it is not for any judicial entity to review the legitimacy or importance of these policy objectives, e.g. by referring to policy objectives "as deemed appropriate by the Party pursuing it".

With regard to compensation to be paid to the investor, it should be ensured that a foreign investor cannot request more in compensation than a domestic investor. One way of achieving this may be a reference in the international investment agreement to principles for determining the amount of compensation of the respective domestic legal order.

Question 5

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion with regard to the way the right to regulate is dealt with in the EU's approach to TTIP?

As explained in Question 13 below, we do not think that provisions on investment protection should be included in TTIP. However, if the EU was to negotiate investment agreements with other countries where there are serious rule of law issues and there may be a rationale for ISDS, preserving countries' right to regulate is essential.

The consultation document points to two legal techniques for protecting countries' right to regulate in international investment agreements: "clarification of the key investment protection provisions that have proved to be controversial in the past" and "carefully drafted exceptions to certain commitments".

Both are important and should be implemented in any future EU agreement containing investment-related clauses. However, the former approach (defining problematic clauses) is likely the more relevant one. Exception clauses often tend to be interpreted narrowly in adjudication; moreover, the onus for showing that the requirements of an exception clause are met is normally on the party invoking the exception, while for demonstrating a violation of a "normal" obligation, the onus will be on the investor.

When defining central terms and provisions, the "positive definition" approach that the Commission has suggested for the FET clause is preferable over a "negative definition" approach. In a "positive definition" approach, it is defined what behavior by a host state may constitute a violation of an investment clause, *excluding* everything else. In a negative approach, it is defined what *cannot* constitute a violation of an investment clause, *including* everything that is not explicitly excluded. Thus, the negative approach provides more risks for such provisions being interpreted broadly at the expense of parties' right to regulate

When drafting exception clauses, a general safeguard provision should be included for non-discriminatory measures of general application taken in the pursuit of public policy goals, rather than a closed list of exceptions such as, for example, in Art. XX GATT. The latter article is problematic as it does not allow explicitly measures in favor of a number of policy goals (that may not have been that relevant at the time the GATT was adopted), such as consumer protection, energy security etc.

Moreover, a reference to the right to regulate should be included in the preamble of any agreement, as preamble recitals are routinely used in (teleological and contextual) interpretation of legal agreements.

Concerning the clarification envisioned by the EU Commission that an adjudicating body will not be allowed to repeal a measure, but only order compensation paid, it should be noted that it may from the viewpoint of the defending state party, in some case be easier and/or more appropriate to alter the incriminated measure, rather than paying compensation. We would thus recommend that the defending party be given the choice to either do so (if this would allow the investor to continue with its desired activities) *or* pay a defined amount of compensation – this choice should be the country's , not the investor's or the arbitrators'. Admittedly, it is difficult for an investor to enforce a decision ordering the state to modify a measure, while enforcement of a decision ordering compensation payment is easier. However, this problem could be mitigated e.g. by giving a country a certain time

for modifying the treaty-inconsistent measure and only if it does not do so, it needs to pay a specified amount of compensation.

Question 6

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on whether this approach contributes to the objective of the EU to increase transparency and openness in the ISDS system for TTIP. Please indicate any additional suggestions you may have.

As explained in Question 13 below, we do not think that provisions on investment protection should be included in TTIP; more specifically rules on ISDS are absolutely not needed in TTIP and should not be included in TTIP. The US and the EU are both rule of law systems with efficiently functioning judicial bodies. Generally, it is questionable whether international investment tribunals, rather than national courts or a judicial entity deciding an inter-state investment dispute, should at all be called upon to enforce provisions in an international investment agreement while no comparatively strong options exist for judicially enforcing at the international level, for example, environmental or consumer protection provisions. This applies even with regard to countries that have an inefficient judicial system. However, if the EU was to negotiate agreements with other countries where there are serious rule of law issues, inefficient or corrupt court systems as well as problems of compliance with international agreements, there may be a rationale for creating legal avenues for investors outside the national legal system – however, this should always be the means of last resort.

In this case, transparency is an important issue and a feature that current investment arbitration proceedings often lack. This is problematic from various angles. First of all, it deprives national regulators of predictability and legal certainty as to how judicial decision-makers may interpret a certain agreement. Moreover, social science research also shows that judicial decision-makers tend to act differently when there is more public scrutiny. Finally, not publishing judgments also cuts off any critical legal discourse that is, for example, quite lively in the case of WTO law where dispute settlement decisions are always public.

Thus, it is indispensable that future EU investment agreements ensure that judicial decisions are published. As the example of the WTO shows, this has no negative impacts whatsoever. Any further steps aimed at transparency – e.g. public hearings, making submissions of parties public, too, are also to be welcomed.

Business communities sometimes point to issues with confidential business information; however, such information could in most cases easily be removed from published decisions. What is of interest concerning arbitration or judicial decisions is the way the law is interpreted. For explaining such interpretation in a public judgment, it will not normally be necessary to provide, e.g. detailed figures, relating to a certain business. However, where this is the case, the public's right to know what is being decided on a public treaty should take precedence over the investor's interests in confidentiality. After all, the investor is in no way forced to initiate dispute settlement proceedings.

As to the issue of *amicus curiae* briefs: It would be useful to include a duty for adjudicators (whether in inter-state or arbitration proceedings) to actually deal with the arguments made by civil society in their decisions. In the WTO, while the Appellate Body has issued a controversial decision that the dispute settlement bodies may accept *amicus curiae* briefs, the Panels and Appellate Body have in no

case so far actually acknowledged or visibly drawn on the arguments presented in any such brief. Instead, they have often stated they did not find it necessary to take the briefs into account. However, a mere formal opportunity to present briefs in judicial proceedings is not enough; they should actually be considered by the judicial decision-makers.

Question 7

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on the effectiveness of this approach for balancing access to ISDS with possible recourse to domestic courts and for avoiding conflicts between domestic remedies and ISDS in relation to the TTIP. Please indicate any further steps that can be taken. Please provide comments on the usefulness of mediation as a means to settle disputes.

As explained in Question 13 below, we do not think that provisions on investment protection should be included in TTIP; more specifically rules on ISDS are absolutely not needed in TTIP and should not be included in TTIP. The US and the EU are both rule of law systems with efficiently functioning judicial bodies. Whether international investment tribunals, rather than national courts or a judicial entity deciding an inter-state investment dispute, should at all be called upon to enforce provisions in an international investment agreement while no comparatively strong options exist for judicially enforcing at the international level, for example, environmental or consumer protection provisions, is generally highly doubtful. This applies even with regard to countries that have an inefficient judicial system. However, if the EU was to negotiate agreements with other countries where there are serious rule of law issues, inefficient or corrupt court systems as well as problems of compliance with international agreements, there may be a rationale for creating legal avenues for investors outside the national legal system – however, this should always be the means of last resort.

In that case, it is important to prevent, as the Commission suggests, that investors can bring claims in several fora on the same subject matter at the same time. Moreover, it is also appropriate to provide incentives for investors to use the domestic court system primarily or even require a full use of domestic litigation prior to access to ISDS.

Question 8

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on these procedures and in particular on the Code of Conduct and the requirements for the qualifications for arbitrators in relation to the TTIP agreement. Do they improve the existing system and can further improvements be envisaged?

As explained in Question 13 below, we do not think that provisions on investment protection should be included in TTIP; more specifically rules on ISDS are absolutely not needed in TTIP and should not be included in TTIP. The US and the EU are both rule of law systems with efficiently functioning judicial bodies. Whether international investment tribunals, rather than national courts or a judicial entity deciding an inter-state investment dispute, should at all be called upon to enforce provisions in an international investment agreement while no comparatively strong options exist for judicially enforcing at the international level, for example, environmental or consumer protection provisions, is generally highly doubtful. This applies even with regard to countries that have an inefficient judicial system. However, if the EU was to negotiate agreements with other countries where there are serious rule of law issues, inefficient or corrupt court systems as well as problems of compliance with

international agreements, there may be a rationale for creating legal avenues for investors outside the national legal system – however, this should always be the means of last resort.

In this case, improving the current system for the selection of arbitrators is of high importance. There is ample evidence in social science research on courts that *who* decides a case greatly matters for the outcome. Currently, one of the main problems is that there are a limited number of individuals deciding such disputes and that many of them act as arbitrators in one case and legal counsel in another. The latter is a classical conflict-of-interest situation; frequent switches between being a judge and an attorney are unusual in other legal systems. These two aspects would be the most important ones to tackle.

Concerning the involvement of a larger number of arbitrators, an important criterion would be to select individuals familiar with public international law, primarily, rather than commercial arbitration. It would also be highly desirable to include experts with e.g. a background in international environmental and health law. This should be added to the qualifications in Art. 25, para. 5 "Constitution of the Tribunal" proposed by the EU Commission. In the case of the WTO, the fact that the first Members of the Appellate Body where mostly outsiders to the WTO world, and came with a background in international and EU law has been identified as one of the factors why the Appellate Body has remedied some of the perceived shortcomings of what was decided by dispute Panels, composed of WTO insiders, under earlier GATT. Thus, it may be more important to ensure that the world of investment disputes is opened to "outsiders", than the arbitrators having prior experience as judges.

Concerning the avoidance of conflicts of interests stemming from the same people being legal counsels and arbitrators, a roster, as suggested, by the EU may help. In that roster only individuals should be included that commit not to represent any parties to an investment dispute while they are on that roster and for a cooling down period, after they have stopped to be on the roster. Such a provision should be added to Art. 25 X para. 3 of the suggested EU text.

Question 9

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on these mechanisms for the avoidance of frivolous or unfounded claims and the removal of incentives in relation to the TTIP agreement. Please also indicate any other means to limit frivolous or unfounded claims.

As explained in Question 13 below, we do not think that provisions on investment protection should be included in TTIP; more specifically rules on ISDS are absolutely not needed in TTIP and should not be included in TTIP. The US and the EU are both rule of law systems with efficiently functioning judicial bodies. Whether international investment tribunals, rather than national courts or a judicial entity deciding an inter-state investment dispute, should at all be called upon to enforce provisions in an international investment agreement while no comparatively strong options exist for judicially enforcing at the international level, for example, environmental or consumer protection provisions, is generally highly doubtful. This applies even with regard to countries that have an inefficient judicial system. However, if the EU was to negotiate agreements with other countries where there are serious rule of law issues, inefficient or corrupt court systems as well as problems of compliance with international agreements, there may be a rationale for creating legal avenues for investors outside the national legal system – however, this should always be the means of last resort.

Generally, we consider the prevention of frivolous claims a less serious matter than some of the other shortcomings in current ISDS provisions. Clarifying that the losing party will have to bear the costs of the proceedings should deter many such claims already. Also, a narrow definition of investment, as suggested in Question 1, should help mitigate the problem.

Question 10

Some investment agreements include filter mechanisms whereby the Parties to the agreement (here the EU and the US) may intervene in ISDS cases where an investor seeks to challenge measures adopted pursuant to prudential rules for financial stability. In such cases the Parties may decide jointly that a claim should not proceed any further. Taking into account the above explanation and the text provided in annex as a reference, what are your views on the use and scope of such filter mechanisms in the TTIP agreement?

As explained in Question 13 below, we do not think that provisions on investment protection should be included in TTIP; more specifically rules on ISDS are absolutely not needed in TTIP and should not be included in TTIP. The US and the EU are both rule of law systems with efficiently functioning judicial bodies. Whether international investment tribunals, rather than national courts or a judicial entity deciding an inter-state investment dispute, should at all be called upon to enforce provisions in an international investment agreement while no comparatively strong options exist for judicially enforcing at the international level, for example, environmental or consumer protection provisions, is generally highly doubtful. This applies even with regard to countries that have an inefficient judicial system. However, if the EU was to negotiate agreements with other countries where there are serious rule of law issues, inefficient or corrupt court systems as well as problems of compliance with international agreements, there may be a rationale for creating legal avenues for investors outside the national legal system – however, this should always be the means of last resort.

In case ISDS is included in a future EU agreement, filter mechanisms would be beneficial. However, it is not evident why they should be confined to measures concerning the financial system. Measures relating to the protection of the environment or the rights of consumers and workers are important as well. Thus, the proposed text by the Commission is much too limited.

Question 11

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on this approach to ensure uniformity and predictability in the interpretation of the agreement to correct the balance? Are these elements desirable, and if so, do you consider them to be sufficient?

As explained in Question 13 below, we do not think that provisions on investment protection should be included in TTIP; more specifically rules on ISDS are absolutely not needed in TTIP and should not be included in TTIP. The US and the EU are both rule of law systems with efficiently functioning judicial bodies. Whether international investment tribunals, rather than national courts or a judicial entity deciding an inter-state investment dispute, should at all be called upon to enforce provisions in an international investment agreement while no comparatively strong options exist for judicially enforcing at the international level, for example, environmental or consumer protection provisions, is generally highly doubtful. This applies even with regard to countries that have an inefficient judicial system. However, if the EU was to negotiate agreements with other countries where there are

serious rule of law issues, inefficient or corrupt court systems as well as problems of compliance with international agreements, there may be a rationale for creating legal avenues for investors outside the national legal system – however, this should always be the means of last resort.

In case ISDS is included in a future EU agreement, it is essential that parties have the right do adopt binding interpretations of the agreement. This is, in fact, also possible in the WTO legal order and called an "authoritative interpretation" there. There is strong evidence in social science literature on courts' decision-making that the prospect of counter-measures (such as an authoritative interpretation by Parties to an agreement annulling a line of interpretation developed in previous case law) has an important influence on the way that judicial decisions get made. Judicial decision-makers tend to tread more carefully and anticipate the preferences of parties to an agreement more closely when faced with such a possibility. The mere possibility of such authoritative interpretation could thus lead arbitrators to be more cautious and well-reasoned in their judgments.

The possibility of an "authoritative interpretation" should not be confined, as in the EU's Commission's proposal, to "serious concerns" as regards interpretation; Parties to an agreement should be allowed to adopt such an interpretation whenever they consider it pertinent to do so. They are the masters of the treaty. It would, however, be expedient to clarify that such an interpretation would not affect proceedings that have already been initiated at the time the authoritative interpretation is adopted; otherwise the fundamentally important principle of legal certainty would be violated.

Question 12

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on the creation of an appellate mechanism in TTIP as a means to ensure uniformity and predictability in the interpretation of the agreement.

As explained in Question 13 below, we do not think that provisions on investment protection should be included in TTIP; more specifically rules on ISDS are absolutely not needed in TTIP and should not be included in TTIP. The US and the EU are both rule of law systems with efficiently functioning judicial bodies. Whether international investment tribunals, rather than national courts or a judicial entity deciding an inter-state investment dispute, should at all be called upon to enforce provisions in an international investment agreement while no comparatively strong options exist for judicially enforcing at the international level, for example, environmental or consumer protection provisions, is generally highly doubtful. This applies even with regard to countries that have an inefficient judicial system. However, if the EU was to negotiate agreements with other countries where there are serious rule of law issues, inefficient or corrupt court systems as well as problems of compliance with international agreements, there may be a rationale for creating legal avenues for investors outside the national legal system – however, this should always be the means of last resort.

Generally, the lack of an appellate mechanism is one of the major shortcomings of the current system for adjudicating investment disputes. However, it is still doubtful whether the creation of such a mechanism in one or several bilateral agreements of the EU would be sufficient to remedy that state of affairs. Rather, a multilateral solution should be sought, which would apply to all future investment agreements and in those already concluded at the stage of revision. A provision on consultation on this matter, as suggested by the EU Commission, may, however, help generate the necessary consensus for a multilateral solution and is thus to be welcomed.

Question 13:

What is your overall assessment of the proposed approach on substantive standards of protection and ISDS as a basis for investment negotiations between the EU and US?

Whether or not to include investment protection rules, including provisions on investor-state dispute settlement, requires a broad public discussion about the pros and cons of and the need for such rules. The present consultation is therefore much too narrowly focused on the technical implementation of certain issues. The present question should have been the very first one of the consultation and it should have been followed by several others on the potential advantages and negative impacts of investment protection rules and particular provisions on ISDS in TTIP.

Given the way that the consultation is structured, it appears to us that the Commission is not interested in a genuine discussion on IF such provisions in TTIP will actually bring sufficient benefits to the EU and the US and what risks for non-economic concerns such as environmental protection, consumer protection, public health, among other, are entailed. Rather it appears that the Commission has already made up its mind and is only interested in technical details of implementation. This is unfortunate, given the huge and controversial public debate on investment protection in TTIP. The narrow scope of the consultation will certainly trigger new and justified criticism of a lack of genuine EU civil society involvement in the TTIP negotiations. While a broad discussion about the EU's approach to investment treaties and how to improve the current system is certainly much needed and desirable, the TTIP negotiations are the wrong context for such a debate.

Moreover, we would also like to note that we find it puzzling that while the Commission inquires about how the rights of investors should be framed, there is no single reference in the consultation to including provisions on the duties of investors or giving victims of – broadly speaking - human rights abuses and environmental damage caused by e.g. subsidiaries of EU companies outside the EU rights and possibilities for legal redress against these investors. The EU has so far only a very weak, largely non-enforceable framework on corporate social responsibility and as shown in several studies it is very difficult for victims of corporate crime from outside the EU to seek redress for this situation before EU courts (see for example the study conducted by Daniel Augenstein on behalf of the EU Commission on the "Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the EU (2010), http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf). However, this important aspect is not at all mentioned by DG Trade.

Based on considerable experience working on international trade policy and law, it is generally doubtful to us whether TTIP is a good policy choice. However, leaving this general argument aside for a moment, we do not see that there is any need for an investment chapter in TTIP; and there is certainly no need for ISDS provisions. On the other hand, there are certain risks attached to such provisions for regulation in the EU and the US.

Turning to the arguments used in favor of including investment protection in general and ISDS more specifically in TTIP, there appear to be currently three main rationales:

An economic rationale: The conventional rationale for ISDS is, of course, that it would foster foreign direct investment and thus economic welfare, providing a kind of insurance for investors against political risks and shortcomings in the legal and judicial system of the host state. Whether that

economic rationale holds true at all is much debated in the economic literature. It is, in any instance, highly questionable in the relations between two developed rule-of-law legal systems like the ones of the EU Member States and the US. For example, a recent study by the London School of Economics [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf] concludes that there is no convincing evidence that past US treaties with investment protection clauses have had a tangible impact on US outward investment, even in "risky jurisdictions". Another study [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410188] concludes that worries over deficiencies of the US judicial system are not “sufficiently substantiated” to warrant an inclusion of ISDS in TTIP. In addition, there is a substantial amount of mutual EU/US investment – without the US having concluded investment treaties with the majority of EU Member States. In the case of TTIP, the economic rationale for ISDS is hence simply and plainly unconvincing.

A further argument sometimes made is that ISDS is needed, because domestic courts do not take into account international treaties in their judgments. While this is factually at least partially true for US courts, but also for the CJEU, this is not an unusual state of affairs: international treaties routinely create rights and obligations only for states that are obliged to implement the ratified treaties in their legal orders. Individuals or legal persons can then bring claims on the basis of the national legislation implementing the international treaties; individuals or companies cannot seek redress before national courts on the basis of provisions contained in international treaties as such. It is not clear why this would be insufficient in the case of TTIP or international trade/investment treaties as such when it is a general approach in international law – including e.g. international environmental law. When a state party to a treaty feels that another state violates the treaty, normal inter-state compliance and dispute resolution mechanisms can be used, such as e.g. done in the World Trade Organization (WTO). Inter-state dispute settlement remains vastly under-used in international investment law. The experience in international trade law where the WTO’s dispute settlement system is an accepted and widely used system for resolving inter-state disputes shows that this avenue could also be used much more widely in international investment law.

A second argument is that ISDS should be included in TTIP, because the EU would like to treat alike all its trade partners with whom it is currently negotiating trade and investments agreements or will do so in the future - these include China and Japan. It is feared that, for example, not including ISDS in TTIP would make it more difficult to include it in an agreement with China, for example. However, international politics and law are rarely guided by a rationale of treating every country equally. To give just two examples: Citizens from different countries are routinely treated differently in visa regulations. Many countries distinguish between different destination countries in arms control regulations – and rightly so. Even, bilateral investment and trade agreements vary considerably between countries. Hence, this rationale is not convincing, either.

A slightly different version of this argument is that the two major economic powers should agree on a “gold standard” of investment protection and ISDS, capable of being multilateralised later on, to remedy some of the existing shortcomings of the system. This argument is made against the failure of past attempts to deal with investment multilaterally such as the (rightly) long-dead MAI or the injection of investment issues in the WTO’s Doha Round. Indeed, ISDS as it currently mostly works suffers from some serious flaws – as rightly pointed out by the Commission in the consultation document. A reform is indeed urgently needed. However, does this mean that there should be a bilateral solution to what is essentially a multilateral problem? We do not think so.

If there is nothing speaking in favor of ISDS in TTIP, what is on the negative side? As is well known, decisions by international arbitrations tribunals – as far as published in first place – are not a consistent body of law; this may be in part due to the absence of an appellate mechanism and is certainly due to the widely varying and vague formulations in international investment agreements. Some of the case law could be read as involving interpretations of e.g. the fair and equitable treatment or clauses prohibiting indirect expropriation that might lead to situation where a state has to be compensate to the investor for certain regulatory measures, adopted e.g. for the protection of the environment. While it is difficult methodologically to prove in a large scale, comparative exercise that the mere threat of ISDS proceedings would lead states to not adopt regulatory measures or to resort to less stringent regulation, there is certainly anecdotic evidence for such "regulatory chill".

Arguably, some of the suggestions made by the Commission would reduce the risk of such negative effects on legitimate public regulation. But there is one way of making absolutely sure that such risks do not arise: simply keeping investment protection and ISDS out of TTIP.

Some of these arguments are spelt out in more detail in the following study supported by the German Heinrich Böll Foundation: Christiane Gerstetter and Nils Meyer-Ohlendorf (2014), Investor-state Dispute Settlement under TTIP - a Risk for Environmental Regulation? Berlin, http://www.boell.org/downloads/HBS-TTIP_2.pdf