



BDI

Bundesverband der
Deutschen Industrie e.V.

ASSESSMENT

Investment Protection in TTIP

Negotiation Proposal by the EU-Commission on a Reformed Investment Chapter in TTIP

Dezember 2015

- On 12 November 2015, the European Commission presented a negotiation proposal for the investment chapter of the Transatlantic Trade and Investment Partnership (TTIP) to the United States. The proposal is in large parts identical with the draft presented on 16 September 2015. It takes into account both the outcome of the public consultations on investment protection in 2014 and the European Parliament's resolution on TTIP adopted in the summer of 2015.
- BDI welcomes many of the provisions proposed by the European Commission. Nevertheless, some parts of the proposal need to be improved substantially. For example, the appointment of judges may on no account become politicized.
- The proposal's weak points must be eliminated, especially in view of the fact that TTIP will serve as a model for future trade agreements. The European Commission has announced that its proposal for a reformed approach to investment protection will be used in the EU negotiations with Japan on a free trade agreement and in negotiations on bilateral investment protection agreements with China and with Myanmar.
- The European Commission's proposal of establishing a permanent »Investment Court System« must not lead to further delays in the TTIP negotiations. Furthermore, investment protection should not be taken out of TTIP if the negotiating parties are unable to reach agreement on such an institution. Foreign investment requires an adequate level of protection now and in the future.

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Background: Investment Protection in TTIP

Since 17 June 2013, the European Union and the United States are negotiating a Transatlantic Trade and Investment Partnership (TTIP). The Agreement is to include a chapter on foreign investment protection. The European Commission conducted a public consultation regarding the modalities of this chapter from March to July 2014. Since then, the negotiations on investment protection between the EU and the United States had been on hold.

The European Commission presented the results of the consultation in January 2015. Based on these results, the Commission then proposed first ideas for the modalities of an investment chapter in TTIP in May 2015. In July 2015, the European Parliament adopted a TTIP resolution, which also addresses investment protection, warning against significantly lowering the current standard level of investment protection under international law, which is also standard in the 129 international investment agreements (IIAs) that Germany is party to.

On 16 September 2015, EU Trade Commissioner Cecilia Malmström presented a text proposal for a reformed investment chapter in TTIP.¹ The European Commission's proposal takes account of the much-voiced criticism communicated in the 2014 public consultation and the conditions set out in the European Parliament's resolution. The proposal was discussed with the EU Member States and European Parliament before its formal submission to the United States on 12 November 2015.² At the heart of the negotiation proposal is the creation of a permanent and public »Investment Court System«.

¹ European Commission, *Trade in Services, Investment and E-Commerce, Chapter II – Investment*, September 2015, <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf>.

² European Commission, *Trade in Services, Investment and E-Commerce, Chapter II – Investment*, November 2015, <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf>.

Summary

Positive Elements

BDI welcomes in principle many of the proposed **substantive investment protection provisions** for the investment chapter in TTIP. The definition of »investment« corresponds largely with investor needs. The detailed list of measures that violate »fair and equitable treatment« provides for a significantly lower level of protection than current investment protection standards. However, the new rules could make the legal situation for states and investors clearer and enhance the legitimacy and acceptance of investment protection. Another positive element in the proposal is the possibility of expanding the list of measures that violate »fair and equitable treatment«. The wording proposed by the European Commission for defining »direct and indirect expropriation« could also achieve greater predictability and acceptance of the system. A further positive element in the proposal is that it contains an »umbrella clause«.

BDI also generally welcomes a number of the European Commission's proposed provisions on **dispute settlement**. The negotiation proposal includes provisions on investor-to-state arbitration. There is nothing objectionable about disclosing information on third party funding of arbitration costs. The Commission proposes establishing a public »Investment Court System« with a permanent tribunal of judges to arbitrate disputes. When an investor files a complaint, a Division formed from among the tribunal members is to hear the case. BDI is open to this proposal and approves of the qualifications and ethical standards required of the judges. The Commission's proposal of allowing »smaller« investment arbitration procedures under TTIP to be decided by a single judge is innovative. Such a procedure could reduce costs for small and mid-sized enterprises (SMEs). BDI also welcomes the proposal that the tribunal uses existing international structures to support its activities. The introduction of an appeal mechanism is also positive. BDI approves of the long-term goal of setting up a multilateral investment court. The Commission wants to work on establishing such a court parallel to setting up an »Investment Court System« in TTIP. BDI also supports the exclusion of parallel litigation, the possibility of rejecting frivolous claims and the Commission's proposal for ensuring procedural transparency in accordance with the standards established by the United Nations Commission on International Trade Law (UNCITRAL).

Necessary Improvements

Improvements are needed regarding the **substantive investment protection provisions**. The condition that a state measure to protect public interests must be »manifestly excessive« to be deemed an indirect expropriation is restrictive and could become problematic for investors. If the term is interpreted too narrowly, all claims of indirect expropriation could be rejected. This should be avoided. Additionally, the principle of »fair and equitable treatment« is limited to very serious violations of the agreement, resulting in a lower level of protection than previous provisions on this principle, as was the case in CETA. Consequently, states might not be penalized for minor and arbitrary violations.

Improvements are also needed regarding the structuring of the **Investment Court System**. BDI rejects the concept of a rotation system for the appointment of judges to the tribunal Divisions, which rule on individual cases. Such a procedure could result in a one-sided composition of these bodies. In future, companies should retain some influence on the selection of at least one judge in international investment disputes. In light of the diversity and complexity of the cases, the permanent tribunal should consist of significantly more judges, to ensure that enough suitable judges are on hand. A politicization of investment protection and dispute settlement must be avoided on all accounts. The significance of this important protection instrument of international law risks being undermined if the proposal's weak points are not rectified.

The European Commission has announced that the proposal for an Investment Court in the TTIP will also constitute the basis for negotiations with other countries³. The EU has trade and investment agreements in place with a broad spectrum of countries. Before presenting such a proposal to other countries, the Commission will have to conduct a comprehensive assessment to analyze the impact of such a system on investment flows between the EU and its various partners.

³ According to the European Commission, the model will also be proposed in the negotiations on an FTA with Japan, as well as the negotiations on bilateral investment treaties (BITs) with China and with Myanmar.

Detailed Assessment of the European Commission's Negotiation Proposal

Substantive Investment Protection Provisions

EU proposal: Definitions of »investment« and »investor« (Definition specific to investment protection, p. 1; Section 2, Article 1, p. 3; Article 9, p. 7-8; Section 3, Article 14, p. 22-23)

The European Commission proposes that all assets owned or controlled, directly or indirectly, by the investor are classified as »covered investment«. This definition also includes portfolio investments. The text proposal includes the restriction (as is the case in CETA) that the asset must be invested for a certain duration to qualify as an investment covered by the agreement. Other qualification criteria are the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.⁴ A Party to the Agreement may under certain circumstances deny an investor protection under the investment protection chapter, such as if the investor from a third-party country owns or controls the enterprise, or if this is deemed necessary for reasons of international peace or security.

Section 3 on the »Investment Court System« also contains a definition of the term »claimant«. »Claimants« are all persons who, directly or indirectly, have an ownership interest in the company/ the investor (directly or indirectly) or are controlled by the company/ the investor and claim to have suffered the same loss or damage as the investor.

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The term »investment« is precisely defined in the European Commission's negotiation proposal, but the word »investor« is not further specified. The definition of »investor« is derived only from the definitions of »investment« and »claimant« (Section 3). BDI is in favor of a broad definition of the terms »investment« and »investor« in order to achieve a greater level of protection for foreign investments. It is good that the definition includes portfolio investments, so that all of a company's assets are covered.

At the same time, the precise definition of »investment« limits the possibility of investors to file claims via letterbox companies, thus deterring so-called »treaty shopping«. These provisions also apply where an investor from a third-party state owns or controls the investment. This is welcomed by BDI.

The definition of »claimant« given in Section 3 is narrower than the definition of »investor« given in Section 2. This narrower definition could lead to the exclusion of claims.

⁴ The European Commission's negotiation proposal lists different types of assets which are to be considered investments within the meaning of the TTIP, including: an enterprise; shares, stocks and other forms of equity participations in an enterprise; bonds, debentures and other debt instruments of an enterprise, a loan to an enterprise, any other kinds of interest in an enterprise; an interest arising from: a concession conferred pursuant to domestic law or under a contract, including to search for, cultivate, extract or exploit national resources, a turnkey, construction, production, or revenue-sharing contract, or other similar contracts; intellectual property rights; any other moveable or immovable property, claims to money or claims to performance under a contract.

 EU proposal: The Right to Regulate / policy space and the non-stabilization clause (Section 2, Article 2, p. 3)

A state's »Right to Regulate« is expressly protected in the European Commission's negotiation proposal in both the preamble and the main body of the text. The Parties to the Agreement shall not be restricted in their right, »through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity« (Section 2, Article 2). It is explicitly stated that the Parties to the Agreement are not committed to refrain from making changes to their legal and regulatory framework, even in a manner that may negatively affect the investments or investor's profit expectations. This is a »non-stabilization clause« intended to prevent »regulatory freeze« or »regulatory chill«. A decision by a Party to the Agreement not to issue, renew or maintain a state subsidy (including EU state aid) shall not, according to the proposal, constitute a breach of the provisions of the Agreement (as long as there are no specific agreements to the contrary and it is in accordance with the terms or conditions of the subsidy). In international comparison, the state's »Right to Regulate« anchored in the European Commission's proposal is one of the most extensive.⁵

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States must be able to legislate and regulate in the public interest, including for such purposes as protecting the environment and the climate, protecting consumers and public health, safeguarding European values and ensuring economic stability. At the same time, there must be a sufficient level of protection for foreign direct investment.

It should be clarified that the »Right to Regulate« is not an absolute right and must always be interpreted in the context of investment protection standards. Otherwise, these standards would be meaningless for investors, as states could always refer to their »Right to Regulate« whenever an investor wants to assert his right. Therefore, a balance must be found between the rights of investors and a state's right to regulate. The character of the »Right to Regulate« should be defined with greater precision.

The wording »through measures necessary« is furthermore very broad and does not permit sufficient conclusions as to the limits of the »Right to Regulate«, such as shielding investors from veiled protectionism.

The burden of proof when invoking its »Right to Regulate« lies with the state. Under WTO rules, states must conduct a necessity test before implementing measures that affect trade. Such tests are designed to ensure that intended measures are not broader in scope than necessary to achieve the respective objective. Express reference should be made in the investment protection chapter to necessity testing. The underlying criteria for necessity testing should also be identified.

There is little empirical evidence of »regulatory chill«, as in practice states enact extensive legislation in the interests of the general public despite having concluded IIAs. It may be beneficial nevertheless to include a »non-stabilization clause« as a means of enhancing trust in a TTIP »Investment Court System«.

⁵ Till Patrik Holterhus: "A New Era in The Settlement of Investment Disputes?" – Reformvorschläge der EU-Kommission zum Investitionsschutz in TTIP, an article in the constitution blog of the Center for Global Constitutionalism: <http://www.verfassungsblog.de/a-new-era-in-the-settlement-of-investment-disputes-reformvorschlaege-der-eu-kommission-zum-investitionsschutz-in-ttip/#.Vf_AKVjouUm> (accessed on 18 September 2015).

 EU proposal: Fair and equitable treatment (FET) for investments and investors (Section 2, Article 3, p. 4)

The European Commission's proposal is intended to ensure »fair and equitable treatment« and full protection and security for investors. It includes a list of measures that constitute a breach of the principle of »fair and equitable treatment«: denial of justice in criminal, civil or administrative proceedings; fundamental breach of due process, including a fundamental breach of transparency in judicial and administrative proceedings; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; harassment, coercion, abuse of power or similar bad faith conduct. Upon request of a Party to the Agreement, the content of the obligation to provide »fair and equitable treatment« is to be reviewed by the Parties with the possibility of supplementing the list. In assessing whether an investor has been treated fairly and equitably, the tribunal may take into account whether the state induced an investment by creating »legitimate expectations« for the investor that the state subsequently frustrated.

BDI Assessment

In the opinion of BDI, the concept of »fair and equitable treatment« needs further clarification. The European Commission's proposal (as is the case in CETA) contains a list of specific measures that violate the principle of »fair and equitable treatment«. Although this list provides states and investors with more certainty in assessing the legal situation, it is problematic because it cannot cover all possible state actions that breach the principle. The list is most problematic in conjunction with Article 3, paragraph 4, which does not sufficiently protect the legitimate expectations of investors. According to this clause, a state would only breach the »legitimate expectations« of an investor if the investor was not given a »specific representation« regarding the investment in question, i.e. an explicit commitment. As long as a state has not made a specific representation to the investor, it could theoretically change a law retroactively without violating the principle of »fair and equitable treatment«. The Commission's proposal to expand the list of measures of unfair and inequitable treatment does not guarantee that all relevant measures will be documented. It would therefore make more sense to formulate the wording to the effect that similar measures are covered automatically.

The overall level of protection provided by the European Commission's proposal is substantially lower than previous provisions on »fair and equitable treatment«. The consistency of legal standards, and the predictability, proportionality and consistency of state measures are not explicitly required. The principle of »fair and equitable treatment« is limited to very serious violations of contractual provisions. Criteria such as »manifest arbitrariness« and »targeted discrimination« must not result in minor or even arbitrary violations of contractual provisions going unpenalized. The terms »fundamental breach«, »manifest arbitrariness« and »manifestly wrongful« should be eliminated from the list of actions that constitute a breach of »fair and equitable treatment«, as they require too much legal interpretation.

It should be clarified that state measures must be proportional at all times and that the legitimate expectations of investors are protected. Relevant claims could otherwise be excluded, which would further reduce the overall level of protection.

 EU proposal: Compensation for losses due to discrimination with regard to domestic investors (national treatment) or investors from third countries (most-favored-nation) (Section 2, Article 4, p. 4-5; Trade in Services, Investment and E-Commerce, Chapter II – Investment, Articles 2-3 and 2-4)

The EU's proposal for the TTIP chapter on Trade in Services, Investment and E-commerce contains provisions regulating market access, national treatment, and most-favored-nation (MFN) treatment that also

cover direct investment. The European Commission published a corresponding proposal on 31 July 2015. The article concerning MFN contains a clause intended to prevent »treaty shopping« (Article 2-4, paragraph 4) which states that the rules for investor treatment under the MFN principle do not apply to ISDS procedures under other IIAs or other trade agreements. The negotiation proposal on the Trade in Services, Investment and E-commerce chapter also outlines reservations concerning investments. The principles for national treatment and MFN are not to apply to non-conforming measures on an EU, national, regional or local government level that were enacted prior to 1 May 2015. Annex I outlines reservations for existing measures, while Annex II outlines reservations for future measures, on the EU level and/or for individual member states. Annex I, for example, includes certain reservations pertaining to national treatment in relation to freelance professions. Annex II, for example, includes reservations regarding national treatment and most-favored-nation status pertaining to the acquisition of land and in the areas of agriculture, the environment and education.

Article 4 of the European Commission's negotiation proposal on investment protection also sets out that foreign investors should not receive less favorable treatment than domestic investors or investors from third countries in the following cases: losses suffered owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the state where the investment was made.

BDI Assessment

Provisions on national treatment and most-favored nation treatment are contained primarily in the proposal on the chapter Trade in Services, Investment and E-commerce. The proposal on investment protection is to be seen as part of this chapter. The Annex⁶ to the chapter Trade in Services, Investment and E-commerce expressly lists both sector-specific and general reservations in which the principles of national treatment and MFN do not apply. These include restrictions in sensitive areas such as healthcare and education, as is common practice in other free trade agreements. Robust anti-discrimination rules are indispensable to ensure a level international playing field. General exceptions should thus be restrictive and formulated precisely in order to avoid founded complaints from being rejected.

The MFN principle can be a gateway for »importing« substantive investment protection provisions from one IIA into another. According to the MFN principle, host countries may not discriminate between foreign investors from different third countries. The following situation could arise: The host country has signed IIAs with several third countries affording higher levels of protection. Citing MFN, a foreign investor could demand that the higher level of protection be applied to the investment agreement signed by his country of origin and his host country. While MFN is an important protection standard for enterprises in general, it can become problematic if the countries concerned deliberately limit certain protections in their IIAs or set conditions for filing complaint. Wishing to guard the provisions in TTIP, the European Commission's negotiation proposal has specified (in its proposal for the Trade in Services, Investment and E-commerce chapter) that the MFN principle does not apply to ISDS procedures in other IIAs and other trade agreements. Similar to CETA, the MFN principle in the TTIP proposal is considerably more limited than under conventional investment protection agreements. This can reduce abusive practices, thus increasing acceptance of the procedures.

⁶ Annex II to the Commission proposal on "*Services, Investment and E-commerce*" is available at <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf>.

 EU proposal: Definition of direct and indirect expropriation (Section 2, Article 5, p. 5-6; Annex I, p. 9)

The European Commission's negotiation proposal includes provisions on the protection against direct and indirect expropriation. At the same time, the Commission's proposal expressly and extensively upholds the state's »Right to regulate«. Expropriation is thus exempted from investment protection rules if carried out under due process of law, in the public interest, in a manner that is non-discriminatory towards foreign investors, and against payment of prompt and adequate compensation. According to Annex I, indirect expropriation occurs when the measure substantially deprives the investor of the fundamental attributes of property in its investment, including the rights to use, enjoy and dispose of its investment. The decision of whether the measure constitutes an indirect expropriation has to be taken on a case-by-case basis. The following criteria should be taken into account: economic impact (the sole fact that a measure has an economic impact does not establish indirect expropriation), and the duration and character (object and content) of the measure.

In addition, non-discriminatory state measures that are designed to protect the interests of the general public, such as health, safety, the environment, consumer protection, and the preservation and promotion of cultural diversity, only constitute indirect expropriation requiring compensation in exceptional cases. Such an exceptional case would occur if the state measure is »manifestly excessive« in-light of its legislative purpose.

The amount of compensation is to amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became public knowledge, whichever is earlier, plus interest at a normal commercial rate, from the date of expropriation until the date of payment.

BDI Assessment

It is important for both investors and states to have a clear definition of the term »indirect expropriation«. The definition has to uphold the state's policy space while not blocking legitimate claims. The European Commission's negotiation proposal is more precise regarding what should constitute indirect expropriation than the definitions set out in Germany's existing investment agreements. Listing criteria could rule out some investor-state claims that would have been permitted under former formulations, thus lowering the level of protection. On the other hand, providing further clarification makes the outcome of investor-state dispute settlement proceedings more predictable, which is in the interest of both states and investors.

The European Commission's proposal also upholds a state's »Right to Regulate« in the context of the regulation on direct and indirect expropriation. The condition that a state measure to protect the public interests must be »manifestly excessive« to constitute indirect expropriation is, however, very restrictive and could become a serious problem for investors. If »manifestly excessive« is interpreted too narrowly by the tribunals, all claims of indirect expropriation could be rejected on this basis. Such an outcome should be avoided. As is the case for FET, the criterion »manifestly« should be eliminated here as well. State measures should always be proportionate and the legitimate expectations of investors should be protected.

The European Commission's proposed provisions on a state's »Right to Regulate« (Section 2, Article 2) also risk undermining the level of investment protection. According to this article, a state has the right to regulate »through measures necessary« to achieve legitimate policy objectives designed to protect public interests. This wording gives states a great deal of policy space, making the overall level of investment protection markedly lower than in other IIAs. It should therefore be clarified that the interplay between investor rights and a state's »Right to Regulate« must be assessed for proportionality.

In calculating compensation amounts for expropriation, BDI believes that lost profits should be adequately considered as investment decisions are made on a long-term basis, which includes expected profits. Failing to include expected profits into compensation calculations may have a negative impact on future investment flows.

EU proposal: Protection against a breach of written agreements between states and investors (umbrella clause)
– (Section 2, Article 7, p. 7)

The European Commission's negotiation proposal calls for the protection against breaches of written agreements and commitments between investors and host states.

BDI Assessment

BDI welcomes that the negotiation proposal for an investment chapter in TTIP includes an »umbrella clause«. In contrast, CETA does not have an »umbrella clause«. Umbrella clauses do not represent an unreasonable burden for states, as they merely require states to meet commitments they have voluntarily entered into. The explicit limitation to written commitments is a concession to critics of such clauses in IIAs and increases legal certainty, especially for the Parties to the Agreement.

EU proposal: Protection of states in case of external imbalances and financial crises (Section 2, Article 6, p 6-7)

A note attached to Article 6 (Transfer) stipulates that limiting rules may be incorporated into other TTIP sections later to protect states in cases of balance of payments difficulties, financial difficulties, and for the operation of the economic and European monetary union. Such rules could then affect the provisions in Article 6 (Transfer).

BDI Assessment

Transfers in connection with covered foreign investment should be subject to as few restrictions as possible. Restrictions must be formulated so that the state cannot arbitrarily limit transfers. The exceptions listed in the note seem very broad in scope, but this cannot be conclusively assessed until the European Commission has presented a concrete formulation.

EU proposal: Protection of states in the restructuring of public debt (Section 2, Annex II, p 9-10)

The European Commission's negotiation proposal specifies that investors cannot assert claims on the basis of the TTIP investment chapter arising from »negotiated restructuring« of public debt. »Public debt« as defined by the Commission's proposal includes the debt of EU member states and of their governments at the regional or local level.

BDI Assessment

The purpose of international investment agreements and investment chapters in trade agreements is to incentivize investment by guaranteeing a minimum degree of rule of law. A central component of respecting the rule of law is the observance of existing laws and adherence to concluded agreements, which also includes meeting payment obligations. For this reason, BDI calls for a more narrow definition of the restrictions on investment protection, by limiting restrictions to extraordinary circumstances, for example a state of emergency.

The Investment Court System

The European Commission proposes an **Investment Court System** as a mechanism for investor-state arbitration, allowing a company from one Party to the Agreement to bring a claim against the other Party (Article 1, paragraph 1).

EU proposal: Definition of »locally established company« (Section 3, Article 1, paragraph 2, p. 11-12)

In Section 3, Article 1 of its negotiation proposal, the European Commission sets out the scope of the »Investment Court System« and defines the key terms. The term »locally established company« is defined in Article 1, paragraph 4. According to the proposal, a locally established company is a juridical person established in the territory of one Party to the Agreement, and owned and controlled by an investor of the other Party. Additional criteria are stipulated in footnote 4. Point (i) specifies that a juridical person from the other Party must hold an equity interest of more than 50 percent in the company to qualify as controlling it. If the equity interest is less than 50 percent, the company no longer qualifies as a »locally established company« and is therefore not entitled to bring claims before the Investment Court.

BDI Assessment

BDI welcomes the fact that the European Commission's negotiation proposal clearly defines the scope of application of the »Investment Court System«. However, the proposed definition of locally established companies' is too restrictive. The 50 percent equity interest rule does not adequately reflect business realities. The Commission should instead adopt the concept of »effective control« for defining the criteria for locally established companies.

EU proposal: Mediation (Section 3, Articles 2 and 3, p. 12-13; Annex I, p. 33-36).

The European Commission's negotiation proposal provides for the possibility of averting investor-state arbitration through mediation. As far as possible, mediation should be the option used in any emerging dispute in the interest of reaching an amicable settlement (Article 2), and mediation proceedings may be initiated voluntarily at any time. When TTIP comes into force, the TTIP Committee responsible for investment issues will name six suitable individuals as mediators in charge of conducting mediation procedures. The disputing parties may jointly address a request of the appointment of a mediator from this list to the President of the Tribunal (Article 3).

Details regarding the mediation procedure are set out in Annex I. The objective of the mediation mechanism is to find a mutually agreed solution to an investment dispute. Either disputing party may request the commencement of a mediation procedure in writing, in which case the other party has ten working days to respond. Where the EU is requested to participate in mediation and agrees, it must declare whether the negotiation partner is the EU itself or an individual Member State. Following a consultation with the parties in the dispute, the mediator may conduct meetings and have hearings with experts at her discretion, and may propose solutions to the parties in the dispute. The parties must endeavor to reach a mutually agreed solution within 60 days from the appointment of the mediator. If no agreement is reached, the mediation procedure is not automatically the basis for any ensuing investor-state dispute settlement arbitration. Information relating to the dispute emerging in the mediation procedure does not form any basis for subsequent proceedings.

Each party bears its own expenses for mediation. The costs of the mediator are shared equally between the two parties.

BDI Assessment

The mediation procedure proposed by the European Commission can help states and investors avoid the high costs associated with lengthy legal proceedings. BDI welcomes the fact that mediation is voluntary. Mandatory mediation would unnecessarily increase the costs and the duration of proceedings in cases where it is foreseeable that an amicable settlement is out of reach.

EU proposal: Third party funding of procedural costs subject to mandatory disclosure (Section 3, Article 8, p. 17)

The European Commission proposes that third party funding of procedural costs must be disclosed to the other disputing party and to the competent Division, or to the president of the Tribunal if a Division has not yet been assigned. The party benefiting from funding must disclose the name and address of the third party funder. Disclosure is required without delay as soon as such funding is agreed. Further requirements and possible consequences of third party funding are not set out in the negotiation proposal.

BDI Assessment

Critics are concerned that the funding of legal costs by a third party (such as a law firm) could incentivize unfounded claims against states. It is good for smaller enterprises in particular that third party funding is in principle permitted, as these may otherwise not be able to afford litigation. BDI is open to greater transparency regarding the funding of ISDS procedures as long as companies are not forced to disclose business secrets. Among German investors, third party funding will probably only occur in exceptional cases.

EU proposal: Establish a Tribunal of First Instance for the resolution of investment disputes (Section 3, Article 9, p. 17-19)

The European Commission's negotiation proposal provides for the establishment of an »Investment Court System« within the TTIP framework. The proposed permanent court is to be organized as a Tribunal of First Instance to hear investment claims. The Tribunal members are to be appointed by the TTIP Committee responsible for investment. This fixed-membership committee will replace the previous ad-hoc arbitral tribunals formed individually for each dispute. The Tribunal is to have a President and Vice-President who are nationals of third countries and are responsible for organizational issues. The Tribunal is to hear cases in Divisions consisting of three judges, who are appointed by the President of the Tribunal. One Division judge is to be from the United States, one from the EU and one a national of a third country. The Division is to be chaired by the judge from the third country.

BDI Assessment

BDI is open to the proposal of establishing an »Investment Court System« in TTIP. This new system should be established on the basis of existing international arbitration structures (such as the International Centre

for Settlement of Investment Disputes – ICSID). The European Commission’s proposal provides for connections to such institutions. It should, however, be made clear at this point that ICSID or other structures will be applicable. The existing Secretariat of ICSID or the Permanent Court of Arbitration (PCA) could serve as the secretariat of the Tribunal. The disputing parties are to share equally the costs incurred. The Commission’s proposal may neither be used as a veiled move to take ISDS out of TTIP, nor to slow down TTIP negotiations. TTIP should include comprehensive investor protection and provide companies operating abroad with legal certainty.

EU proposal: Appointment of a Tribunal of First Instance (Section 3, Article 9, paragraphs 2, 3, 6 and 12, p. 17-18).

The European Commission proposes that the TTIP Committee responsible for investments appoints 15 judges to the Tribunal. Five from the US; five from the EU; and five from third countries. At a later point in time, the TTIP Committee may increase or decrease the total number of judges by multiples of three, preserving the ratio stipulated above. Judges will be appointed for a term of six years, which is renewable once. Seven of the 15 judges appointed when the Agreement comes into force will be appointed for a term of nine years. For every dispute, a Division of three judges is appointed from the Tribunal, with one from the EU, one from the United States and one from a third country. A retainer fee is to be set by the TTIP Committee responsible for investment issues. The Commission proposes 2,000 euro per month for judges and 7,000 euro per month for the Tribunal President and Vice-President. In addition, the President and Vice-President are to receive a fee for each day worked in their capacity.

BDI Assessment

It is already difficult to find qualified arbitration judges for ISDS cases in the present system. The majority of cases are highly complex. With only 15 appointed judges, it is unlikely that this group will have suitable candidates available for judging cases considering the extremely diverse experience and specialist knowledge necessary for the different economic sectors. This is even more problematic due to the restrictive requirement in the negotiation proposal that every judge must be selected from a different group of five (United States, EU, third country). The Tribunal should therefore have more judges to begin with, despite the increased costs that this would entail (see BDI position on Article 9, paragraph 12 and Article 10, paragraph 12).

Furthermore, the selection of only five judges from the EU would not take account of the national interests of EU member states. Nor is there any guarantee that at least one of the EU judges on the Tribunal will be versed in the national law of the state concerned.

In its negotiation proposal, the European Commission does not specify where the TTIP Tribunal should be located and hear the claims.

EU proposal: Judge qualification requirements. Judges should be experienced in international investment law and in the resolution of investment disputes (Section 3, Article 9, paragraph 4, p. 17)

The European Commission proposes certain qualification requirements for judges of the Tribunal. Candidates must have the qualifications required for appointment to judicial office in their home countries or be

jurists of recognized competence and have demonstrated expertise in public international law. Desirable in particular is expertise in international trade law and international investment law as well as experience in the resolution of investment disputes.

BDI Assessment

For ISDS procedures to be effective and legitimate, the judges must be highly qualified and display the utmost integrity. BDI expressly supports the call for judges of an »Investment Court System« to be experienced in international investment law and in the resolution of trade disputes.

EU proposal: Tribunal and Division composition. Objective that all judges are given equal opportunity to serve (Section 3, Article 9, paragraphs 6, 7 and 8, p. 17-18)

The European Commission's negotiation proposal stipulates that the Chair of the TTIP Committee will draw (by lot) the President and Vice-President of the Tribunal from the group of judges from third countries. The President and Vice-President of the Tribunal serve two-year terms on a rotation basis.

Within 90 days of the submission of a claim, the President will appoint three judges composing a Division that will hear the case. One of these judges is to be from the United States, one from the EU and one from a third country, with the judge from the third country chairing the Division. The President will appoint judges on a rotation basis to ensure that the composition of the Divisions is random and unpredictable; giving all judges equal opportunity to serve on Divisions.

BDI Assessment

In the opinion of BDI, the European Commission's negotiation proposal does not specify clearly enough how a transparent and impartial selection of judges for the Divisions will be ensured.

International investment disputes entail financial risks for both parties. A balanced composition of the Divisions must be ensured. Accordingly, both disputing parties must have an influence on the selection of at least one of the Division judges. The chair may be selected by an impartial instance, but BDI is strictly opposed to appointing judges to Divisions on a rotation basis. A rotating appointment makes the exact composition of the Division random, harboring the risk that the Division composition is one-sided.

Furthermore, if the panel of judges appointed by this entirely state-driven procedure does not constitute an arbitration tribunal within the meaning of the New York Convention, decisions may not be enforceable worldwide. These considerations must be reviewed.

Furthermore, the European Commission's objective of giving all tribunal judges equal opportunity to serve runs counter to the objective of having disputes resolved by the most expert individuals in the respective fields concerned. A rotation system cannot ensure that the most appropriate judges are selected in each case. The most expert judgment is to be expected from judges that have the most knowledge about the facts of a respective case. Consequently, the investor on the one hand and the state on the other can best assess which candidates from the available group of judges are the most appropriate. The disputing parties can better assess which judges are most familiar with the facts of the case than a random method. BDI is open to the proposal that Division chairs must come from a third country. Here too, nonetheless, it needs to be ensured that the most qualified judge is selected for a given case.

The advantage of a permanent court over an arbitral tribunal is the fact that the former is generally available immediately. Having a 90-day period for appointing the Divisions cancels out this advantage. The time period here should be shortened.

EU proposal: Single-judge arbitration to lower costs, especially for SME claimants (Article 9, paragraph 9, p. 18)

The European Commission's negotiation proposal stipulates that a single judge instead of a Division of three judges can hear investment disputes. If both disputing parties agree on this modality, the President of the Tribunal selects the judge. This option is intended primarily for the resolution of disputes involving small or medium-sized enterprises (SMEs) or where the compensation or damages claimed are relatively low.

BDI Assessment

The biggest barrier for foreign direct investment by SMEs is the lack of legal certainty in the host country.⁷ Investment agreements are thus an important factor in the investment decision-making of SMEs as they increase the confidence in the host country and reduce the risks. According to an OECD study of 50 ICSID and 45 UNCITRAL cases, 22 percent of claims were filed by SMEs.⁸ However, high procedural costs can prevent SMEs from initiating investor-state arbitration. BDI therefore expressly welcomes the proposal to have »smaller« investment arbitration proceedings under TTIP, as this can cut costs.

A TTIP investment protection chapter should nonetheless include further simplifications for SMEs, as procedural costs are set to increase because of the complicated claim filing procedure and substantially increased transparency regulations (which BDI welcomes in principle). As an example, SMEs could be provided with technical support in selecting suitable law firms.

EU proposal: Tribunal to receive administrative support from international institutions (Section 3, Article 9, paragraph 16, p. 19)

The European Commission's negotiation proposal stipulates that the Tribunal uses an existing secretariat of an international institution for administrative support. The European Commission does not specify which institution, but suggests the ICSID and PCA. The Parties to the Agreement would equally share the costs for this administrative support.

BDI Assessment

BDI expressly approves of this proposal by the European Commission. Using existing structures would cost significantly less than creating a separate infrastructure. This would also integrate the »Investment Court System« into established structures, so it can tap into the wealth of expertise and experience of the staff of

⁷ KfW Economic Research/Creditreform, *Internationalisierung im deutschen Mittelstand*, 2012, p. 38.

⁸ David Gaukrodger and Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, 2012/03, OECD Publishing, p.17, <http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf>.

these institutions. However, the European Commission's negotiation proposal does not state clearly, what the relationship would be between the rules of the »Investment Court System« regulations and those of ICSID or PCA.

EU proposal: Establishment of an appeal mechanism. The Members of the Appeal Tribunal are to be selected using the same method as the Tribunal of First Instance (Section 3, Article 10, p. 19-20; Article 29, p. 31)

The European Commission proposes setting up an Appeal Tribunal. The grounds for appeal are errors in the application or interpretation of the applicable law or errors in the appreciation of the facts (Article 29, paragraph 1). If an appeal is rejected because such grounds are not deemed to be in evidence, the decision of the Tribunal of First Instance becomes final.

The TTIP Committee responsible for investment appoints the members of the Appeal Tribunal. Each Party to the Agreement proposes three candidates, with two from the proposing state and one from a third country, after which the Committee appoints the members. The Committee may decide to increase the number of members on the Appeal Tribunal. The Appeal Tribunal members are appointed for a term of six years, which can be renewed once. The terms of three of the six members appointed immediately after the entry into force of the Agreement, and determined by lot, are to be extended to nine years. Under the European Commission's proposal, members of the Appeal Tribunal are to be paid a monthly fee of 7,000 euro.

The Appeal Tribunal is also to have a President and Vice-President selected using the same procedure as the President and Vice-President of the Tribunal of First Instance.

The composition of the Divisions of the Appeal Tribunal is to be regulated in line with the Tribunal of First Instance, with three members and chaired by the member from a third country.

BDI Assessment

Up to now, the awards issued by arbitral tribunals in investor-state dispute settlements have been final and binding, appealable only in case of procedural errors. The negotiation proposal provides for the possibility of establishing an appeals procedure in TTIP. Second-instance awards in investment cases would have a particularly high degree of legal and political authority for the contracting parties.

BDI welcomes the introduction of an appeal mechanism. However, it must be ensured that the appeals procedure does not increase the costs of litigation unproportionally and that the proceedings are not unduly drawn out. This is especially in the interest of SMEs, which should also be able to assert their contractual rights. Possibilities of including a remitting rule should also be considered.

Having only as little as six Appeal Tribunal members is problematic. It is unlikely that suitable candidates will be available out of a total of six to hear each case due to the extremely diverse background and knowledge necessary depending on the respective economic sector. The Appeal Tribunal should therefore have more members to begin with; despite the increased cost (see BDI position on Article 9, paragraph 12 and Article 10, paragraph 12).

BDI is also in favor of the Commission's proposal to enlist secretariat support from international institutions such as ICSID or PCA (see BDI position on Article 9, paragraph 16).

As with the first instance, BDI opposes the selection of Division members on a rotating basis (for the same reasons as per the BDI opinion on Article 9, paragraph 7).

EU proposal: Judge and Appeal Tribunal member remuneration and related costs (Section 3, Article 9, paragraph 12, p. 18; Article 10, paragraph 12, p. 20.)

To increase the availability of Tribunal judges and Appeal Tribunal members the European Commission proposes the payment of a monthly retainer fee. The fee amount is to be set by the TTIP Committee responsible for investment, but the Commission's proposal is 2,000 euro per month, which is roughly a third of the remuneration of WTO Appeal Tribunal members. A fee of 7,000 euro per month is proposed for the Tribunal President and Vice-President. The two Parties to the Agreement are to bear these costs jointly and equally, which will be organized and paid out by the secretariat (possibly that of ICSID or PCA). Other procedural costs of the Divisions are to be billable in accordance with the ICSID Convention rules. The TTIP Committee responsible for investment can transform the payments into a regular salary, in which case the members would be barred from engaging in any other occupation. The Commission's negotiation proposal provides that Appeal Tribunal members are to receive a monthly fee of 7,000 euro, which may also be transformed into a regular salary.

In addition, the President and Vice-President of the Tribunal and the Appeal Tribunal are to be remunerated for every day worked in fulfilling their functions.

BDI Assessment

The vast majority of international investment agreements (IIAs) have never been the basis for investor-state arbitration. Given this fact and that the number of judges should be significantly increased, the remuneration structure should be reviewed.

EU proposal: Judge selection should ensure independence and high standards of conduct (Section 3, Article 11, p. 20-21; Annex II, p. 37-39)

The European Commission proposes that judges of the Tribunal and members of the Appeal Tribunal must follow a certain codes of conduct. Tribunal judges and Appeal Tribunal members must be independent and may not be affiliated with any government of a Party to the Agreement. They may not be subject to instructions from any government or organization with regard to matters related to the dispute. In addition, they may not participate in disputes that would create a direct or indirect conflict of interest. The Commission proposes a corresponding »Code of Conduct« (Annex II).

BDI Assessment

BDI welcomes the setting of high moral standards for judges. For investment settlement procedures to be effective and legitimate, the judges must without exception be highly qualified and display the utmost integrity. This system can only work if the judges and members are independent and impartial. ICSID and UNCITRAL regulations already mandate reviews of candidate judges along these lines. A binding code of conduct as called for in the European Commission's negotiation proposal could be effective in ensuring the independence and impartiality of judges and members. It is also positive that judges must be free from government instructions and that the avoidance of conflicts of interest is addressed.

EU proposal: Objective of having a multilateral settlement mechanism for investment disputes (Section 3, Article 12, p. 21)

The European Commission proposes establishing an »Investment Court System« for the resolution of investment disputes. The Commission has announced that it wants to use the structure implemented for TTIP as a model for other EU investment treaties. The long-term objective is to replace bilateral solutions with a multilateral dispute settlement mechanism. The Commission is pursuing this goal in parallel with the TTIP negotiations.⁹

BDI Assessment

BDI supports the long-term objective of implementing a multilateral dispute settlement mechanism. In addition to meeting the basic requirements for future IIAs mentioned above, such an institution would have to fulfil the following criteria. Dispute settlement procedures should continue to be investor-state proceedings and should not be turned into state-state proceedings. The court should as far as possible be organized on the basis of existing international arbitration structures (ICSID, UNCITRAL etc.). A multilateral arbitral tribunal should also include an appeal mechanism. In addition, the parallel considerations for a multilateral court should not be responsible for an impasse in negotiations over a bilateral ISDS mechanism in TTIP.

EU proposal: Relationship to national law (Section 3, Article 13, p. 21f.)

In its decisions, the Tribunal is to observe the provisions of TTIP and other rules of international law applicable between the Parties to the Agreement. The domestic law does not form part of the applicable body of law under the Agreement. Should the tribunal need to interpret the domestic laws of the Parties, the tribunal is to follow the prevailing interpretation made by the relevant courts of the Parties. The meaning given to the relevant domestic law made by the Tribunal is not to be binding upon the national courts of the Parties.

BDI Assessment

BDI welcomes the reference in the European Commission's negotiation proposal to the authority of national courts to interpret national law.

EU proposal: Relationship to national courts. The »no U-turn« approach to exclude parallel claims before national or other international courts → forum shopping« (Section 3, Article 14, p. 22-23)

The European Commission proposes that the Tribunal should dismiss claims which at the time of filing are being heard before a national (Article 1) or international court (Article 2). If other courts are already hearing

⁹ Press Conference held by EU Trade Commissioner Cecilia Malmström on 16 September 2015; European Commission press release: *Commission proposes investment court system for TTIP and other EU trade and investment agreements* <[Http://europa.eu/rapid/press-release_IP-15-5651_de.htm](http://europa.eu/rapid/press-release_IP-15-5651_de.htm)> (accessed 16 September 2015).

a case, a claim can only be brought to the TTIP Tribunal if the investor drops the proceedings before the other court or after a judgment is passed.

BDI Assessment

BDI is in favor of the »no U-turn« approach proposed by the European Commission to prevent claimants from having a dispute heard simultaneously before a national court and the Tribunal. This provision rules out the possibility of filing parallel claims. The approach also avoids the risk of investors preferring to forgo claims before national courts entirely, as an ISDS claim can still be filed if the national proceedings have been decided on or have been dropped. The more extensive »fork-in-the-road« approach, in contrast, would mean that the investor has to make a binding decision to pursue one course of legal action for a dispute, the other option then being ruled out. This type of approach could lead to investors avoiding seeking recourse through national court systems. The »no-U-turn« approach is thus preferable to the »fork-in-the-road« approach.

EU proposal: Possibility of preliminary review to exclude claims that are manifestly without legal basis or unfounded (Section 3, Article 16 and 17, p. 23-24)

The European Commission's proposal provides for the exclusion of frivolous and manifestly unfounded complaints. Within 30 days of formation of a Division and prior to the first Division meeting, the respondent may raise an objection to a claim, outlining the reasons on which the respondent considers it to be »manifestly without legal merit«. The basis for such an objection should be specified as precisely as possible. The Division then conducts a hearing of the disputing parties and makes a decision, stating the reasoning for decision (Article 16).

As another preliminary measure, the Tribunal is also to consider any objection raised by the respondent that a claim is not a claim for which an award in favor of the claimant may be made under Section 3, Article 28 (Provisional Awards). Such an objection is to be raised as soon as possible after the constitution of the Division, and no later than the deadline set for the respondent to submit a statement of defense. When such objections are raised, the tribunal is to suspend the proceedings and issue a reasoned decision on the objection (Article 17), unless the objection is considered manifestly unfounded.

BDI Assessment

Every claim involves costs and ties up resources whether or not an investor company wins or loses in a dispute, which is why existing arbitration procedures contain mechanisms for barring »frivolous claims«. Incorporating further clauses could contain unnecessary costs. BDI is open to the European Commission's negotiation proposal of conducting a preliminary review of the merit of a claim. It must, however, be ensured that justified claims are not rejected. The word »manifestly« should thus be deleted from Article 16, paragraph 1. Such a review should furthermore be narrowly restricted to cases that are evidently unfounded. To save time, this should be carried out by the secretariat before the Tribunal is constituted or during this process.

 EU proposal: Increase public transparency of investor-state dispute settlements (Section 3, Article 18, p. 25)

The European Commission's negotiation proposal calls for the application of UNCITRAL transparency rules to investment disputes. UNCITRAL transparency rules provide that all procedural documents are made public and that verbal hearings are publicly held. The European Commission's proposal goes beyond the scope of the UNCITRAL transparency rules in stipulating that exhibits from independent expert reports and witness statements be made accessible to the public.

BDI Assessment

Transparency is a fundamental prerequisite for the legitimacy and acceptance of IPTs and ISDS among the public. This is especially the case because such disputes are not between private enterprises but rather between a private enterprise and a state, which means that the public interest is directly affected. For some years, efforts have been made on an international level to improve transparency in investment dispute settlements.

In July 2013, UNCITRAL adopted transparency rules for arbitration, which went into force in April 2014. On 17 March 2015, the governments of Germany, the United States, Canada and five other states signed the Mauritius Convention (Convention on Treaty-based Investor-State Arbitration), and were later joined by Italy, Luxembourg, Belgium, Switzerland and Syria.¹⁰ The countries that have ratified the Mauritius Convention agree to observe the new UNCITRAL transparency rules for both new and existing investment treaties.

BDI is in favor of TTIP being based on the UNCITRAL transparency rules as proposed by the European Commission. As with national court proceedings, arbitration cannot be completely transparent because it also requires a certain amount of discretion, as trade secrets and privacy rights, for example, must remain protected. The Commission's proposal for the article on public transparency includes a corresponding restriction clause.

However, Article 22 does not provide for such a restriction with regard to transparency and disclosures vis-à-vis the investor's country of origin, in other words the »non-disputing Party to the Agreement«. Nonetheless, an investor's trade secrets should also be protected vis-à-vis the investor's country of origin. Article 22 should thus contain such a restriction as well.

 EU proposal: Consolidation of claims (Section 3, Article 27, p. 28-29)

The European Commission's negotiation proposal provides that a state confronted with two or more claims with the same cause of the plea (for example about a law or government measure) may at its discretion request for the »consolidated consideration« of these claims. The state must submit a corresponding request to the President of the Tribunal and notify the claimants. Claimants must then submit a response within 30 days. The new Division, the »consolidating Division«, constituted by the President of the Tribunal exclusively decides on whether to accept or reject the request for consolidation.

¹⁰ UNCITRAL, *Status, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)*, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html> (accessed on 24 September 2015).

BDI Assessment

BDI is in principle open to the consolidated consideration of claims. This should increase the efficiency of the Tribunal, which is welcomed by BDI. SMEs in particular stand to benefit from a consolidated consideration.

The European Commission's negotiation proposal nonetheless harbors risks that need to be properly addressed in the further specification of the model. For example, it should be defined very precisely what the decision criteria are for the approval or rejection of the request for consolidated consideration. Paragraph 7 is especially problematic. According to this paragraph, an investor can withdraw the claim subject to consolidation, but may not resubmit the claim to the Tribunal. The Tribunal's consolidation decision could thus result in a case where an investor only has legal recourse in national courts even though its individual claim could have been brought before the investment court.

EU proposal: Loser pays principle (Section 3, Article 28, p. 29-31)

The European Commission's negotiation proposal sets out that the arbitration costs are borne by the unsuccessful disputing party. However, in exceptional circumstances, the Tribunal may decide on dividing the costs between the disputing parties. This could happen, for example, if the successful party has behaved unreasonably. The TTIP Committee is called upon to adopt supplemental rules no later than one year after the entry into force of the Agreement to set a maximum amount for the legal representation costs to be borne by SMEs. According to the Commission proposal, the financial resources of SMEs and the foreseeable amount of compensation should be taken into account (Article 28, paragraph 5).

BDI Assessment

A TTIP investment chapter should rule out the filing of improper and manifestly »frivolous claims«. Even if states are successful, claims incur costs and tie up resources. The loser-pays principle as proposed by the European Commission is one possible mechanism. Previously, costs for investor-state arbitration were shared between the two disputing parties regardless of which party is ultimately successful. Under such an arrangement, a claimant will not have to calculate in the possibility of having to bear all the procedural costs.

The loser-pays rule nonetheless entails the risk that SMEs will decide not to lodge a claim – even in cases where the legal situation is clear – for fear of having to bear the procedural costs in the event of losing. The loser-pays rule must not result in SMEs not daring to lodge justified claims for investor-state arbitration due to financial risks. Capping the legal representation costs to be borne by SMEs is a good idea. It should nonetheless be clarified how the TTIP Committee will calculate the maximum amount. The wording of Article 28, paragraph 5 is too vague.

The loser-pays principle could also be problematic to implement, as the »successful« party often wins on some but not all charges. BDI is therefore in favor of giving the »Investment Court System« discretionary authority in allocating the costs between the disputing parties. A well-considered application of this discretionary authority in practice will then be necessary.

EU proposal: Enforcement of awards (Section 3, Article 30, p. 31-32)

The European Commission's negotiation proposal provides that arbitral awards by the Tribunal and the Appeal Tribunal are to be binding to the disputing parties. According to the Commission's proposal, awards are to be enforced based on national legislation or on the New York Convention.

BDI Assessment

The European Commission's negotiation proposal does not outline with adequate clarity and detail how the awards are to be enforced by domestic law procedures. According to the European Commission proposal, claimants are entitled to enforcement as per Article 1 of the New York Convention, which BDI welcomes. This will enable investors to enforce awards worldwide against states if the court rules against the latter.

Additional BDI commentary on investment promotion and protection treaties and investor-state dispute settlement:

In position papers titled »*Protecting European Investments Abroad*« (in German: »Schutz europäischer Investitionen im Ausland«) and »*The 'I' in TTIP: Why the Transatlantic Trade and Investment Partnership Needs an Investment Chapter*« the BDI has outlined its recommendations for the future structuring of IIAs.

In the BDI paper »*International Investment Agreements and Investor-State Dispute Settlement: Fears, Facts, Faultlines*« particular attention is given to the most frequently cited criticisms and investor issues discussed in recent months.

BDI opinions on the proposals and demands of European social democrats regarding future investment promotion and protection agreements are outlined in the paper »*Investitionsschutz und Schiedsgerichtbarkeit*« (in German).

BDI opinion on the German government signing the UN Convention on Treaty-based Investor-State Arbitration (the Mauritius Convention) is outlined in the paper »*Transparenz in Investor-Staat-Schiedsverfahren*« (in German).

BDI's opinion on the European Commission's proposals on the negotiations of investment treaties made public in May 2015 is outlined in the paper »*Stellungnahme des BDI zu den Vorschlägen der EU-Kommission zur Verhandlung künftiger Investitionsschutzverträge*« (in German).

BDI opinion on a draft of a model investment protection treaty commissioned by the German Federal Ministry for Economic Affairs and Energy can be found in the paper »*Investitionsschutz und Schiedsgerichtbarkeit*« (in German).

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