

OPEN MARKETS, PROSPERITY AND GLOBAL STANDARDS

THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

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Few statements cause less controversy in the field of economics as the idea that free trade increases the world's prosperity. At the same time, the negotiations between the European Union and the United States of America over a comprehensive trade and investment agreement are met in Germany with criticism at best and hostility at worst. This seems paradoxical, as Germany itself has achieved considerable wealth through its high degree of integration in world trade. Put simply: "Globalisation has made Germany rich."¹

The enormous importance of open markets for Germany is also reflected in the large number of jobs dependent upon them. Directly and indirectly, more than nine million people alone work in exporting German products in this country.² According to BDI calculations, foreign direct investment creates nearly 2.6 million jobs in Germany.³

The value creation chains have become increasingly complex and above all intertwined in recent decades. For a long time now the simple formula of importing raw materials and exporting finished products has ceased to hold true; our exports are heavily dependent upon preliminary products from abroad. These



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- 1 | Maximilian Weingartner, "Eine Mischung aus Angst und Zufriedenheit", *Frankfurter Allgemeine Zeitung*, 21 Mar 2015, p. 24.
- 2 | 9.6 million people were employed in 2007. Cf. Prognos, "Globalisierungsreport 2011. Welche Arbeitsplätze in Deutschland hängen von welchen Ländern ab?", p. 8, http://prognos.com/uploads/tx_atwpubdb/Prognos_Globalisierungsreport_2011_web.pdf (accessed 27 Apr 2015).
- 3 | Cf. The Voice of German Industry (BDI), "Ausländische Direktinvestitionen in Deutschland. Investitionsfreiheit fördern und öffentliche Akzeptanz schaffen", p. 6, http://bdi.eu/download_content/GlobalisierungMaerkteUndHandel/Auslaendische_Direktinvestitionen_in_Deutschland.pdf (accessed 27 Apr 2015).

globalised production chains have seen the proportion of foreign intermediate inputs for German exports rise to more than 40 per cent.⁴ At the same time, German exports themselves occasionally represent intermediate inputs for foreign products. Some 3.5 million jobs are created in the EU alone by the demand for preliminary inputs for German industry.⁵

INCREASE PROSPERITY, FIGHT POVERTY

Integration into international trade flows is an incomparably successful way for emerging and developing countries to free people from poverty.

Yet trade is capable of more than just creating well-paid skilled jobs in Germany; integration into international trade flows is an incomparably successful way for emerging

and developing countries to free people from poverty. In these past decades of increasing globalisation, the number of people forced to live in absolute poverty has declined sharply – not only relatively speaking, but also in absolute terms despite overall growth in the world’s population. Development did not proceed in the same way everywhere: regions with a high level of integration in world trade were particularly successful in reducing poverty, as the example of East Asia shows, where the percentage of absolute poverty was reduced from nearly 80 per cent in the early 1980s to less than ten per cent within 30 years.⁶ The economic rise of China, which has freed some half a billion people from extreme poverty, occurred simultaneously to the transition from a closed economy towards one that is heavily intertwined with international trade relations. Sub-Saharan Africa, however, which makes up only a very small portion of world trade, has remained stagnant during the same period, with extreme poverty hovering around 50 per cent.⁷

- 4 | In 2010 this was 43 per cent. Cf. German Federal Statistical Office (Statistisches Bundesamt), “Deutscher Außenhandel. Export und Import im Zeichen der Globalisierung”, p. 9, <https://destatis.de/DE/Publikationen/Thematisch/Aussenhandel/Gesamtentwicklung/AussenhandelWelthandel5510006139004.pdf> (accessed 27 Apr 2015).
- 5 | Cf. The Bavarian Industry Association, “Die Bedeutung der deutschen Industrie für Europa”, p. 1, http://prognos.com/uploads/tx_atwpubdb/140417_Prognos_Studie_vbw_Bedeutung_dt._Industrie_EU_DE.pdf (accessed 27 Apr 2015).
- 6 | Cf. The World Bank, “Poverty & Equity. Regional Dashboard East Asia & Pacific”, <http://povertydata.worldbank.org/poverty/region/EAP> (accessed 27 Apr 2015).
- 7 | Cf. The World Bank, “Poverty & Equity. Regional Dashboard Sub-Saharan Africa”, <http://povertydata.worldbank.org/poverty/region/SSA> (accessed 27 Apr 2015).

The free flow of goods and services and favourable conditions for foreign direct investment enable the development of an international division of labour, which in turn allows efficient use of our scarce resources through fair competition. Innovation, better products and lower prices are tangible benefits seen by those involved in free trade.⁸



The Port of Hamburg is the third largest container port in Europe. International trade relations are an essential factor for the economic success of Germany. | Source: Jens Auer, flickr ©©©©.

The large number of EU trade agreements already in force demonstrates the economic benefits of reducing trade barriers. Because of this, the European Commission was able to present an impressive balance in late March 2015 after three years of free trade agreements with South Korea: EU exports to South Korea have increased by 35 per cent. In places where all trade restrictions could be abandoned, this increase amounted to up to 46 per cent. The automotive industry reached peak values with 90 per cent increases.⁹

8 | Cf. Ronald Clapham, "Die Internationale Ordnung in wirtschaftlicher, sozialer und ökologischer Sicht", *Zukunft der Sozialen Marktwirtschaft*, Lucius & Lucius, Stuttgart, 2006, vol. 8, p. 13.

9 | Cf. European Commission, "Jährlicher Bericht über die Durchführung des Freihandelsabkommens zwischen der EU und Korea", 26 Mar 2015, http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153279.pdf (accessed 27 Apr 2015).

It is simply untrue that only corporations benefit from trade liberalisation. On the contrary, protectionist restrictions on free trade are intended to benefit domestic enterprises. However, the consumer must ultimately pay for these economic policies, resulting in foregoing innovation, product improvements and lower prices.¹⁰ By contrast, trade liberalisations result in benefits to both parties: businesses and consumers.



TTIP is perceived by many consumers in Germany as a “deal for corporations” – and a great contradiction to democracy, environmental protection and fair trade. | Source: Christian Mang, Campact, flickr ©©©.

The TTIP would lower trade costs, enabling additional trade. This would result in cost savings from the reduction of tariffs and non-tariff barriers (NTB).¹¹ Whilst, on average, the level of customs duties in transatlantic trade is already relatively low,¹² NTBs lead to an average cost impact, which corresponds to a tariff rate of 20 per cent. It is therefore easy to see that the transatlantic trade agreement promises great potential for further growth,

10 | Cf. Clapham, n.8, p.13.

11 | This term includes all trade restrictions that are not customs duties but are also designated as tariffs.

12 | The high volume of trade between the EU and the U.S. nevertheless results in large possible savings. The annual customs duties in the German automotive industry alone for export trade with the U.S. amount to more than one billion euros. Cf. German Association of the Automotive Industry (VDA), “Deutsche Automobilindustrie sagt ‘Ja zu TTIP!’”, 28 Jan 2015, <http://vda.de/de/presse/Pressemeldungen/20150128-Deutsche-Automobilindustrie-sagt--Ja-zu-TTIP--> (accessed 27 Apr 2015).

particularly in terms of NTBs (non-tariff barriers). Criticism is once again being raised that, with the goal of reducing NTBs, the TTIP is surpassing the actual trade policy and thus gaining a new quality. However, the fact remains that NTBs have found themselves on the trade policy agenda at least since the Tokyo Round of the GATT negotiations in the 1970s, and have been intensively debated ever since.¹³

A whole host of different technical standards means products that need to be manufactured differently for European and American markets are more expensive. Not infrequently, the effort that would be expended for this is so high that exporting is no longer possible. It is often the case that these different technical standards are intended to provide the same level of protection and simply employ different methods of doing so. It quickly becomes clear that these regulations can be mutually recognised without disadvantaging consumers. This also includes regulations that are not so readily apparent to consumers, such as the famous example of different indicator colours.¹⁴ For example, different rules apply in the EU and the U.S. as to the height at which an emergency shut-off must be placed on a machine. This seemingly insignificant difference results in a great expense, since machine components must then be designed and manufactured differently.

CONSUMER PROTECTION – NOT ONLY IN EUROPE BUT WORLDWIDE

Public opinion has been far more sensitised regarding regulations relating to approvals for food or the use of actually or potentially hazardous substances. It was rightly noted during the debate on the TTIP that the EU

Whilst a risk must be ruled out before a product is approved in the EU on the premise of the precautionary principle, in the U.S. a product can be sold until evidence is found of a specific risk.


and the U.S. take a divergent approach to potential hazards for consumers. Whilst a risk must be ruled out before a product is approved in the EU on the premise of the precautionary principle, in the U.S. a product can be sold until evidence is found of a specific risk. The liability for this then lies with the company, which must pay substantial compensation in the event of any damage.

13 | Cf. Clapham, n. 8, p. 18.

14 | Direction indicator lights on vehicles in the EU must be orange, but in the U.S. these are generally red.

Both in Europe and in the U.S., consumers remain convinced of the superiority of their own consumer protection standards. Just as some European consumers fear a supposedly lower level of protection in the U.S., some U.S. consumers fear supposedly lax regulations in the EU. And the truth is that examples can be found of both. It is therefore not at all the case that the European level of protection is higher per se than that in the U.S., and vice versa.



The different regulations on limits of lead in children's toys in the EU and the U.S. show that consumer protection in Europe is not necessarily higher than in the U.S. | Source: woodleywonderworks, flickr ©

For example, limits on lead content in children's toys that apply in the United States are significantly stricter: the surface of the toy is only permitted to contain 90 milligrams of lead per kilogram, whilst in the EU 160 milligrams per kilogram is permitted.¹⁵ Another example can be found in the food industry: by now it has become common knowledge through the TTIP debate that growth hormones are used in U.S. cattle farming, which is not permitted in the EU. Less well known is the fact that the use of antibiotics is more restrictive in the U.S.: whilst European farmers may use antibiotics to treat sick cattle and nevertheless sell the affected meat as an organic product, antibiotic use is not permitted in the United States for meat that will later be sold as organic.¹⁶

15 | Cf. Nicola Abé et al., "Im Säurebad", *Der Spiegel*, 22/2014, 26 May 2014, p.21, <http://spiegel.de/spiegel/print/d-127194895.html> (accessed 27 Apr 2015).

16 | Cf. *ibid.*

The political will to maintain the level of consumer protection they have achieved is present on both sides of the Atlantic. Decision makers have repeatedly expressed corresponding opinions.¹⁷ Lowering these standards is therefore out of the question. The EU's existing trade agreements and the requirements of the Member States' negotiating mandate also contain a wide range of exceptions, which relate mainly to the field of culture and regulation at the local level. The State's room to manoeuvre is thus not unduly restricted. The TTIP even has the potential to export our high level of protection to third countries: countries wishing to make use of the additional market opportunities a common transatlantic economic area would afford them, or even those who wish to join this transatlantic economic area will have to abide by its rules in the medium term and will have to adapt their production processes accordingly. This would also benefit consumers outside of the EU and the U.S., and would instead lead much more to a race to the top than a race to the bottom.

REASONABLE INVESTOR PROTECTION IN PLACE OF A SPECTRE

One of the 24 sections planned in the TTIP is meant to contain protection for investors. This protection, and particularly the investor-state dispute settlement (ISDS) it includes, have ignited harsh criticism from some. This criticism is aimed, on the one hand, at issues surrounding the actual design of ISDS, but is also criticism of a very fundamental nature on the other.

The TTIP has the potential to export our high level of protection to third countries that want to make use of the additional market opportunities.

All issues regarding the actual design of an ISDS in the TTIP are the subject of the current negotiations. For example, these include the selection of the arbitrators, the option of an appeal or the transparency of the proceedings. Different proposals are offered

17 | For example, as Angela Merkel stated in her podcast: "Es geht hier nicht, wie oft gesagt wird, um die Absenkung von Standards – im Gegenteil." Angela Merkel, "Merkel gegen Wachstum auf Pump", *Die Kanzlerin direkt*, The Federal Government, 10 May 2014, http://bundesregierung.de/SiteGlobals/Forms/Webs/Breg/Suche/DE/Solr_Mediathek_formular.html?cat=podcasts&id=869332 (accessed 27 Apr 2015). Or Barack Obama in a press conference on 26 Mar 2014: "I have fought my entire political career and as President to strengthen consumer protections. I have no intention of signing legislation that would weaken those protections." Barack Obama, "Press Conference by President Obama, European Council President Van Rompuy, and European Commission President Barroso", European Council, Brussels, 26 Mar 2015, <https://whitehouse.gov/the-press-office/2014/03/26/press-conference-president-obama-european-council-president-van-rompuy-a> (accessed 27 Apr 2015).

for all these issues, so a fundamental rejection of ISDS in the TTIP on the basis of these issues – before any negotiated outcome even faces any parliamentary debate – would be misguided.

The fundamental criticism levelled at an ISDS being part of the TTIP includes the allegation that ISDS would create a parallel justice system with special privileges for foreign investors and concerns that it would create a so-called regulatory chill. It should first be noted that courts of arbitration would be in no way foreign to German legal culture as implied by this allegation of a parallel justice system. On the contrary, the German Code of Civil Procedure (Zivilprozessordnung) explicitly stipulates that “any pecuniary claim...” may “be the subject of an arbitration agreement”.¹⁸ The reality is therefore, which should be no surprise, that courts of arbitration are frequently encountered in Germany regardless of ISDS.



Chinese representatives from politics and economy taking part in the World Economic Forum 2014 in Tianjin: Asian countries are becoming increasingly important in the shift of the world economic order. | Source: Sikarin Fon Thanachaiary, World Economic Forum, flickr ©①②③.

The Comprehensive Economic and Trade Agreement (CETA) that the EU has already negotiated with Canada is often referred to as a blueprint for the TTIP. And indeed, as the EU’s most recently negotiated agreement, CETA can provide us with insight as to

18 | Cf. German Code of Civil Procedure (Zivilprozessordnung, ZPO), para. 1, “Paragraph § 1030 ZPO”, <http://zivilprozessordnung.net/paragraph-1030> (accessed 27 Apr 2015).

the state of affairs. It is useful to base a fundamental evaluation of ISDS in the TTIP on this state of affairs rather than on older agreements now considered obsolete. It is against this backdrop that we can safely abandon concerns over alleged privileges for foreign investors: specifically, a legal opinion commissioned by the German Federal Ministry of Economy and Energy (Bundesministerium für Wirtschaft und Energie) demonstrates that European Union law and German constitutional law in particular already offers investors a level of protection that extends well beyond those contained in the CETA.¹⁹

Investment protection agreements aim at providing foreign investors with protection against expropriation without compensation, arbitrariness and discrimination. Without effective enforcement options, such guarantees would be worthless. The notion of selecting a neutral enforcement body seems quite appropriate here. Ultimately, the fair treatment of investors before just a national court of the State, which stands accused of arbitrariness or discrimination, is not automatically given.

We know that the EU is not a homogeneous area of justice and that the rule of law is not always as advanced in other Member States as it is in this country. We also know that, in the past, an investor's foreign background has been made the subject of proceedings in the U.S. and has likely influenced the decisions of juries. This makes clear that ISDS can be a reasonable instrument in the TTIP. Rather than fundamentally rejecting it outright, we should instead take an interest in further developing ISDS in accordance with the principles of our own rule of law in order to create a model for future agreements. On the contrary, it would likely be impossible to establish such an approach in agreements with China, for example, if it were dispensed with in the TTIP.

We should aim at further developing ISDS in accordance with the principles of our own rule of law in order to create a model for future agreements.

German constitutional law guarantees basic rights, which we hold dear. Investor protection in the TTIP secures rights that do not extend beyond what we as Germans are already guaranteed. It is

19 | Cf. Stephan Schill, "Auswirkungen der Bestimmungen zum Investitionsschutz und zu den Investor-Staat-Schiedsverfahren im Entwurf des Freihandelsabkommens zwischen der EU und Kanada (CETA) auf den Handlungsspielraum des Gesetzgebers (Kurzgutachten)", Federal Ministry for Economic Affairs and Energy, http://bmwi.de/BMWi/Redaktion/PDF/C-D/ceta-gutachten-investitionsschutz,property=pdf,ber_eich=bmwi2012,sprache=de,rwb=true.pdf (accessed 27 Apr 2015).

quite the opposite. In light of this, we should not fear a possible regulatory chill through ISDS in the TTIP, we should instead welcome it. If states dispense with unjustified interference in property rights for fear of costly claims for damages,²⁰ a great deal will have been accomplished for freedom and the rule of law.

PROACTIVE DESIGN WITH THE TTIP

The ninth round of negotiations took place in New York from 20 to 24 April 2015. By the end of 2015, a political accord on the core elements of the agreement should be reached at the very least. Further work on the negotiating text and the subsequent ratification process will extend beyond 2016 according to Ignacio Garcia Bercero, Chief Negotiator of the European Commission.²¹ The transparency of these TTIP negotiations was and is one of the main points of criticism. However, the fact remains that so much more information is publicly available on the state of the negotiations than for any other trade talks that have come before.²² Stakeholders are regularly involved on both sides of the Atlantic, and it must not be forgotten that before any entry into force of the TTIP a parliamentary and therefore a public debate and decision must take place.

In summary, many fears and anxieties stirred up in the debate surrounding the TTIP are unfounded. They should not hinder us from taking an active role in shaping a world in which strategic alignment is due to the global trade order. A transatlantic economic area would emerge through a TTIP which, because of its economic significance, would impact the future world trade order. Given Europe's dwindling economic influence on the world it is imperative that we seize the opportunity to create an economically significant transatlantic economic area. The world ultimately still turns without us and other stakeholders, the People's Republic of China in particular, are taking greater steps to shape the global order for themselves according to their own rules and without Western

Given Europe's dwindling economic influence on the world it is imperative that we grasp the opportunity of creating an economically significant transatlantic economic area.

20 | It is precisely this dispensation that the term regulatory chill refers to.

21 | Cf. Thomas Ludwig, "Nicht mehr während Obamas Amtszeit", *Handelsblatt*, 23 Apr 2015, <http://handelsblatt.com/my/politik/international/ttip-unterhaendler-garcia-ignacio-bercero-nicht-mehr-waehrend-obamas-amtszeit/11675670.html> (accessed 27 Apr 2015).

22 | However, the demand for the published text proposals on the European side is very low, thus forming a strong contrast to previous demands for publication. Cf. Hendrik Kafsack, "Kein Interesse an TTIP-Dokumenten", *Frankfurter Allgemeine Zeitung*, 17 Apr 2015, p. 17.

leadership. The establishment of the new international development bank under China's direction is an impressive indicator of this. The European Union and the United States can contrast this development with the TTIP and thus reaffirm their own design standards.

The TTIP can be an important building block for a multilateral world trade order that corresponds to our principles and values. Since the beginning of the deadlocked Doha Round in the WTO, changing value chains and new production methods have placed new issues on the trade agenda, which will be the subject of multilateral negotiations in the future. The past has demonstrated that regional initiatives, such as the TTIP, not only brought the necessary momentum to multilateral rounds of negotiations, but also provided direction in terms of content.²³ With the TTIP, Europe has the opportunity to take an active role in shaping "reliable market economy conditions for the growing prosperity in countries involved in world trade".²⁴ If Europe does not use this opportunity, others will impose their rules upon us.

23 | For example, the establishment of the EC customs union at the so-called Kennedy Round in the 1960s and the North American Free Trade Area (NAFTA) agreement at the so-called Uruguay Round in the 1990s.

24 | Clapham, n. 8, p. 15.