The German Bishops'
Committee for Society and Social Affairs No. 43

Fair Rules for Free Trade

Socio-ethical Guidance for a Transatlantic Trade and Investment Partnership (TTIP)

Position paper by a Group of Experts appointed by the Committee for Society and Social Affairs of the German Bishops' Conference

15 October 2015

Fair Rules for Free Trade. Socio-ethical Guidance for a Transatlantic Trade and Investment Partnership (TTIP). Position paper by a Group of Experts appointed by the Committee for Society and Social Affairs of the German Bishops' Conference / Published by the Secretariat of the German Bishops' Conference. – Bonn 2015. – 54 pages. – (The German Bishops' – Committee for Society and Social Affairs ; 43). The English version of the position paper has been brought up to date in March 2016.

CONTENTS

Foreword 5

1. Why does TTIP concern the bishops? 9
2. A socio-ethical assessment of cross-border trade relations 13
3. The regulatory framework for shaping foreign trade 16
4. Distributive effects 20
5. Differentiated market opening in developing and industrialised nations 24
6. Standards and regulatory cooperation 28
7. Investment protection and arbitration 33
8. Procedures and transparency 42
9. Future dimensions 46
10. Recommendations 51

Foreword

The conclusion of a Transatlantic Trade and Investment Partnership (TTIP) between the USA and the EU will undoubtedly affect the shape of the global economic and trade system, thus the negotiations are rightly attracting particular attention. An agreement between two extremely significant economic powers raises questions of principle, not just of detail.

Indeed, the negotiation process is accompanied by a debate which is particularly controversial, and at times somewhat heated. While proponents of the negotiations expect the free trade agreement to lead in particular to positive growth and employment effects, critics, above all, fear that social, environmental, and consumer protection standards will be lowered. There is also considerable contention as to the planned investment protection agreement. The opposition to TTIP, however, rests mainly on a widespread feeling of uneasiness, since the negotiations initially took place behind closed doors, and the legislative project was not adequately explained. A lack of transparency, fundamental concerns as to the consequences of globalisation, as well as latent scepticism vis-à-vis the USA, have triggered a major protest movement against the planned agreement, particularly in the German-speaking areas of Europe. One needs to consider that the negotiations have not yet by any means been concluded. In this sense, one should be careful when it comes to reaching definitive conclusions. This does not mean refusing to enter into a critical debate. In fact, it is thanks to the opponents of the agreement that the debate has received broad public attention.

In the light of this discussion, which is indeed also taking place within the Church, the Committee for Society and Soci-

al Affairs of the German Bishops' Conference appointed a Group of Experts to explain from a socio-ethical perspective the opportunities and risks emanating from a Transatlantic Trade and Investment Partnership and to offer some socio-ethical guidance as to how to obtain fair rules for free trade.

A central socio-ethical question concerns the impact such an agreement would have on outside parties: what does it mean for global co-existence if economic powers such as the USA and the EU come together in this way? Does it mean that the rich nations are building a fortress in which they isolate themselves from developing and emerging countries? Does such an agreement widen the gulf between poor and rich countries? A Transatlantic Trade and Investment Partnership must not lose sight of the weakest, be it in global terms regarding developing countries, be it at the EU level concerning weaker member states, or be it nationally as concerns individual industries or economic regions coming under pressure due to the transformations of competitive relationships. As many people as possible should benefit from the positive effects of free trade, for example by adopting generous rules for market access of third countries. The gains in growth and prosperity stemming from free trade agreements must not come at the expense of global, ecological, and social justice.

As a result of multilateral and bilateral agreements, a process to which also the TTIP belongs, we currently observe a growing fragmentation within the international trading system. This raises the question of the impact on the WTO and the entire international trading system. One should therefore seize the opportunity offered by the ongoing negotiations to reach an agreement which is attractive also for countries currently not participating and which sets value-based, powerful

norms and standards to which other regions may also accede. Given the possible openness of the agreement or its capacity to become a model for future WTO rules, the EU and USA should reach pioneering agreements which can serve as models at the international level, including in sensitive areas such as investment protection. The USA and Europe have a special responsibility and an opportunity to promote clear, ethically-founded norms in the global economy. Ultimately, this gives TTIP also a geostrategic significance. Therefore, not only the question arises what the consequences of this agreement will be, but also what would be the consequences of *not* concluding such an agreement.

By publishing this position paper, we hope to offer a fruitful contribution to the continuing discussion. We are thankful to the members of the Group of Experts who drew up this position paper: Prof. Dr. Gabriel Felbermayr (Munich), Prof. Dr. Gerhard Kruip (Mainz), Prof. Dr. Stephan Leibfried (Bremen), and Prof. Dr. Dr. Johannes Wallacher (Munich). The work was overseen by Dr. Dagmar Nelleßen-Strauch and Dr. Matthias Belafi (both in Bonn). Dr. Gabriela Schneider LL.M. from the Catholic liaison office in Berlin participated in the deliberations. We would also like to thank especially Lothar Ehring MPA (Brussels), as well as Prof. Dr. Andreas Freytag and Prof. Dr. Christoph Ohler LL.M. (both in Jena) for contributing their expertise.

The conclusion of a Transatlantic Trade and Investment Partnership requires considerable readiness to negotiate on both sides of the Atlantic and laborious efforts in regulatory work. Should this endeavour succeed, such an agreement could set the stage in an important way for a global regulatory and structural policy. Pope Francis recently also called for such

global governance in the Encyclical *Laudato si'*. Creating a fair framework for our global co-existence in the 21st Century is one of the greatest challenges of our time.

Bonn, 15 October 2015

Cardinal Reinhard Marx
President of the German Bishops' Conference

Bishop Dr. Franz-Josef Overbeck
President of the Committee for Society and Social Affairs of the German Bishops' Conference

1. Why does TTIP concern the bishops?

The Transatlantic Trade and Investment Agreement TTIP, which is currently being negotiated between the USA and the EU, stirs the emotions. There are many reasons for this rightly being the case: this agreement concerns 40 percent of world trade. The agreement is to recast the entire transatlantic economic order. It could serve as a model for many other bilateral or multilateral agreements. And the conclusion of the agreement has become much more likely as President Obama obtained a "fast track" mandate from US Congress in June 2015.

In procedural terms, the TTIP is a twin of the US-Asian Trans-Pacific Partnership (TPP), which was agreed on 5 October 2015 and signed 4 February 2016 in Auckland, New Zealand. While the TPP is largely a classical free *trade* agreement, the TTIP is much more ambitious in normative terms. It aims to bring the European and North American internal markets closer together, and to come somewhat closer to achieving a common transatlantic internal market *without* a common supranational umbrella. The TTIP, hence, is likely to develop rules which will, for a long time to come, seriously affect the domestic and economic policies of the EU and the USA.

There is, therefore, an intensive and controversial discussion of the planned free trade agreement in politics and society, as well as in Catholic circles and associations.[1] On the one hand, the

[1] The United States Conference of Catholic Bishops (USCCB) has taken the trouble to establish a separate ongoing report category on trade issues with a great variety of statements by individual church officials: cf. http://www.usccb.org/issues-and-action/human-life-and-dignity/global-issues/trade. However, there is no general statement from the USCCB on TTIP and TPP as such.

growth and employment effects of such an agreement are emphasised, while on the other hand social, consumer and environmental standards are considered to be at risk, which applies also to climate policy and even to the welfare state as a whole. Many are voicing political and constitutional reservations. We in Germany are in the midst of a debate which, in part, is highly emotional and callous, with participants often simply dismissing even convincing arguments and justifiable questions of the other side. The TTIP, however, certainly raises central issues relating to social cohesion. This expert statement is intended to help 'rationalise' the debate, while also pointing to vital aspects which have not received enough attention in the discussion so far. It is particularly important to include socio-ethical perspectives and to ask to what degree the agreement can help bring about greater national and international justice.

When evaluating events on markets and in trade, we are using premises which are shared by Catholic social doctrine and by the classics of research on economic history alike. As long ago as 1931, the Social Encyclical *Quadragesimo Anno* stated: "Just as the unity of human society cannot be founded on an opposition of classes, so also the right ordering of economic life cannot be left to a free competition of forces. For from this source … have originated and spread all the errors of individualist economic teaching." (*QA* 88).[2] In 1944, Karl Polanyi points in his

[2] *Quadragesimo Anno* goes on to detail the errors in economic teaching as follows: "Destroying through forgetfulness or ignorance the social and moral character of economic life, it held that economic life must be considered and treated as altogether free from and independent of public authority, because in the market, i.e., in the free struggle of competitors, it would have a principle of self direction which governs it much more perfectly than would the intervention of any created intellect. But free

classic *The Great Transformation: The Political and Economic Origins of Our Time* to the same necessity of adopting an overall socio-ethical view: "To allow the market mechanism to be sole director of the fate of human beings and their natural environment, indeed, even of the amount and use of purchasing power, would result in the demolition of society."[3] These are important guide posts for evaluating an agreement which primarily aims to free trade on a massive transatlantic market for many decades, given that, as the doyen of Catholic social doctrine Oswald von Nell-Breuning put it, we still need to be concerned with "taming Capitalism".[4]

The particular challenge of our time now lies in the fact that Capitalism has long shaped the economy of the entire world, so that it is no longer a matter solely of establishing a fair system for a national economic order, but rather for a global one. At the latest since the Second Vatican Council, Catholic social doctrine has also argued that the "social issue" has taken on a global dimension.[5] The essential elements of the global economic

---

competition, while justified and certainly useful provided it is kept within certain limits, clearly cannot direct economic life…" (*QA* 88).

3 Boston, Massachusetts: Beacon Press 1957 [1944], p. 73.

4 Cf. Bernhard Emunds and Hans Günter Hockerts (eds.): *Den Kapitalismus bändigen. Oswald von Nell-Breunings Impulse für die Sozialpolitik* (Paderborn 2015).

5 In fact, *Gaudium et spes* (1965), one of the constitutions resulting from the Council, already assumes a perspective of global justice: "Every day human interdependence grows more tightly drawn and spreads by degrees over the whole world. As a result the common good […] today takes on an increasingly universal complexion and consequently involves rights and duties with respect to the whole human race" (*GS* 26). *Populorum Progressio* (1967) also finds: "Today it is most important for people to understand and appreciate that the social question ties all men together, in every part of the world" (*PP* 3). Pope

order include the conditions of international trade, which since 1995 are being negotiated in the global framework of the World Trade Organization (WTO), and bilaterally between states and entire economic areas. If TTIP is concluded, it will set the stage decisively not only for the economic orders of the participating countries, but it will also affect non-participating states and regions. Thus, this trade agreement between two rich economic areas will also affect the world's poorest.

However, the TTIP free trade agreement can also be expected to affect allocation within Germany. Not the smallest consideration is that the approximation and mutual recognition of standards in the social sphere, in environmental, climate, and consumer protection will affect working conditions, the conservation of creation, and the lives of individuals. A free trade agreement must not adversely affect global, ecological and social justice or restrict the options available to the contracting partners where they are particularly called upon today to decisively "reform" and refine their lifestyles and ways of doing business. This includes above all the protection of the climate, of the losers of globalisation, and of consumers. On the contrary, the TTIP itself should be a driver of progress for these issues, and should moreover encourage the contracting parties to advance further with such reforms.

This makes it all the more important to pay particular attention to separating verifiable facts from mere assertions such that we can sensibly assess the pros and cons of such an agreement and its scope, and provide some guidance. Our socio-ethical guidance

---

Francis, too, in his latest Encyclical *Laudato si'* (2015) consistently links the ecological issue with that of justice among all members of the family of man.

intends to contribute to a debate that needs to take place in Germany and in European societies generally.

2. A socio-ethical assessment of cross-border trade relations

The central characteristics of economic globalisation include the concentration and acceleration of the international division of labour and cross-border trade relations. These are perceived and appreciated in highly different ways. This makes it all the more important to recognise and evaluate the interactions of international trade relations and the underlying trade agreements with the opportunities and risks that they entail. In socio-ethical terms, cross-border trade must always be assessed as to whether and how it helps to increase general prosperity, to raise societal participation and the involvement of everybody, and in particular to improve the development opportunities for the poor.

The *advantages* of international trade relations consist, on the one hand, in reducing trade barriers and creating common norms and standards to further deepen the international division of labour, enlarge sales markets and permit larger production quantities, which ultimately reduces production costs and provides consumers with a more varied, cheaper range of products. This can increase prosperity, safeguard jobs, and reduce poverty. As a matter of principle, international trade relations also offer to developing and emerging countries the possibility to enhance their economic development by increasing exports, attracting direct foreign investment, and using new technologies from abroad.

On the other hand, opening up for foreign trade is, however, also linked with major *problems and risks*, and that is so not only

for weaker economies. It was no coincidence that this opening in Western democracies after the Second World War was built on an already well-developed welfare state of the 1950s. The opening could, hence, rely on well-functioning "social buffers" for those who were to lose out in the opening process, for instance through unemployment insurance covering all employees and through publicly-funded re-training programmes. The awareness has increased in recent years that the risks of globalisation need to be countered by re-qualification programmes and by higher over-all investments in education intended to prevent a relatively large percentage of young people from dropping out of school and being left behind without any vocational qualification. Open economies are more exposed to external influences, which affect them more quickly – such as fluctuations in prices on world markets and exchange rate fluctuations – about which they can do virtually nothing. Also, as a result of heightened international competition, they are exposed to greater adjustment pressure, which can, however, be cushioned by such "social buffers".

What is more, from a socio-ethical perspective, it is certainly not sufficient to evaluate development exclusively in terms of its impact on growth. Firstly, the distributive effects of international trade relations also need to be analysed, both those between the countries involved and those between various population groups within these countries. In empirical terms, there are clear indications that the liberalisation of trade can be an engine for growth, but that it is not the only condition on which growth depends. Stable economic development is not simply achieved by market opening, but also depends on the economic, social, and institutional preconditions of "good governance" and on targeted measures to promote participation in international trade, all of which can be very clearly traced down through economic history.

Secondly, it is becoming ever more clear that economic growth is not a means unto itself, but must be linked with more comprehensive concepts of prosperity. It is not only in prosperous countries that the focus lies more and more on the quality of economic growth. Growth should be measured according to whether it has a broad, sustainable effect, that is on whether it really reduces poverty and increases the prosperity of broad groups of the population without spoiling the chances for prosperity of generations to come by using up excessive amounts of environmental resources or losing control over the outcomes for the climate. Prosperity also is ultimately concerned more and more with non-economic aspects, and particularly with questions related to political participation and involvement and democratic legitimation.

If all this is taken into account, it becomes impossible to deny that there is a fundamental divide between economic integration, nation-state sovereignty, and both democratic and social policy, which already was described several years ago as the fundamental "trilemma of globalisation". Increasing prosperity by opening up to foreign trade cannot, hence, be easily rendered compatible with nation-state sovereignty and democratic participation cum involvement. The adjustment processes necessitated by economic opening must be carried out by institutions to improve social security and to guarantee education based on equal opportunities, as well as by a democratic re-structuring of social systems in line with concepts for a "decent life". Free trade agreements hence must not excessively restrict the space for manoeuvre for the economic, social, and environmental policy necessary – such agreements should in fact help to make use of such spaces.

At the same time, there are a number of regulatory shortcomings at the global level related directly or indirectly to cross-border trade. While at the national level, the market economy

was first tamed by a good regulatory framework in the sense of an ecological and social market economy, and while it can be tamed further there, at best we can make out the beginnings of such a framework at the global level. There is for instance no transnational regulation and supervision of competition. In some areas like argricultural trade considerable market distortions are caused by protectionism and subsidies. Minimum social, environmental, and climate policy standards are thin on the ground at the moment, or are not exacting enough, or they are frequently not adhered to. This undermines fair economic exchange since distortions of competition caused by market power or by subsidies, or by differences in standards, are in breach of the principle of transactional justice and of an equality of opportunity. The standard of needs-based justice grants top priority to the satisfaction of fundamental human needs. In trade agreements, this legitimises for instance adequate provisions for the protection of life, health, and other fundamental needs, as well as for the social services, public services and social protection necessary to protect individuals against basic risks. Finally, it should not be forgotten that trade agreements reached between countries or regions *de facto* always also assume geopolitical significance where the parties involved grant preferences to one another, thereby excluding others. The growing number of bilateral and regional preferential agreements is, hence, also a problematic development.

3. The regulatory framework for shaping foreign trade

If the expansion of cross-border trade relations entails opportunities and risks for spreading prosperity across the board, the regulatory framework needed has to make exchange as fair and

equitable as possible so that the population at large, and its poorer strata in particular, can partake suitably in the prosperity-enhancing effects of the expansion, and, at the same time, be protected against its risks. The standard that is required here is not only distributive justice, equality of opportunities, and transactional justice. Procedural justice, too, is vitally significant, since the justice of regulatory structures depends to a considerable degree on how such agreements arise, which sectors are to be opened, and who decides which rules are to apply when, or which rules are to be eliminated.

Various elements of an international and transnational regulatory system of cross-border trade relations have evolved in recent decades. The main pillar is formed by the World Trade Organization (WTO), which emerged at the beginning of 1995 from the General Agreement on Tariffs and Trade (GATT), which had been gradually refined since 1947. Essential fundamental principles of the GATT and the WTO are the prohibition of discrimination (obligation to give imports the most-favoured-nation treatment and to not treat them less favourable than one does domestic products) and the liberalisation of trade conforming to the principle of reciprocity. With the establishment of the WTO, the rules were expanded to cover new fields of world trade – such as services and trade-related aspects of intellectual property –, the regulatory framework was deepened institutionally, and reciprocity secured globally. Regardless of the need for reform which persists, this has strengthened multilateralism and created greater legal security at the global level.

In the 2000s, it was however no longer possible to further develop the global regulatory framework in the WTO because industrialised, emerging, and developing countries were unable to reach agreement on major bones of contention. Instead, the number of bilateral and regional trade agreements has soared, which raises the question how such agreements relate to the

WTO. There are many underlying causes for this development, in particular the growing heterogeneity of interests of the regions of the world and the unmistakeable power shift, for instance from the West to the BRICS countries – Brazil, Russia, India, China and South Africa –, these countries still being the new economic powerhouses of the global South and of the former "Second World".

As a matter of principle, the WTO permits its members to form customs unions and conclude free trade agreements. It permits, under certain conditions, attendant deviations from the most-favoured-nation treatment. Regional trade agreements are permitted according to Art. XXIV of the GATT if they do not raise new external trade barriers and if the unavoidable discrimination against third countries is counter-balanced by general internal trade liberalisation, that is by a reduction in tariffs and other restrictive regulations of commerce. Regional agreements frequently also contain more far-reaching rules, which however must not conflict with the WTO agreements. Derogations from the principle of most-favoured-nation treatment were accepted because it was hoped that economic integration could take place more rapidly between neighbouring countries or between nations with historic ties than it would on a global scale. If this progress was to gradually become general in multilateral trade rounds, regional agreements, such as TTIP and TPP, could come to form the pillars of an ever more stable multilateral system. Since TTIP would be the farthest-reaching supra-regional agreement between relatively homogeneous partners, one may justifiably hope that it would be best suited to serve as a model for subsequent generalisation. This applies for instance to the establishment of a world investment tribunal, and also to regulatory cooperation or other forms of reducing non-tariff trade barriers.

Such developments, however, need not necessarily be positive in nature. Experience shows that the conditions set by the WTO

are frequently not respected because bilateral agreements often do not lead to a sufficiently wide market opening. It also causes concern that countries which are politically and economically strong appear to increasingly rely on bilateral and regional trade agreements to assert their interests more easily than they can through the WTO. This danger of weakening the WTO also arises with TTIP – as much as its proponents stress the potential that TTIP would, again, strengthen the worldwide interest in the WTO.

Many countries now belong to several trade alliances, so that a complex network of agreements has come about which overlaps in many ways. A problem that needs to be taken seriously is the lack of coherence and coordination between the large number of trade agreements and the WTO agreements, as well as the lack of coordination between the various trade agreements and internationally-agreed social and ecological standards. This can also lead to lost opportunities, inefficiencies, and even contradictions. Against this background, agreements such as the transatlantic trade agreement need to also be evaluated as to whether they do more to promote than they do to undermine a binding worldwide system of international trade. There is, furthermore, a need to examine whether they also contain internationally-recognised minimum standards (such as the Core Labour Standards of the International Labour Organisation, the ILO), actively support their expansion, and possibly refine them. Finally, the principle of procedural justice demands optimum transparency, democratic participation on the part of national parliaments, as well as adequate involvement of third states or of civil society in the procedures of regulatory cooperation.

4. Distributive effects

In the globalisation process, almost imperatively, there are winners and losers in economic terms. This is a central insight of both classic and the modern foreign trade doctrines documented in many empirical studies. This is, therefore, to be expected also with the transatlantic free trade agreement, firstly, within Germany between industries and employees, and, secondly, within the EU between its Member States, as well as between the latter and other European states, and, thirdly, at the international level between TTIP partners and third states plus the regions of the world. Seen against the background of a more comprehensive concept of prosperity that we called for at the outset, such a view of economic impacts on distribution is only one assessment measure among others; however, there is no doubt that it is a rather central yardstick. Distributive consequences also influence *de facto* non-economic prosperity factors like political participation rights, access to education, or healthcare.

It can be anticipated *for Germany* that highly-competitive companies will benefit from new sales opportunities in the US stemming from TTIP, and that this also benefits employees in most cases. Less competitive companies could, however, be adversely affected by stronger competition in Germany and Europe, which is likely to lead to job loss and lower wages. This applies to companies of all sizes, and its effect is felt both within and between industries. In agriculture, for instance, producers of dairy products and specialist crops could benefit, while classical farming could lose out. Economic adjustment processes going hand in hand with TTIP, however, also incur transition costs. If one accepts them in exchange for macroeconomic increases in productivity and income and for improving the employment situation in general, the resulting burdens must be equalised at the

national – and increasingly also at the European – level by welfare state benefits. The acceptability of such adjustments, however, depends on fair competition, without which TTIP could entrench monopolies and weaken economic dynamics. To prevent this TTIP should provide for improved cooperation between the EU and the USA in the area of guarding competition, i.e. antitrust policy.

TTIP could also trigger an even more unequal distribution of gross wages because highly competitive companies and industries which will benefit most are already paying higher wages. The opposite applies to uncompetitive companies. But, the tax system, the social transfer system, labour market and wage policy provide effective tools for shaping net wage distribution. These tools remain available to national legislators, and they should be used where necessary to absorb TTIP's distributive effects.

The economic *cohesion of Europe* will also be affected considerably by the agreement. While most studies point to positive growth effects in all EU countries, such effects may well be spread unequally as EU Member States are specialised to an unequal degree in industries in which the strongest positive TTIP impulses may occur. This could lead to a further drifting apart in income distribution between EU Member States. This would require corrective measures. These might be taken by the European Structural Fund, the European Globalisation Adjustment Fund (EGF) of 2015, perhaps by a new compensation fund, or even through a new European financial transfer mechanism. Innovative social policy measures might be taken at the European level which satisfy individual demands to level out damages done by globalisation. With the accompanying "Trade Adjustment Assistance" bill – additional social assistance motivated by trade policy, without which Obama would not have obtained a "fast track" mandate –, the USA has demonstrated to the EU

that such social policy buffers are also needed when it comes to TTIP. Furthermore, we need to engage in an intensive debate in Europe as to how supranational social equalisation for TTIP can be conceived as an individual entitlement and perceived by citizens as a system of European compensation measures. The 'funds approach' as a matter of principle cannot provide such entitlements. No "market Europe" can be stable in the long run without a "social Europe" that provides an active "insurance" policy for its national social welfare states. It is not only banks and monetary systems that need to be rescued, but also citizens. It is not only companies that wish to be anchored in larger markets, but also citizens that want to be embedded in greater security. Thus, there is a need consider the degree to which and the way in which a kind of *re*insurance of national social welfare states can be established at the European level *if* Europe is to be successfully developed further and is to remain viable.

Countries outside the USA and the EU are initially not taking part in TTIP. Hence, the agreement primarily aims to reduce trade barriers between the EU and the US. These "other countries" will nonetheless be indirectly affected by TTIP – first of all positively because additional growth in the EU and the US also opens up new sales opportunities for third countries (demand effect), but also negatively because the agreement worsens their relative competitiveness on markets in the EU and the US (trade diversion). The overall effect on these TTIP outsiders is ambiguous in terms of economic theory, and depends on whether exports from third countries tend to compete with those between the EU and the US, or rather to complement them.

Hence, one may anticipate that there will be winners and losers. As more precise recent studies have shown, most of the poorest countries in the world only manufacture small quantities of export goods which can compete directly with goods from the TTIP area, and which are thus interchangeable. Therefore, a po-

sitive demand effect could prevail for these countries. This, however, does not obtain for some agricultural products from the USA or the EU which are competitive in global terms, and hence are already being exported to poorer or emerging countries. Particularly in agriculture, such competitive advantages are frequently still the consequence of massive subsidies which agriculture receives in both the USA and the EU, subsidies which TTIP ideally should also reduce because they undermine fair trade opportunities for third countries. The agreement could also make it more difficult for economically less developed third countries to penetrate parts of the global value chains. Richer TTIP outsiders, or those which are, in geographical terms, close to the EU and the US, could however benefit because they are already integrated into the global value chains of the industrialised nations that are marked by a transnational division of labour.

To improve the development policy impact of the agreement, regulatory cooperation between the EU and the USA should take place such that third countries also benefit. This should enhance the mutual recognition of product or process standards so that manufacturers from third countries are included where they meet these standards. This requires technical assistance in some cases so that manufacturers can *de facto* meet the standards and access certification bodies that are not too distant geographically. The definition of joint transatlantic rules in the planned regulatory cooperation bodies must take place in an absolutely transparent way, so that developing countries are informed and their voices heard where appropriate. Finally, the rules of origin of TTIP should be as generous as possible so that producers from the EU or the US can retain suppliers from developing countries in their global value chains without losing preferential access to the other TTIP market. Moreover, it goes without saying that, all in all, development cooperation between rich and

poor countries must be continued and made more effective to combat world poverty and world hunger.

5. Differentiated market opening in developing and industrialised nations

Trade can promote economic growth, and, hence, also provide an impetus for qualitative socially sustainable and environment-friendly growth. This is a necessary but by no means sufficient condition for combating poverty successfully, as information on distributive effects has shown. It depends in many cases on the governments and whether they take the appropriate course and also use economic growth for this purpose.

The WTO furthermore builds on the conviction that the international division of labour and free trade combined will lead to worldwide prosperity gains. Hence, a wide range of efforts is needed to define the right targets ensuring that developing countries can be integrated into international trade. In addition to a reliable, uniform system of rules, poorer developing countries in particular require preferential treatment. To enable as many countries as possible to benefit from the positive effects of free trade, the industrial and emerging countries should guarantee to the poorest countries as free an access to their markets as possible, as it is frequently the trade potential in the developing countries which clashes with protectionist measures in the industrialised ones. The WTO, as well as the EU, have since established programmes for trade and development. However, the various forms of preferential treatment only benefit the poorer countries to a limited degree. These also entail misincentives in some cases which, for instance, lead to a one-sided export structure or delay vital fundamental structural reforms on the ground. There is also a need to distinguish between countries

more clearly concerning their state of development; the WTO's subdivision into developed countries, developing countries, and (currently 48) least developed countries is altogether not refined enough.

What is more, the liberalisation of trade frequently erodes the preferential treatment of beneficiary countries. In this regard, liberalisation is disadvantageous here in both multilateral and bilateral terms, so that supporting measures suggest themselves. Here, and that also concerns all forms of preferential and differentiated treatment, they are only justified if they actually benefit the poor. The efforts of the EU, the WTO, and other international development aid partners to provide support to the economically-weak countries when establishing infrastructure for participation in international trade are good and important, but one can see with the EU's Economic Partnership Agreements (EPAs) with the African, Caribbean, and Pacific states (ACP) how difficult it is and how long it takes before such efforts have results or an impact emerges at all. What follows from all this for overcoming the side effects of further EU bilateral agreements with other, economically-strong trading partners? This a question as yet unanswered, and perhaps also one asked much too rarely, given that, unlike liberalisation in the WTO, where the developing countries can and do bring up the problem of "preference erosion", these countries do not have a voice in bilateral fora.

Also for developing countries, the reduction of political and administrative trade barriers in the services sector makes it easier, firstly, to gain access to functioning, effective services which are a major precondition for industry and agriculture to survive in an age of information technology. At the same time, as international trade in services becomes liberalised, competition by foreign providers on the global market is feared just as much as

is the loss of policy space resulting from the actions of foreign service providers in one's own country.

The call to open markets in a differentiated manner is certainly also a topic for the USA and the EU countries, and hence also for TTIP. The danger of becoming overly dependent on international providers arises above all in sensitive services areas, particularly in public services, that is the universal public supply of water, electricity, gas, or transport services. It has not yet been unambiguously clarified for what service areas agreements are to be reached. If however one takes the CETA (Comprehensive Economic and Trade Agreement) Treaty between the EU and Canada as a basis, a treaty which has already been drawn up, public services are likely to be the subject-matter of TTIP also, even if the European side does not intend to grant any additional market opening in that field. The special role of public services, cultural services, and the accompanying particularities absolutely must be considered. Over and above the obligations already contained in the WTO service agreement GATS (General Agreement on Trade in Services), TTIP should not contain any obligation to further liberalise public services since this could reduce the peculiar socio-cultural forms of providing social services in Europe, such as in culture or education. TTIP, for instance, must not lead to education and independent welfare provision being principally considered, or indeed offered, from a commercial point of view.

Such clauses would also affect the work of independent and church welfare agencies. At least in Germany, the latter play a major role in providing social services. The charitable work carried out by the Churches and their welfare associations not only have a crucial social function, which is why they are subsidised by the state, they also are at the heart of the Churches' "serving mandate" in this world. It is, therefore, also their special Christian nature which is characteristic for the social services thus

provided. Provision of social services by independent agencies has furthermore been extended to other religious societies, as well as to non-Church agencies, that is it has evolved into a universal service model of "independent welfare provision". It is also a major advantage for the recipients of such services if they can chose in a self-determined manner on a market with several providers which are philosophically different. The European Parliament recently created legal instruments for this sphere which are to guarantee that the provision of social services conforms to European law, particular consideration being given to the properties of the services and to their major social importance. Trade agreements must not change the legal situation recognised under European law. The legal reservations in favour of health services and other social services which the EU and Germany have negotiated vis-à-vis some of the fundamental obligations of CETA are fitting for TTIP too. Also, to be positively evaluated is the fact that the rules on public procurement provided for in CETA evidently do not apply to commissioning social services; it is vital to also incorporate such legal reservations into TTIP.

Furthermore, we need to ponder the approach adopted in the liberalisation obligations for services. "Negative lists" are customary for the USA, lists in which it is stated that all areas are liberalised which are *not* explicitly listed and ruled out in advance. This approach was also followed in CETA with a detailed list of protected regulations. Nonetheless, the use of negative lists is still contested in some places since services which are not listed or which have been recently developed may be unintentionally subjected to liberalisation obligations, thus making it important to also create exceptions for them. Particularly in the field of public services as well as in other fields, the "list-it-or-loose-it" approach remains contested with regard to the predictability of the impact that these agreements may have on all

those who do not trust the reliability of the listed reservations. A positive list stating in which fields liberalisation is expressly welcome is safer in this regard, but here unintentional errors will take place too (such as they happened to the USA in the WTO with regard to gambling). The fact that a positive list can also be successively extended where necessary is a more theoretical argument since, in practice, such future-orientated intentions tend to materialise only rarely. There is a need to consider, finally, that reservations and exceptions are applied with regard to any format in which important policy areas are protected.

6. Standards and regulatory cooperation

Modern societies regulate their economies intensively. Most of these rules attend to consumer protection, worker or health protection, protection against environmental damage, or against social turmoil. They increasingly also serve the purpose of climate protection. If such rules refer to the properties of goods and their manufacturing processes, one also speaks of "technical regulation" or "standards". There are extensive regulations in the services sector, too, these being in particular preconditions for admission to a profession, for instance of nurses, architects, or teachers. The term "standards" is generally used below since this term is customary in the vernacular, including mandatory statutory provisions.[6] Unlike customs duties that are levied at the border, for instance, these standards are not governmental foreign

[6] By contrast, in the technical terminology, "standards" refer exclusively to non-mandatory norms set by private organisations which are complied with fundamentally on a voluntary basis.

trade policy measures affecting only imports, but they are central topics of domestic policy taking place "behind the border".

If two large economic areas try to open their markets for each other, and at the same time to maintain the climate, environmental, social, health, and consumer protection standards which they have set for themselves, they face a number of challenges:

Firstly, not all standards are identical, even though the qualitative demands of environmental protection, social fairness, health, and consumer protection are highly similar in many ways between the EU and the USA.

Secondly, demands in terms of standards change due to new scientific knowledge or to changes in political preferences, for instance for climate and environmental protection. The competent legislatures must be able to respond to such changes.

The *third* challenge lies in the fact that standards do not always serve the public good only, but they frequently also shield companies from competition. Reducing such "protection", and, hence, in many cases also enhancing the position of consumers (greater selection, lower prices), is a legitimate goal of international economic integration. Accordingly, all trade agreements, as well as all arrangements at national and European levels, prohibit unjustifiable discrimination against foreigners to the benefit of one's own nationals when applying standards. Furthermore, such standards must not be more restrictive than is required to achieve their legitimate aim, i.e. they have to conform to the "principle of proportionality".

Fourthly, the transatlantic relationship involves not only two possible standards per product or production process. Up to 78 different standards are conceivable where there was previously no harmonisation for either the 28 EU Member States and/or the 50 individual US states.

Finally, and *fifthly*, here too we find the impact transatlantic integration has on third states, particularly on developing countries. They should not be harmed by TTIP.

Considerable advantages can be expected to result from a relaxation of standards which unjustifiably hinder trade, investment, and public procurement. Conversely, however, the disadvantages following from doing away with necessary, justified standards would be considerable. There is, therefore, a need to find ways to open markets without renouncing standards justified by the common good and that, hence, need to be maintained, and without becoming unable to introduce important new standards. There are basically three options for achieving this:

The approximation of standards. This is a double-edged sword: On the one hand, it reduces transaction costs and obstacles for transatlantic trade and, hence, benefits welfare in the TTIP countries. At the same time, it provides third countries with security and allows them to focus on a single standard. This is all the more so if the joint USA/EU standard were also to be adopted elsewhere in the world. On the other hand, harmonisation *ex ante,* that is in advance, can be to the disadvantage of competition in search of the best regulatory solution and of a sensible socio-cultural pluralism of multiple regulations. Once a standard has been agreed upon, it becomes difficult to change it, given that a new agreement needs to be reached on such a change, or the advantage of the adjustment is lost ("lock-in effect").

Mutual recognition. An agreement on the mutual recognition of rules and regulations (Mutual Recognition Agreement, MRA) is sometimes a better way forward than the approximation of standards. This allows both sides to retain their respective standards, but also to accept the standards of the other side as a result of an examination of the equivalence or acceptability of the level of protection in another sense. A potential disadvantage,

however, is the fact that unequal but nonetheless mutually recognised standards may lead to unjustified competitive advantages for companies which are subject to the lower standards.

Opening for third countries. Foreign competitors from third countries should be permitted to select between the standards on this and those on the other side of the Atlantic, and to offer their goods on the entire TTIP market while retaining the standard they have selected. This is conditional on procedures for conformity assessment: If an exporter from a third country satisfies the standards of one TTIP country, the product should also be accepted in all other TTIP countries.

Non-negotiable standards and regulations. There are standards which the respective participants hold to be non-negotiable. This applies in the EU for instance in the area of food safety (for instance with genetically-modified food or hormone-treated meat), data protection, and the protection of cultural diversity (such as film promotion and fixed book pricing). Exceptions need to be agreed on here: there would be a need to consider whether they are defined case-by-case or based on general exceptions. General exceptions based on examples ("in particular ...") are probably to be recommended, as these concrete examples do not require an interpretation.

This leads to a procedure which is complex in detail, and which requires a precise stock-taking and valuation of the many environmental, social, health, and consumer protection standards in relation to the goods and services in question. In particular, future wishes for stricter regulation, or – this too is possible – for their abolition, need also be taken into consideration.

Many people are concerned that TTIP will reduce the level of protection for consumers and the environment, as well as the ability of European states to intervene in markets and regulate them. This must not be allowed to happen. For instance, muni-

cipalities must remain able to redefine or alter the standards for local services such as waste disposal and water supply in a transparent way. States must be able to introduce new or stricter measures against climate change, and they must be able to ban certain activities or production processes in their own dominion. Such rules are compatible with a free trade agreement as a matter of principle, but are contingent in particular on foreigners not being discriminated against to the benefit of nationals. It must not be allowed that particularly US companies are put at a disadvantage in Europe by new standards, or conversely that above all European firms face unjustified disadvantages in the United States. This must also be taken into account in public procurement. This is precisely why trade agreements are concluded. In some cases, trade agreements require, beyond and above non-discrimination, that standards do not restrict trade to a greater extent than necessary for the legitimate purpose pursued. Even where these classical rules are adhered to, the above tools, and mutual recognition in particular, may lead to further liberalisation, and the level of protection can be retained, if so desired.

It is quite possible that TTIP negotiations will not be so successful that a considerable range of mutual recognitions or uniform standards will already be part of the agreement at the time of its conclusion. As a mandate for the future, procedures and bodies will then probably be deployed for further regulatory cooperation. This will enable the competent authorities, prior to drafting new rules or with regard to possibly approximating such rules, to enter into an exchange and to investigate the possibility of adopting a joint approach. On this basis, parallel new standards will be launched which will be more similar than before, or even identical. Or agreements will be subsequently concluded on the mutual recognition of different, but sufficiently equivalent standards. In any case, regulatory cooperation is quite important and offers opportunities where standards are to be

further refined even independently of TTIP or are set for new technologies for the first time, such as for the electric car. It is naturally also necessary for such regulatory cooperation to respect the basic principles of transparency and of decision-making by democratically-legitimated bodies. A TTIP regulatory cooperation body must, hence, limit itself to making recommendations for regulation on both sides of the Atlantic.

7. Investment protection and arbitration

Besides customary international law, international investment protection law today consists of more than 3,000 bilateral agreements that have been concluded between states since 1959, with roughly 1,400 of these agreements involving a Member State of the European Union. This web of agreements developed first of all between capital-exporting industrialised nations and capital-importing developing countries whose legal systems were not deemed to offer sufficient protection for foreign investment. The intention was to expand the protection classically applying already in general international law (ban on the expropriation of foreigners' assets without compensation), but which can only be enforced in international relations between governments, that is through so-called diplomatic protection: one state demands that the other adhere to international law or provide reparation for the breach. The disadvantage of this mechanism was that states had to become advocates for the interests of some of their companies, which had invested abroad. They were not always ready to do this; the concerns of investors were, thus, only taken up in a "filtered" fashion.

To overcome these disadvantages, governments concluded investment protection agreements and established international

arbitration tribunals before which foreign investors could take direct action against the host state of the investment, without an upstream political filter and a need for the investor's state to take sides. This was also done to avoid disturbing diplomatic relations between two countries by taking up some particular problem of a foreign private investor. The investor can now look after his own affairs, has direct access to an international public law (arbitration) tribunal, and need not fear that his investments in the host state will be denied legal protection and that his home state will sacrifice his interests for maintaining good diplomatic relations. The other side of the delegation and empowerment coin is: under international trade agreements governments can no longer decide what court actions they consider legitimate and pursue them.

Today, Germany is party to 129 bilateral investment protection agreements. Germany has concluded 105 of these agreements with developing and emerging countries, including nine with Arab countries, Hong Kong, and Singapore, as well as – as a consequence of regime changes and ahead of their accession to the EU – twelve with Eastern and Southern European states. Germany has not yet concluded an investment protection agreement with a country like the USA. At least since the 1990s, that is since the experience with the North American Free Trade Area (NAFTA), it has been increasingly recognised that companies from developing countries, too, are investing in industrialised nations and rely on investment protection agreements and resort to arbitration tribunals provided for in these treaties, when needed. People slowly realise that the rules of these agreements, which are always phrased reciprocally for both parties, truly apply to both sides and, hence, their content must be acceptable to both.

When it comes to investment protection, it must, naturally, not only be a matter of optimally protecting foreign investors

against governmental interference. Rather, governmental regulation must also remain possible in areas affected by TTIP, even if that runs against the commercial interests of an investor. The rules in question of course need to pursue legitimate objectives and must be proportionate and non-discriminatory. The presently existing bilateral investment protection agreements do not, however, always strike a good balance – in particular through exception clauses – between the guarantees for investors and the regulatory space left to states. That stands in contrast to the trade agreements of the World Trade Organization (WTO) and those on free trade areas, as these always feature exception clauses for environmental and health protection, etc.

When the Treaty of Lisbon came into effect at the end of 2009, the responsibility for concluding treaties on investment protection was transferred from Member States to the EU. The existing bilateral agreements of EU Member States continue to apply, but should be replaced step-by-step by new agreements concluded by the EU. TTIP and CETA, hence, offer first opportunities to exercise that new competence at the EU level and to discuss its shape by setting an example for the future.

This points us to several already existing examples regarding investment protection: the CETA Treaty between the EU and Canada contains a chapter on investment protection, while the EU concluded its trade agreement with South Korea in 2012 without such protection. The USA highly promote investment protection agreements in their trade relations, but for instance in its free trade agreement with Australia in 2005 it abstained from investment protection, and instead referred to the solid domestic legal systems in place in both countries.

There are many voices in the current debate on TTIP which fundamentally oppose investment protection between countries whose legal protection systems are highly developed: in view of

the well-functioning national legal systems and their courts, there is said to be no need for additional legal protection privileging foreign vis-à-vis national investors. This is deemed to be the case in the USA and EU Member States, for the latter above all in view of the safeguards of high-quality protection against expropriation and discrimination safeguarded by the decisions of the European Court of Human Rights, which is recognised worldwide. These critics dispute the existence of a statistical correlation between concluding investment protection agreements and attracting additional foreign investment. Rather, they point to studies having shown that investment protection agreements tend to cement the existing legal situation and make it more difficult to change policies ("regulatory freeze"). It, therefore, appears to many to be also politically and ethically questionable to empower individual commercial players via investment protection mechanisms to influence democratically legitimised policies outside domestic legal channels and in a direction incongruent with the political will (of the majority). Some of these critical voices are calling for national courts to apply international investment protection law in addition to national law. Some voices are also emphatically opposed to international investment protection agreements, and, furthermore, they argue these agreements restrict the states' legislative margin of manoeuvre in an unacceptable way.

The opposing view presumes that such agreements and international investments correlate and stresses that in practice it has been shown numerous times that legal systems, as developed as they may be, do not always adequately protect foreign interests against discrimination. This is precisely where international law – with human rights, rules on trade regulation, and also with investment protection – helps states in really respecting legitimate foreign interests. International law is said to offer independent, international legal protection in these three areas, and to

be a law with which domestic courts are frequently not sufficiently familiar, and which, presently, they are in most cases not even permitted to apply. And it is said to offer legal standards that can be applied globally in a uniform way to all contractually bound states. Access to an impartial international tribunal is said to be a vital advantage, while in substance the legal guarantees need not, and should not go beyond the guarantees to investors under national law in countries characterized by the rule of law.

Furthermore, according to this view and in the light of existing investment protection agreements it would not be helpful, or could even be discriminatory, if investors from the USA or Canada cannot seek protection vis-à-vis the European Union against discrimination or expropriation before investment arbitration tribunals under international law in the same way as can investors from India or China. Moreover, in more fundamental terms, it is said that it makes sense to pay particular attention to investment under international law, not only because property is also a human right in need of protection, but also for functional reasons: since economic development depends on investment, incentives and guarantees for investment are deemed necessary, and this is indeed its legal and effective judicial protection. Finally, since the Second World War there has been a trend towards legalisation and judicialisation of controversies in international law that has increased considerably in recent decades, that is we see a movement towards the rule of law in international relations, which one could follow with the establishment of a world investment court system.

If one decides in favour of such an instrument after weighing advantages and disadvantages of international (arbitration) tribunals, what matters is that all investment protection agreements, of which Germany or the European Union are a party, contain well-balanced rules in which a convincing balance is struck bet-

ween the rights and obligations of states. The negotiations with countries like the USA and Canada, hence, offer a valuable opportunity to set better trends and create models for the replacement of other bilateral agreements, as well as for more modern agreements with other countries. The chances for such a development are assessed differently in the current debate. While the texts which have been published with the CETA draft and in the European Commission's public consultation on investment protection already point in this direction, the at times massive criticism nonetheless continues. These texts already emphasise clear definitions, and make sure that exceptions apply for the sake of expanding national regulatory authority. At the same time, the term "investment" and "investor" is defined more narrowly to only grant international protection if an investment is of use to the host country, and an actual economic activity exists on the national territory (no letterbox companies). The requirement emanating from recent arbitration tribunal jurisprudence for a longer-term contribution to the local economy is likely to rule out mere financial speculation and certain types of portfolio investment.

There is also a need and an opportunity to modernise and improve the arbitration system within TTIP. This has been recognised in Europe, and partly also in the United States. Even if one phrases the agreements very precisely, we know from experience with every legal system that the interpretation of the rules through the judicial authorities will, in the end, remain the decisive factor. It is, therefore, a matter of the quality and reliability of the judicial system. Opinions diverge widely on whether or not the traditional international investment arbitration system meets these requirements. It is on this point that the most vociferous criticism is expressed against international investment protection and against including it in TTIP. True, the traditional system of international investment protection tribunals lags be-

hind the standards observed by established international judiciaries in various ways: there is a lack of transparency of the procedures since the oral hearings so far were not public as a matter of principle, and the arbitration tribunals' decisions are frequently also not published. Furthermore, there are potential conflicts of interest if lawyers and judges switch roles from case to case. The European Commission itself now sees a need for reform in this respect, and espoused the idea of an international investment court in September 2015, which it successfully introduced in CETA in February 2016.

It is in any event necessary to create an international appeals tribunal that can fully review the legal correctness of the first-instance rulings of (arbitration) tribunals. So far, this does not exist anywhere in investment protection law, while the experience of the World Trade Organization since 1995 demonstrates the importance of a standing, high-quality appeals tribunal, in other words the Appellate Body, if one wishes to accomplish a consistent and reliable jurisprudence. The additional time required is not a convincing counterargument, after all there must be time enough to find the right result when it comes to public matters – that is to the issue whether a law can be maintained or the taxpayer needs to pay compensation. What is more, with good organisation, sufficient funding, and deadlines one can ensure rapid, functional reactions of such an appeals body. So far, there has not been a majority in favour of such an innovation in international investment protection; reforms are also extremely difficult to carry out if the entire world needs to approve them. TTIP and CETA, therefore, offer a valuable opening for creating such an appellate review, albeit initially only within bilateral agreements, though important ones. This appeals body could be made accessible also for decisions by arbitration tribunals provided for in other agreements and, thus, could become an international investment court. In the European Union, the prolonga-

tion of Member States' investment protection agreements with other countries with which the EU has not yet concluded such an agreement could be made contingent upon the integration of such an appellate review. Since it is so vital to create an appeals tribunal, we should focus our energies here and pursue that project with determination vis-à-vis the USA, even if TTIP is subject to political and time pressure.

In an ideal world one could also take a more fundamental jurisdictional approach and create an international court already for the first instance. This court would have to be designed such that impartial judges are selected by the treaty states, naturally in advance of the cases to be decided and meeting high quality standards, and the body would have to be so responsive and flexible that it can work more efficiently and reliably than do traditional ad hoc arbitration tribunals. There are international tribunals elsewhere in international law, for example in criminal and maritime law, which enjoy a high reputation and act quickly. Anyone who intends to become established in a world with globalised markets should also maintain and shape the rule of law at the international plane to effectively cover the main issues that are transnationalised and internationalised today. To make use of such a judicial system should also be affordable for the claimants. If normal procedural costs amount to several million Euros, the procedures will rarely be easily accessible to small and medium-sized enterprises but only to large firms. A Europe in which smaller companies are frequently the "engines for innovation" should find ways in TTIP to particularly allow the weaker parties in industry to obtain investment protection.

If the international court system outlined here cannot be obtained at this stage, there is, however, a need to at least remedy the major current weaknesses in traditional investment arbitration by guaranteeing procedural transparency and selection of arbitrators in an objective procedure, while obliging them to obser-

ve stricter rules of conduct. In particular, there is a need to avoid conflicts of interest by not appointing judges who are simultaneously active attorneys in the investment protection business. To establish common lists of judges ("pools") who are jointly selected by the states would be a first step towards creating a permanent international court. Having said that, such an institutionalised international judiciary would also hover above the constitutional bodies of the United States, and could meet with particularly strong resistance there, while less institutionalised forms of international dispute resolution have a tradition of their own in the USA, and do not trigger the same defensive reactions. The new approach to investment protection which the EU and Canada agreed on for CETA in late February 2016 is encouraging as it goes in exactly this direction: arbitrators are no longer selected ad hoc by the investor and the host state, but taken from a pool of 15 persons determined in advance by Canada and the EU; there are stronger rules of professional conduct for the arbitrators, the roles of arbitrators and attorneys are strictly separate; and, most importantly, there will from the outset be an appellate tribunal; Canada and the EU also commit to jointly work towards a permanent multilateral investment court with a standing appellate mechanism.[7]

The particularly vociferous public criticism of investment protection and arbitration in TTIP does not always take adequate account of the fact that investment protection agreements and arbitration bodies also exist independent of and have existed before TTIP – and that they would largely remain *unchanged* if TTIP was *not* used to modernise arbitration. The criticism is also triggered in most cases by certain current investment disputes filed by individual investors against domestic legislative

7 Cf. http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468.

measures, disputes which are deemed problematic. But what counts are not the complaints filed by investors, but the decisions made by the arbitration tribunals. If these decisions provide convincing answers to the actions taken by investors, the cases currently so controversial would confirm the value of international investment protection in the same way as would decisions in which wrongs are undone. It is also frequently but falsely assumed that American companies account for the lion's share of litigants. Rather, European companies are most active by and large, and that also corresponds with the many bilateral agreements having been concluded by Member States of the European Union.

Furthermore, one could shape international investment protection such that investors need to initially exhaust national legal channels before resorting to an international (arbitration) tribunal. This would, admittedly, lead to rather drawn-out proceedings. It should also be examined whether it is only foreign investors that deserve such additional legal protection, but not national investors or actors to whom certain guarantees are granted in other chapters of TTIP, such as exporters and service-providers. The answer might be: among all those who need protection, foreign investors are the most exposed given that they are risking their own assets in a foreign country; for them, therefore, there is much more at stake than – as is customary in free trade – market access pure and simple.

8. Procedures and transparency

For TTIP as an international EU agreement in the making, the division of tasks is specified as follows in the Treaty on the Functioning of the European Union: The Council of the EU, in which the governments of the Member States are represented,

empowered the Commission in June 2013 to open negotiations with the USA on a comprehensive trade and investment protection agreement. The Commission is to carry out these negotiations just as national governments do in similar cases; it has to adhere to the negotiation directives adopted by the Council and to regularly consult the Trade Policy Committee of the Council and the International Trade Committee of the European Parliament. The empowerment and the guidelines, also referred to as "mandate", and also the texts for the negotiations are usually confidential as not to reveal to the opposing side how accommodating one is prepared to be in the bargaining process. These texts, however, frequently reach the public through unofficial channels. For TTIP the Council, for the first time, decided to officially publish the negotiation mandate. Moreover, the Commission has now, in the interest of transparency, posted a large number of negotiation documents on the web.[8]

Once the negotiations have been completed, the negotiated text of the agreement will be presented to the Council and the European Parliament for decision. Should the TTIP become a "mixed agreement", EU Member States would also need to ratify the agreement, depending on their national constitutional requirements. Mixed agreements are international agreements jointly concluded with another country by the EU *and* its Member States. This is the case when, according to the allocation of competences within the EU, Member States' competences are also affected and Member States exercise them by concluding international agreements. Whether Member States' competences are affected depends on the content of the agreement to be concluded. In some cases, the precise dividing lines between EU and

8 Cf. http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#/eu-position.

Member States' competences are disputed between the Council of the EU and the Commission. So far, trade agreements have as a rule, however, been "mixed agreements", and this is also generally expected to be the case for TTIP. It would certainly be advantageous for the acceptance of TTIP if it would also be ratified as a "mixed agreement" by EU Member States.

National Parliaments and the European Parliament guarantee democratic legitimation. However, the margin of parliamentary discretion is much smaller when international agreements are concluded than when decisions about national or European statutes are prepared in national ministries or in the Directorates-General of the European Commission to be discussed in detail in Parliament. For parliamentary amendments, the TTIP package deal, which had already been made in laborious, difficult negotiations with the USA, would have to be untied and then retied in re-negotiations. This is no simple matter as the other party of the treaty must also agree to a re-opening of the negotiation, and it may then make demands of its own. In contrast to national legislation, the margin of manoeuvre for parliamentary decision on an international agreement is, therefore, in practice largely restricted to a "yes" or "no" to the package as a whole, even if re-negotiations remain, as a matter of principle, a last resort for particularly important questions. The "fast track mandate" for President Obama also creates a similar situation for US Congress.

It is, therefore, important from the outset that European Parliament and Council can directly follow and influence the course of the negotiations and their progress. This takes place in the committees mentioned; in particular the Council is following negotiations on a weekly basis in its Trade Policy Committee. Moreover, it is possible to allow for the maximum degree of feasible transparency, and to closely involve the public in the discussions, particularly those of the contested problems of TTIP

and those that cause concerns. Public distrust of TTIP is particularly prevalent in Germany, and also in Austria, Luxemburg, and Slowenia. This lack of trust cannot be countered by referring to the diplomatic tradition of confidential international negotiations. There is, rather, a need to provide information regarding these complex circumstances and to include in the negotiation process all those affected by the agreement, as well as other interested parties.

Compared with earlier negotiations, the European Commission has certainly acted more transparently: Some of the draft texts proposed by the European side are public,[9] but the lists of those goods and services for which a market opening is offered were not. Now, as part of a new trade strategy the Commission decided in October 2015 as a matter of principle to publish all important European negotiation documents for free trade agreements where Member States agree.[10] The European Commission does not, however, consider itself to be in a position to also

---

9 Cf. http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#/eu-position.

10 This decision applies to all ongoing negotiations on agreements, to all future agreements, and to all agreements that have already been concluded, but are to be revised. Rounds of negotiations which are already *underway*, in addition to the TTIP, are: the Trade in Services Agreement (TISA), an intended international agreement between 23 parties, including the EU and the USA; furthermore the rounds on a Free Trade Agreement with Japan and an Investment Protection Agreement with China. *Future* agreements could then be free trade agreements with China and also with Australia, New Zealand, the Philippines, and Indonesia. Of the *existing* EU agreements, those with Turkey, Chile, and Mexico are to be revised. (cf. European Commission (2015) 497 final, 15 October 2015, "Trade for All"; *"Malmström verspricht Transparenz bei allen Freihandelsgesprächen"*, *Frankfurter Allgemeine Zeitung*, 18 October 2015, No. 239, p. 16).

publish draft texts that are currently under negotiation and reflect the positions of *both* parties, and, hence, reveal the differences which remain to be bridged. The European Ombudsman has, nevertheless, recommended also to publish these consolidated text versions and, furthermore, to act more transparently as regards meetings with lobbyists. The EU needs to reach a completely new understanding on all this with the USA. For some citizens, it will in any case remain a deficiency that negotiations themselves are not carried out in public. Thorough public reports after each round of negotiations are, however, a step in the right direction.

Only if the EU goes for optimal transparency and constitutive public participation it might prevent TTIP from facing a broad and destructive resistance of EU-citizens, individual countries, and, indeed, from similar developments in the USA. Then TTIP would have no future, not least given the many parliamentary ratification processes that may well be needed. The failure of TTIP, in turn, might cast a long shadow on the relationship between the EU and the USA for years to come and weaken their joint standing in the world. This would also not benefit the rest of the world wherever the USA and the EU, or its Member States, can have a positive impact.

9. Future dimensions

The dynamics of transatlantic cooperation

Economic exchange between the EU and the USA is among the most intensive in the world. And because these two regions are technological leaders in many fields, new trade policy topics frequently arise first between them before they are discussed in other bilateral or multilateral relationships. For this reason, even

after TTIP has been concluded, there will be further need for cooperation, and transatlantic solutions will, in the medium term, always have to serve as a model for the multilateral system and other bilateral agreements. Furthermore, not all topics on the negotiating table today can be dealt within the first agreement because the two parties cannot accomplish all the substantive coordination required at once.

Hence, TTIP is likely to become a "living agreement", a "breathing set of rules" which for some areas, like regulatory cooperation, establishes only the framework for further agreements and some fundamental rules, but postpones details and processes them in further stages. The regulatory bodies necessary for this are frequently criticised because their work might dodge control by democratic institutions. These bodies hence need precise powers in line with the guidelines established by TTIP and ratified by Parliaments. Transparency is needed here too: The refinement of the agreement should not take place in bodies which do not meet publicly, but in official rounds of negotiations whose interim results are published and whose final results have to be ratified by Parliament. The integration of the European Union and of GATT and WTO, which also has taken several rounds so far, could serve as examples, though they are not entirely comparable.

Finally, there are uncertainties in some areas as to the implementability and results of some rules, like the dispute resolution procedures. We already called for the introduction of at least an appeals body that takes the shape of an international investment court. If this cannot be achieved presently, the negotiating parties should already set, when they conclude TTIP, time lines for reviews: then the rules in question need to be re-examined and an understanding reached on their extension or improvement.

All in all, it would be quite advantageous if the impact of the agreement on income distribution and inequality, climate, environmental, consumer, and employee protection, on third countries, and so on, could be evaluated regularly, in detail and empirically after enactment, for instance every four years, by an Independent Transatlantic Commission of experts. A lively transatlantic public debate could, thus, be facilitated. This Commission should also make proposals for improvements, and needs to be heard when rules are revised.

Global aspects and the WTO

The global economy is changing very rapidly. While ten years ago the EU and the USA still accounted for approximately 60 percent of global gross value added, this share has now fallen to 45 percent. In the longer term, one may anticipate a further relative drop in the economic significance of the EU in favour of up-and-coming regions, particularly South East Asia. The European situation differs from that of the USA, particularly because of lower demographic dynamics in Europe, the higher standard of social protection applying in Europe, and a different pattern of redistribution, including primary distribution, which leads to greater equality overall.

Europe is not only negotiating a new trade agreement with the USA. In parallel, discussions have been underway for some time with Japan, with the ASEAN states and – on an Investment Protection Agreement – with China. In other regions of the world, there are also major initiatives for new regional free trade zones. In Asia, the ten ASEAN states have been negotiating since 2012 with China, India and other regional partners on the Regional Comprehensive Economic Partnership (RCEP) Agreement, which covers roughly one-third of the world's gross domestic product and 45 percent of the world's population. The

members of the Asian Pacific Economic Cooperation (APEC) are increasingly examining the Free Trade Area of the Asia Pacific Partnership (FTAAP), an agreement which is to bring the major Pacific powers China and the USA together with regional partners, and which would have an even greater effect in the world. The negotiations, which started in 2006 between the USA and 12 other Pacific states (not including China) on a Transpacific Partnership Agreement (TPP), were concluded on 5 October 2015, albeit ratification has yet to take place and is contested. In the view of the USA TPP was politically more important than TTIP, perhaps also because it links the USA with Asia's future growth markets, and it is also about limiting a stronger Chinese claim to power. TPP includes 40 percent of the world's economic performance; TTIP would, however, cover 45 percent. The Alianza del Pacífico has been under development in South America since 2011. Since 2009 Russia has been developing its plans for a Eurasian Economic Union, EAEU or EEU. In Africa, there is a series of attempts to intensify existing regional economic areas and to integrate them in a pan-African agreement – the Tripartite Free Trade Agreement (TFTA). The BRICS states too (Brazil, Russia, India, China, and South Africa) – with 20 percent of the world's gross national product and 17 percent of world trade – are seeking a binding arrangement in trade and investment policy; that was demonstrated in July 2015 by forming a New Development Bank (NDB) and a monetary pool, that compete with the World Bank and the International Monetary Fund, both headquartered in Washington, D.C.

The TTIP is therefore only one element – albeit an important one *for the EU* – of a regulatory framework for cross-border trade. How far it may serve as a model in the world is a crucial matter for the EU and the USA as negotiating partners, and will certainly also depend on the amount of space they are able to

leave for the development of the different national social cultures, and to promote their development and advance international cooperation, as in climate and environmental protection.

The various initiatives on trade agreements all stem from an attempt to find problem-tailored solutions for regional economic areas, and from the fact that – in view of the heterogeneity of its members in economic and democratic terms – the multilateral approach adopted by the WTO with its universal method can obviously, and unfortunately, not be successfully pursued presently.

Against this background, TTIP is to be regarded as one piece of a jigsaw in a broader European foreign trade strategy. Together with the agreements which Europe and the USA have already struck with other OECD states (e.g. with South Korea, Israel, Mexico, and Chile), and with those which are currently under negotiation (e.g. EU-Japan) or have just been signed (USA-Japan, in TPP amongst others), one may anticipate a long-term consolidation of the web of bilateral agreements in the world, the components of which are currently difficult to tell apart. This is known as the big "spaghetti bowl". Two reasons suggest that this will be the case: *Firstly*, overlapping agreements create a great deal of bureaucracy for companies, but are frequently rife with contradictions and lead to a marked lack in take-up of the export potential by companies; *secondly*, modern agreements do not entirely manage to survive without establishing integrating institutions – such as a court to resolve investment disputes –, and these would be the more worthwhile the broader the association.

The tightening formation of blocs also potentially affects negatively third states, for instance developing countries, which are not to take part, which could trigger further regional integration efforts among them. Trade policy tensions between these blocs

could become more frequent and more serious. In order to prevent this, the blocs created should not be allowed to weaken the WTO in a lasting way. All players should ensure that the treaties for regional economic areas can be accessed by new members and that the spirit of the WTO remains alive, in other words that no barriers are raised vis-à-vis third states in the long term, but that the reduction of trade barriers also advances again in the WTO in the near future. But also the WTO remains more popular than ever before in its role as arbitrator as its members, although concluding regional agreements, prefer whenever possible to resolve their trade disputes in the WTO, and the number of such disputes has continued to increase in recent years. The EU should, hence, make efforts to nurture the WTO in order to enable it to shoulder these tasks. This is in the EU's own interest and in that of the world as a whole.

10. Recommendations

All in all, an agreement on the Transatlantic Trade and Investment Partnership (TTIP) is to be welcomed *if*, as a minimum, the following conditions are adhered to, entirely as intended in the Encyclical *Quadragesimo Anno* (*QA*) quoted at the outset, and in agreement with the central insight of Karl Polanyi:

1. *Transparency:* In the interest of legitimacy and acceptance of such a trade and investment protection agreement, the greatest possible degree of transparency vis-à-vis the public is to be achieved during negotiations. The European Parliament, the Council of the European Union, and, especially, national parliaments must be able to directly follow and influence the course and progress of the negotiations.
2. *Standards:* Regardless of whether one opts for a determination of joint standards or for a mutual recognition of stan-

dards, it must always be possible in the interest of security, health, and social protection, as well as of environmental and climate protection, to maintain standards at the desired level of protection and also to refine and improve them, all-thewhile, however, the other party must not be discriminated against.

3. *Exceptions:* The topics to be excluded from the agreement, and the rules permitted to restrict trade, must include both areas to be expected (hormone-treated beef, genetically-modified food, approval of chemicals, etc.), and independent welfare provision, public educational facilities, as well as social services, public services, and consumer, climate, and environmental protection. These rules on exceptions are to be worded such as to protect states' regulatory space vis-à-vis potential future developments in these areas. These rules must not only conserve the status quo, but must also allow for major policy-shaping in the future. They must simultaneously allow for varieties of policy pursuit in different Member States, given that the EU is home to a wide variety of different national or regional "social cultures".

4. *Opening for third countries:* Wherever possible, TTIP is to open up for the global South by extending the mutual US-EU recognition of product or process standards to manufacturers from third countries, by a process of setting joint transatlantic rules that is also transparent for the benefit of third countries, and by generous rules of origin in TTIP so that suppliers from developing countries can continue to export more easily to the USA and the EU, and can benefit from TTIP indirectly. Finally, we must be able to offer agreements with preferential treatment particularly to poor developing countries and to support them in establishing an infrastructure so they can better participate in international trade. In the long term, efforts should continue to expand

the WTO to become a truly global regulatory framework for fair world trade that includes all countries wherever possible.

5. *Compensation:* The losers in different market opening processes must be compensated. This concern plays a major role in the USA, and should also be satisfied in the EU, that is centrally with EU funds, in addition to national mechanisms. To this end, the EU should develop supranational compensation mechanisms that can satisfy such individual claims. A European social market economy can only be safeguarded if, at the supranational level, the "social" *and* the "market" economy are secured *simultaneously*. This too needs to be taken into account in setting up TTIP.
6. *International investment protection court:* The current investor-state dispute mechanism is fraught with serious problems, so TTIP needs a reformed organisation of investment protection dispute settlement. At the very least, an appeals body should be established as a bilateral investment court that could be expanded gradually into an international court. This legal protection should be affordable at both instances, in particular for small and medium-sized companies. However, it should be considered whether all types of investment – for instance speculative versus long-term – are really worth protecting. The investment protection chapter should steer a new course in its content with better and more precise rules on the justifiable and sensible protection of foreign investment.
7. *Evaluation of rules and regular reform:* Empirical data on trade, investment, and social policy developments in the (group of) TTIP countries should be reported every four years and a range of proposals developed as to how the contracting partners can counter problematic developments by

adjusting TTIP and adapting transnational and national policies.

The Catholic Church can help to ensure that we engage in a broad European and transatlantic dialogue on the various aspects of "taming" the process of capitalist development, towards which TTIP could also make a major contribution. We hope that the socio-ethical guidance offered here has been of help in moving on and that we could point out some of the central requirements for achieving a sensible result.

In so doing, we are deliberately continuing in the tradition of Catholic social doctrine, of fundamental insights which already included back in 1931 that "free competition, while justified and certainly useful provided it is kept within certain limits, clearly cannot direct economic life" (*QA* 88). This also applies to the transatlantic internal market of TTIP, given that two such different "internal" markets as the EU and the US cannot be successfully merged without struggling over new regulative principles, and that this struggle should be safeguarded through a new institutional system of checks and balances.

We, as Europeans, need to define for ourselves, and repeatedly demand the fulfilment of these regulatory principles, this regulatory framework of the good system for a fair life. We must assert these principles ourselves, and protect them in these negotiations.