



Business, Innovation and Skills Committee

Oral evidence: [Transatlantic Trade and Investment Partnership](#) (TTIP), HC 804–ii

Tuesday 16 December 2014

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Members present: Mr Adrian Bailey (Chair); Mr William Bain; Paul Blomfield; Mike Crockart; Caroline Dinene; Rebecca Harris; Ann McKechin and Mr Robin Walker

Questions 153-233

Witness: **Dr Gabriel Siles-Brügge**, Lecturer in Politics, University of Manchester, gave evidence.

Q153 Chair: We can start now, a little early. The financial benefit to Europe of TTIP has been estimated at about £100 billion. I believe you have questioned the modelling that led to that figure. In your submission, you state: “Shrouded in uncertainty as the social world is too contingent to be modelled in terms of neoclassical economics, they are presented as reliable predictions of future outcomes.” Now, as a simple person, that sounds like academic gobbledegook to me. Could you explain to us what you mean?

Dr Siles-Brügge: Sure. We can explore the details, but in a nutshell I am saying that with an agreement such as TTIP, which is quite complex and involves a lot of areas and a series of complex negotiations, it is impossible from the get-go to predict exactly what the economic implications will be and to come up with as exact a figure as this modelling has come up with. It is somewhat disingenuous to present that figure as a reliable estimate of what is to come. The term that my co-author, Ferdi De Ville from Ghent University, and I use is “fictional expectations” because it creates a fiction of what is going to happen in the future, which, inherently, because of the complex nature of trade agreements and trade negotiations, cannot be foreseen. I hope that was not too much academic gobbledegook, Mr Chairman.

Q154 Chair: Yes, it was slightly simpler. Again, my interpretation is that you are saying that there were assumptions built into the model that are not necessarily robust. Is that a reasonable summary?

Dr Siles-Brügge: That is a reasonable summary of what I said. More broadly than that, any sort of modelling exercise such as this must be treated with caution, in so far as you cannot predict the future with any degree of certainty. I am not saying that you shouldn’t generate figures, but that you have to be honest about the uncertainty

underpinning them. More specifically, I think the assumptions built into this model are quite unrealistic.

Q155 Chair: I understand that there have been two modelling exercises: one for Europe and one for the US. Is that correct?

Dr Siles-Brügge: Yes, that is right. There are figures for the gains for the US and figures for the gains for the EU in that model.

Q156 Chair: Did they both use the same model?

Dr Siles-Brügge: Yes, they did.

Q157 Chair: Okay. I understand that the model is—this, again, is gobbledegook, although I realise that it is not from you—a computable general equilibrium model. Can you explain the main principles of it and how it was used to predict outcomes?

Dr Siles-Brügge: Okay. Let us break up “computable general equilibrium” into its component parts. “General equilibrium” means that the model assumes that there is a representative household that is a composite of all sectors in the economy. In essence, the assumption is that the economy is in general equilibrium: all supply is satisfied by demand—there is no excess supply—and the individual or the representative household is a rational optimiser of their utility. “Computable” means that you can plug in values and generate a series of statistics.

A number of criticisms are often directed at computable general equilibrium models, but I will focus on two here. One is that they make a number of unreasonable assumptions about the way that the economy works by assuming such things as full employment, which we know is not necessarily the case. It also assumes the economy, after a policy decision such as TTIP, adjusts smoothly from point 1 to point 2 without any social costs in between. Those are a series of unreasonable assumptions. The other assumption that it makes is that individuals are rational optimisers. You might argue with that.

Chair: Yes.

Dr Siles-Brügge: There is one final point I want to make: they are subject to considerable bias. The researchers have a lot of room to plug in values that generate the results that they want. We can talk about the specifics of that, in terms of this model, but the statistics that were plugged in here on the impact of non-tariff barriers were generated using what I would consider to be potentially problematic numbers, because they came from business, which has a vested interest in exaggerating the extent of the non-tariff barriers.

Q158 Chair: Is your objection only because they came from business and therefore are questionable, or have you got any hard evidence to show that they are incorrect?

Dr Siles-Brügge: The weighted average that they generated of the impact of non-tariff barriers on trade costs between the EU and the US was about 17%. So it wasn't just businesses—

Q159 Chair: A 17% reduction in costs?

Dr Siles-Brügge: What that means is that the average impact on trade of non-tariff barriers between the EU and the US was to raise trade costs by 17%. That is the weighted average. The study that compiled those statistics used a business survey, a literature review and a number of other things to come up with that figure. A number of other sources suggest that the impact of non-tariff barriers is more in the region of 3%, so it is considerably larger than a lot of other studies suggest.

Q160 Chair: Have you a better economic model?

Dr Siles-Brügge: I am not an econometrician so no, I do not have a better economic model. What I would say is that what is problematic here is the way in which this econometric model is presented as fact. My role as a political scientist is to emphasise how that isn't necessarily the case, and the political uses to which econometric modelling can be put to.

Q161 Mr Walker: I accept the basic premise that all modelling is in some sense flawed. It can't replicate the real world and if it did we would be in a world of Isaac Asimov's concept of psychohistory where you could predict anything that was going to happen in advance.

In terms of the work done by the Bertelsmann Stiftung on relative benefits of this between different countries, do you accept that there is a logic that countries such as the UK are likely to benefit economically more because they trade more with the United States? We have in front of us in our brief a chart from the Bertelsmann Stiftung that has figures for each area of Europe. The UK is on 9.7% whereas the average across Europe is closer to 5% benefit. The benefit in the US, it is fair to say, is bigger. It is about 13% according to this chart. While it is probably not perfect, do you accept that there is that relative differential in terms of where the benefits lie?

Dr Siles-Brügge: I should stress that the model that I was specifically focusing on in this study was the CEPR study that was being used by the Commission. That is the one that is usually quoted. The 10 billion figure comes from a version of that applied to the UK. The Bertelsmann study is considered to be somewhat of an outlier in so far as it predicts much larger gains than the other studies and it uses a slightly different methodology in terms of computing its gains. Let me just get back to your fundamental question. If I don't get you wrong, Mr Walker, you are saying that there are some gains and we should accept that there are some gains?

Q162 Mr Walker: It seems likely that where there are substantial volumes of trade there will be gains in reducing the barriers to trade.

Dr Siles-Brügge: Sure. I mean, the question is the old volume effect. People say that even if we reduce low tariffs somewhat, you will get some gain. The question for me is that even if you take these figures at face value—€120 billion for the EU economy; that's about £100 billion—that amounts to very little if you compute it at a household level. That figure means extra disposable income of €550 per family of four in the EU. I think it was a journalist who said that equals about an extra cup of coffee per person per week, in gain from the TTIP. You think that we should not laugh at any growth, but the question is, what potential cost does that come at?

I can't be disingenuous and sit here and say that TTIP is going to lead to big bang deregulation or that it is going to lead to this or to that, much like you cannot predict with any certainty the full economic impact of the agreement. I am not going to sit here and tell you that TTIP is going to lead to x, y and z, but I think that there are signs, if you look at some of the leaked negotiating texts and also the proposals that the Commission has put forward and the history of trade negotiation more generally, that there is potential here for some deregulation.

Q163 Mr Walker: On the history of trade negotiations generally, what are the precedents? Are there precedents that you have analysed that show that there were trade deals signed that didn't result in any economic benefits?

Dr Siles-Brügge: Absolutely. I think the Assess TTIP study was mentioned previously. It is the Werner Raza study, a very good study by the Austrian Foundation for Development Research. They have an appendix that looks at the economic impact of NAFTA, which is something I have mentioned briefly in our paper as well. There were big promises of economic gains, especially for Mexico and Canada, and some economic gains for the United States. The evidence suggests that those haven't necessarily materialised. There is a big debate about whether NAFTA cost or created jobs. The evidence on that is mixed, but clearly the promises of large economic gains through NAFTA have not necessarily been borne out.

The other example I would use is the EU single market. Now, in a lot of ways TTIP—you hear it in the rhetoric—is about creating a transatlantic marketplace. That is because it is largely about regulatory convergence—not necessarily harmonisation, but reducing regulatory barriers, which in way is what the single market was about. There the key document was the so-called Cecchini report, which talked of gains, I think, of about 4% to 6.54% of EU GDP from the EU single market, which even the Commission's subsequent reviews didn't find. I think a single market review in 2007 talked about 2% GDP gains, so there is a history of using econometric modelling to hype up the benefits of trade liberalisation and to downplay the potential costs. I have talked about deregulation, but also the model makes the assumption that employment will somehow smoothly adjust—people who are displaced from their jobs will just transit towards more competitive sectors—but we know that that is not necessarily what happens.

Q164 Chair: Somewhere in your papers you talked about how people in uncompetitive industries may suffer, but the reverse of that is that you do not have trade deals and you keep people in uncompetitive industries. Is that an acceptable way forward?

Dr Siles-Brügge: I am not saying that there does not necessarily have to be structural change. What I am suggesting is that simply dealing with the trade liberalisation equation and saying, “There are all these benefits,” neglects the social adjustment costs involved. Actually, the measures that exist at EU level to deal with that—the European Globalisation Adjustment Fund—in particular are very meagre means to deal with those issues.

Q165 Ann McKechin: You mentioned NAFTA, and I appreciate the genuine criticisms of that deal, but clearly those are also about the timeline on which you might examine it. The current timeline includes the global recession and its impact, which was considerable in North America, so to what extent do you try to discount other factors that may arise when a trade agreement has been signed and impacts afterwards that are not about that agreement?

You mentioned the single market. It is undoubtedly true that countries such as Poland and others in Eastern Europe have had considerable growth in GDP since they became members of the European Union. A good argument can be made that the breaking down of trade barriers and the ability that that gives them to trade provides real advantage.

Dr Siles-Brügge: I would not dispute that the single market is a good thing—I think on balance it is—but I would say that it was hyped up in such a way for political reasons, and those hyped-up expectations did not materialise. That is all I am saying. I am not suggesting in any way that the single market is not to be desired.

The other thing about the single market is that it did not just lead to an elimination of trade barriers; it also led to a process whereby European regulations could be harmonised, which I do not think is necessarily what will happen in the case of TTIP. But, to answer your question about the global recession, the models take a baseline: they assume no policy change and the numbers are computed with respect to that. The models talk about job displacement in the region of 400,000 to 1.1 million people EU-wide. The assumption in the model is that that will be a seamless adjustment, but I suggest with my co-authors that you have to take it into account that that will not necessarily be the case.

Q166 Ann McKechin: Mr Walker mentioned that the UK has greater exports to the US than other European countries and different sectors have been mentioned to us, such as the automotive sector, in which the UK has a higher level of export than other parts of the EU. Eight of 10 cars are currently exported, so there would appear to be a clear advantage in that sector. Would you argue that it would be better to look at it within a sector-by-sector approach or via a “nation state within the EU” approach because that would give you a more realistic picture of what advantages or disadvantages might occur?

Dr Siles-Brügge: Absolutely, I am all in favour of more fine-grained analysis. These studies talk about the gains in particular sectors. According to the CEPR study, the automotive sector’s output in the EU will increase by 1.5%. I guess that automobiles are often considered the low-hanging fruit in so far as people say, “It’s easy to harmonise standards and to reduce non-tariff barriers because standards are broadly equivalent,” but you should not forget that the US has a system of multiple overlapping jurisdictions, so actually achieving that might be a bit harder than people say. I would encourage the

Committee to look at each sector individually and to consider that sector on its merits and whether it makes sense to liberalise.

Q167 Caroline Dinenage: In your paper you state that the problem with computable general equilibrium is that the modelling suffers “from a remarkable lack of transparency”. Are the inputs and assumptions made public?

Dr Siles-Brügge: They are. The modellers do talk about their assumptions. Because they are using established data on trade flows and established data on NTBs, which come from the ECORYS study, you have to dig into this material and find it. This is what my co-author and I did. More generally, I think the Committee Chairman was saying that people struggle even with the technical term itself—it is something that puts people to sleep, let’s face it, right? With the label of legitimacy that is given to it by quantifiable economic science, it is hard for us to discern what is in there without looking into the detail. It is presented as something objective when, I suggest, it isn’t.

I don’t think anyone is necessarily hiding things. It is all there to see, if you dig hard enough. It is just that people have generally talked about CGE models as suffering from a black box problem, in so far as they are often impenetrable to the non-expert.

Q168 Caroline Dinenage: Your headline assertion is that the European Commission’s modelling makes overly optimistic predictions—we have already discussed that—and that the outcome of the Commission’s modelling is unreliable as a guide to future outcomes. We have discussed that too. Do you think the problems in this modelling are bad economics or political interference?

Dr Siles-Brügge: As someone who identifies as a political economist, I don’t think you can separate the politics from the economics, in a sense. On one hand, people in the economics discipline have for a while criticised the theory of general equilibrium that underpins general CGE models and the CGE models themselves, because they are open to considerable bias. I think, as we have shown, there is some bad economics in there. At the same time, these models are presented as reliable estimates without any meaningful health warnings. I think there is a section where we talk about how these are presented as state of the art models; they may well be state of the art, but that does not necessarily mean they are reliable. There is a bit of politicking in the way they are presented as well, but I would say they are both entwined.

Q169 Caroline Dinenage: What is the impact on results of small changes to inputs?

Dr Siles-Brügge: What is the result of small changes to inputs? I am not an econometrician, so I have not run robustness analyses and so on. One thing I looked at was the original ECORYS study. If you add up the gains from liberalising non-tariff barriers in each sector individually, that is substantially less by, I think, an order of about four times less than if you liberalise across the board.

Clearly, the assumption of there being important synergies between different sectors—automobiles not just being dependent on automobiles, but on the chemical sector, financial sector and so on. That is an important assumption, and yet we do not know whether there is going to be a comprehensive TTIP that is going to cut across all these different sectors. In chemicals, for example, the negotiators have said that the regulations are too far apart for any meaningful mutual recognition or harmonisation. Playing around with the inputs can have a substantial impact. As I was saying earlier, the impact of NTBs is estimated as having a trade impact of about 17% rather than what other people say is 3%. That, of course, has a significant impact.

Q170 Paul Blomfield: I have a couple of questions around the regulatory reform. I want to take stock on our discussion so far to make sure that I am clear where we are. Your argument is, if I am summarising it correctly, that studies done so far are overestimating economic benefits, but those benefits are there. You don't disagree with Robin's point that they could be disproportionately beneficial to the UK economy or with Ann's point that there could be specific sectoral advantages, but you think they should be weighed up against the social adjustment costs. Is that a fair summary?

Dr Siles-Brügge: Yes, broadly. I would add that framing this in terms of the modelling of quantifiable economic gains, such as GDP growth, in a way skews the debate. What you are saying is that regulations, as far as the modelling goes, or differences in the regulations between the EU and the US, are simply non-tariff barriers. There may be very good non-quantifiable reasons that there are differences in regulations between the EU and the US. The EU is much more stringent on chemicals, for instance. I think most of the Committee would agree that it makes much more sense to classify chemicals on their toxicity than on the basis of them being new or not, as the US does. By making it a debate about economic gains, narrowly understood as GDP growth, you are skewing the terms of the debate. I am not saying that GDP growth is necessarily a bad thing, but it needs to be weighed up against a host of other potential costs and benefits that may not be as easily quantifiable.

Q171 Paul Blomfield: Do you want to develop a little bit more what you think those other social adjustment costs are? If, for example, there seemed to be a growing consensus in the debate across Europe that the ISDS provisions were out and public services were excluded, where would you then see outstanding problem areas?

Dr Siles-Brügge: Assume ISDS was out and public services were carved out—it is very difficult to do that, but assume that was the case. In a way, those sorts of issues are sideshows because the agreement is largely about regulatory convergence. That is the central pillar, as it were. I do not think that there is going to be a big deregulatory big bang—we are not going to have to face chlorinated chicken or hormone beef—because the issues are far too controversial and there are plenty of veto points in the EU machinery to prevent that. However, there is a process being entrenched where, potentially, the trade implications of regulations become much more important in decision making.

There is talk of the agreement having a regulatory co-operation chapter, which would institutionalise existing dialogues between the EU and US on regulatory co-operation and

consider the trade impact of regulation on transatlantic trade. In the EU, increasingly, the trade impact of regulations is taken into account in the so-called REFIT programme—the regulatory fitness and performance programme of the EU—which assesses the impact of regulations, increasingly according to a competitiveness metric. In that sort of context, an initiative such as TTIP is pushing towards a more deregulated outcome. I can't put an exact figure on it; I have to be honest and say that. It needs a lot more research and work. That sort of argument is much more difficult to make in a context where hard figures are just taken for granted.

Q172 Paul Blomfield: Thanks for that. Moving on to the issue of regulatory harmonisation, you state that the economic benefits of TTIP rely on extensive and deep harmonisation, but you argue that that is not likely to be delivered.

Dr Siles-Brügge: No.

Q173 Paul Blomfield: What are the key obstacles to delivering it?

Dr Siles-Brügge: I would say that, from the literature on EU-US relations, the broad consensus view is that different forms of regulation are institutionally entrenched. For example, on genetically modified organisms, despite the fact that the Commission's views are much closer to the US views than a lot of people would probably acknowledge, there has not been much co-operation. That is because there are a lot of veto points in the EU. Lots of member states do not want to authorise new GM varieties and are willing, as they did, to lose a WTO dispute over the issue.

Likewise, on the US side, there is quite a lot of zeal from regulators to preserve their autonomy. Back in the 1990s—this is perhaps the most ambitious initiative that the EU undertook—the EU and the US signed a number of mutual recognition agreements, which were very limited in so far as they only recognised the conformity assessment testing procedures of each other's regulators. It was not a recognition of each other's standards but a recognition that the EU's body for testing electrical safety was capable of testing for American standards in electrical safety, let's say.

All of those agreements, with the exception of two, had their implementation blocked by US regulators—the Food and Drug Administration, and the Occupational Safety and Health Administration. There are plenty of institutionally entrenched interests that would block meaningful or extensive harmonisation, but there is still deregulatory potential because you can institute practices whereby competitive objectives and the impact of trade is ever more considered as important in terms of shaping regulations.

Q174 Paul Blomfield: Thanks. Following on from that, you argue that the stated economic benefits for TTIP require liberalisation of non-tariff measures to occur “across all sectors at once”. I guess you are arguing that that is not achievable.

Dr Siles-Brügge: The Commission is saying that it is not achievable in so far as—

Q175 Paul Blomfield: Therefore, I guess what you are saying is not that it rules out all the benefits, but that the benefits will be in proportion to what was achieved?

Dr Siles-Brügge: Yes. What I am suggesting is that this figure is much exaggerated because those sorts of benefits are difficult to achieve. There are a number of different scenarios within the study that are a lot less ambitious. If you reduce the degree of NTB convergence, your gains are much smaller. What is disingenuous is that the Commission, in the past, has only talked about the most ambitious scenario from that study; it has never talked about the less ambitious scenarios, at least in speeches. The €100¹ billion figure was the one that was mentioned, not the much smaller figures.

Q176 Mr Walker: Following up on Paul’s point, you say that if you reduce the degree of convergence, the gains are smaller. Is there any study which has looked into that? Has anything tried to measure what the benefits would be if it was mutual recognition rather than harmonisation?

Dr Siles-Brügge: The studies are agnostic on what form of regulatory convergence you take. Mutual recognition of standards would be an acceptable way of reducing non-tariff measures, but of course the area where it does have an impact is on third countries. The studies assume positive spill-over effects from the agreement in most cases, in terms of other countries adopting common EU and US standards and so on. That is much reduced if you have mutual recognition because there is less of an incentive to adopt it.

Q177 Mr Walker: Surely, just as it brings down the benefits, it might also bring down the social adjustment costs, in terms of having something that is less of a shift. We could have a degree of mutual recognition and accept that we’re going to agree to disagree on some things, but perhaps use labelling to say, this good, which we’re going to sell in the US, meets EU standards.

Dr Siles-Brügge: It depends what you mean by mutual recognition. If it is a mutual recognition of standards, that, without any minimum harmonisation, has the greatest potential for a race to the bottom, in so far as you’re just accepting the other side’s standards without setting a minimum bar, as you did in the single market. This is why the single market didn’t lead to a race to the bottom, in so far as it established a process for harmonising other regulations. There are a number of safeguards in there as well. I guess your point is more about whether there is more room on the margins of tinkering with classifications, of chemicals, for example. I suppose, yes, but the question is, how far is

¹ Note by witness: figure corrected to €120 billion

that just tinkering? Does that lead to a process where the trade implications of regulation become the overriding concern, or one of the main concerns, rather than the social and environmental impact?

Q178 Mr Walker: If the aim is to open up more trade and allow both markets to expand, and if you argue that the social adjustment costs of doing that in a big bang are too great and might outweigh the benefits, then something that is more tinkering and less ambitious might look quite attractive.

Dr Siles-Brügge: I would perhaps be less concerned with that. Certainly, that is the way that the negotiations seem to be going. You still have to be wary and follow the negotiations carefully, because there might be a subtle process afoot, as I was mentioning earlier, about the institutionalisation of particular processes, especially if you have this sort of regulatory co-operation council in a living agreement. I urge the Committee to keep a close eye on trade issues even if TTIP is off the agenda, because trade issues are one area which hasn't received sufficient public scrutiny, in my eyes. That has allowed decisions to be taken which aren't necessarily always in the public interest. It is great to be seeing such an interest from the Committee and from Parliament in general, but I encourage the momentum to be sustained.

Q179 Mr Walker: Some of us might argue that we would have more power to scrutinise trade issues if we had the competency at the UK rather than the EU level, but we'd better not get into that. You have argued that the European Commission's preference, and the way the negotiations are headed, is for market mutual recognition rather than purely harmonisation of regulations. Are there any risks attached to mutual recognition, beyond what you said about it looking like tinkering? Does it have specific risks which harmonisation of regulations wouldn't?

Dr Siles-Brügge: As I was saying earlier, mutual recognition has the greatest potential for a race to the bottom, in so far as you accept the other side's standards, and if those standards are lower, of course your own standards are being circumvented. I don't think that's going to happen in very many cases, because there's quite a lot of political pressure for it not to, but at the margins, it can. For example, and this might seem a bit technical, so forgive me, an analysis of the leaked text of the SPS chapter, which deals with sanitary and phytosanitary measures—issues relating to environmental safety and food safety—suggested that the EU was going to get rid of re-testing at port of entry of food from countries where the standard had been considered equivalent. You might think, "How is that any dilution of standards?" Well, it is in so far as it's diluting the EU's precautionary principle, which is in this case not just to take others' words for it, but to check and make sure that standards are being maintained. That is what I mean by mutual recognition. That is a move towards greater mutual recognition—where there's a potential risk, right?

Q180 Mr Walker: Of course, I mean that also absolutely recognises the concern about not having a race to the bottom and the importance of the extent of regulations. Also, the enforcement is pretty key. We have seen, I suppose, recently in the UK with the whole horse

meat scandal, that things can be regulated against, but it doesn't necessarily mean that the enforcement always works. That was particularly with issues in the European supply chain. I guess, in some respects, the American Food and Drug Administration probably has a more fearsome reputation than some of its European equivalents.

Dr Siles-Brügge: Sure. Actually, the FDA in a lot of ways has a lot less statutory power. What you have in the US is a much more litigious legal culture, where the onus is on manufacturers to make sure their products are safe if they want to avoid law suits. But of course you have to wait until those law suits emerge, etc., and of course the harm of certain products or chemicals might not be apparent until a number of years have passed, and so on. Although of course there are differences within each member state, in the EU as a whole this is rather different. Just to import the US standard when you do not have a particular legal culture and a particular legal standard of holding companies to account in that respect is potentially problematic, as well.

Q181 Rebecca Harris: Are there any other ways of measuring potential benefits of TTIP, other than looking at the purely economic ones, even if it was a sort of economically neutral for Europe? Are there any other benefits?

Dr Siles-Brügge: I am sure you have heard about the Tufts study, which is in some ways better, in so far as it makes—to my mind—more reasonable assumptions, but again it is, in a way, falling into the trap of making predictions about the future and putting a hard figure on it and perhaps not putting enough health warnings on that.

I think my approach would be to say, “I’m not saying you shouldn’t have modelling, but you should be honest about the modelling and its limitations and you should try and make it as reasonable as possible.” At the same time as you do formal econometric modelling, you should have detailed qualitative studies that look at various issues in depth and are intellectually honest and say, “It’s not definitely going to be this, necessarily. We need to see what the outcome is, but there are such and such risks.”

If I was going to give you an example of a very good study in that respect, at least in my opinion, it is the study commissioned by BIS on the impact of ISDS on the UK, which I think was mentioned in the last session. That, I think, strikes the right balance between putting a figure on things which you can put a figure on—US investment, foreign direct investment in the UK, and vice versa—and then, on the basis of that, making a number of assessments based on the expertise of the authors.

Q182 Rebecca Harris: Just from your study of the subject, what would you point out as plausible non-economic benefits?

Dr Siles-Brügge: What are the plausible non-economic benefits of TTIP? I think this is going to be pushed a lot more. It depends whether—oh, you mean in my opinion or rather what is said in the rhetoric?

Rebecca Harris: Yes.

Dr Siles-Brügge: In so far as, very diffusely, TTIP promotes international co-operation—and for the EU I guess there’s concern that the US is pivoting towards Asia, so this is a way of cementing the relationship. I guess that’s a very diffuse sort of argument. On the whole, I’m not very convinced by the arguments made in favour of TTIP. I think the economic gains are going to be modest, if they do indeed materialise, and it is potentially at the cost of social adjustment, but also a broader move towards deregulation. The extent of that—if it’s going to be one centimetre or five miles along the road—is up for debate, but I’m not very confident.

Q183 Rebecca Harris: If it was down to you, would you just say, “Scrap it, forget it”?

Dr Siles-Brügge: Given the parameters of the negotiation, I don’t think it’s worth pursuing, in my opinion. On the other hand, the one very positive thing I have seen out of TTIP is the mobilisation of people and the increasing scrutiny of trade policy making. I always tell this story when I talk about TTIP, but when I started doing my PhD on EU free trade agreements a few years ago, no one was interested; now, it is actually an area that is debated quite regularly, and that is quite a positive thing. So, in a way, it would be a shame if all that energy on trade issues and holding negotiators to account was dissipated after TTIP was scrapped. But, as the agreement stands, and as it is currently envisaged, I can’t see any major benefits, and there are potential risks, which are worth bearing in mind.

Q184 Ann McKechin: Can we turn to investor-state dispute settlements, which you touched on earlier? You have argued that the clauses on this provide significant advantage to multinational enterprises at the expense of governmental flexibility. Does that advantage lie in the court procedures that are part of the arbitration, in the ability of multinationals to threaten states or in states feeling that they may be threatened by multinationals?

Dr Siles-Brügge: I should say that that is a quote from, I think, Gus Van Harten; those are not my words, but I reproduced them approvingly—I don’t want to be accused of plagiarism! They’re in quotation marks.

I guess your question is about two things. One is whether ISDS proceedings themselves imply a significant cost in terms of lost proceedings. The other question is about regulatory chill—the impact of ISDS on broader rule making. Am I right in interpreting your question in that way?

Ann McKechin: Yes.

Dr Siles-Brügge: Okay. Let me answer that in two parts. I can focus on the UK and draw on the LSE study that BIS has. It suggests that, in the UK’s case, there are considerable economic costs from having ISDS in an investment treaty, or a trade and investment treaty like TTIP, in so far as there is a lot of US FDI in the UK. If you look at the experience of Canada under NAFTA, it was exposed to a number of lawsuits. Of course, the UK is in a position to defend itself quite robustly—it can afford to fight its corner—but the issue is, of course, that there are still significant costs, even if you win. The Commission is proposing a “loser pays” principle, but we will see whether that necessarily gets put in. But there is a cost, even if you win, as it stands.

In terms of regulatory chill, as you will appreciate, the evidence is mixed, in so far as it is hard to measure non-decisions. But, again, the LSE study concludes that it is reasonable to assume that there would be some impact in terms of regulatory chill.

Q185 Ann McKechin: Some people might argue that if you did not have these clauses, you would still have two jurisdictions with very sophisticated legal systems, and multinationals could still bring legal actions against member states or devolved Administrations, as is currently occurring in the case of the Scotch Whisky Association against the Scottish Government in the European Court. Given that we are dealing with two highly sophisticated trading blocs, I wonder whether the difference between using ISDS and domestic courts will be neither here nor there in terms of cost, for example.

Dr Siles-Brügge: Well, here's the thing. The fact that there is a very developed legal system in the UK and the US is, for me, a strong argument not to have ISDS, because there is no evidence to suggest that foreign companies are systematically discriminated against in the UK or the US. There may be instances where it happens, but just because you have instances, that doesn't mean you have to have a mechanism which allows such companies significant advantages vis-à-vis Governments. There is a reason why there are very few investment treaties between OECD countries—it is because they have established legal systems. So the benefits of having this are relatively small.

Q186 Ann McKechin: You have also mentioned that the tribunals lack transparency and the appropriate mechanisms to ensure the impartiality of the arbitrators. What reasons are given for the need for the tribunals to be held in private? To be fair, most arbitration is held in private, as opposed to court hearings, so that is not unusual in itself. What, in the case of the ISDS, do you consider particularly disadvantageous?

Dr Siles-Brügge: You are talking about the respondent being a Government, so there is a public interest reason for having such things in public. We will see what the negotiations yield, but it must be said that the Commission is working towards a more transparent ISDS mechanism. That is one of the only areas where there is some significant improvement in what the Commission is proposing, compared with previous EU member state bilateral investment treaties.

The broader problem is one of the systemic bias of the system. You have a system of arbitration which depends on repeat custom, and who brings repeat custom? It is multinationals. I am not suggesting that every arbitrator is corrupt, but there is a broader conflict of interest in having a system that basically depends on custom from foreign multinationals.

Q187 Mike Crockart: The question I wanted to ask has pretty much been dealt with already in the questions that you have just answered. ISDS clauses are there to protect companies in countries with less developed legal systems. You said that the UK and the US have fairly developed legal systems, and so there does not seem to be a need for this. Is that the case across the whole of the EU?

Dr Siles-Brügge: The fact of the matter is that most EU legal systems are quite developed. The countries in central and eastern Europe which are considered to have less developed legal systems already have investment treaties with the United States. An agreement such as TTIP, if it were to go through, would also have a state-to-state dispute settlement mechanism through which such issues could be brought. But on the whole, investments throughout the EU are well protected. I do not think there is systemic bias against foreign multinationals in any EU country.

Q188 Mike Crockart: So in your opinion, ISDS would not add anything to the situation.

Dr Siles-Brügge: I don't think it would. For the potential costs it brings with it, it does not necessarily add very much.

Q189 Chair: There are one or two issues I would like to pick up. You have criticised the economic modelling. From my recollection of my undergraduate studies of economics, which I must admit were a very long time ago, certain assumptions which would not necessarily exactly reflect human behaviour were built into all economic theory and modelling. Why is it so inappropriate to use such modelling on this occasion, yet in many ways it forms the basis of the study of economics in general?

Dr Siles-Brügge: What I would say is that there has been much critique of the economics discipline in general. I do not know whether you may have heard of the post-crash economics society at Manchester University. I am a lecturer there, so I taught a number of those students. There is a concern generally with the state of economics, where heterodox perspectives are often discounted. My and my co-author's argument about this modelling is in part to say that this is very mainstream modelling, and has all sorts of problems. I have no issue with modelling per se if it is presented in an intellectually honest fashion and makes a number of reasonable assumptions, but this particular type of CGE modelling has been widely criticised, for the reasons we have gone through. I find it odd that this is the pièce de résistance of the Commission and the UK Government's campaign in favour of TTIP.

Chair: I believe that Paul wanted to come in. I have a couple of other questions, but I will take yours next.

Paul Blomfield: I have a general question, so perhaps we should take your questions first.

Q190 Chair: Okay, I will continue with my questions. As a lay person, I would have reasonably expected that, even if you distrusted the economic modelling, there would be some sort of assessment of other EU trade deals to see what benefits or disbenefits accrued from them, in order to make some sort of projection of what could happen in this context. Have you looked at these, and have you made any assessment?

Dr Siles-Brügge: No. As I said earlier, I am not an econometrician.

Chair: No, I am not talking about econometrics here. I am talking about actually studying what has happened as a result of previous trade deals.

Dr Siles-Brügge: As I mentioned earlier, I looked in the paper at previous instances of the use of CGE and other forms of modelling. In the case of NAFTA it was widely oversold. I mentioned the discussion about the Cecchini report in the case of the single market, which is perhaps a closer example to use. Another example I used in the paper was the Doha round. Of course the Doha round is not complete, but there has been an explosion of CGE modelling on the Doha round, and there has been much criticism of wildly exaggerated claims of gains being made there in a number of cases.

I think this fits into a broader picture of modelling being used for particular political purposes and to exaggerate the benefits of liberalisation. Past history suggests that where there are benefits, they are not as substantial as the modelling would claim.

Q191 Chair: I realise that this is not your area of academic expertise, but are you satisfied that some of the arguments for the social consequences are equally theoretical and exaggerated? Some were put at our previous session. Are you totally confident and comfortable, as an academic, that these are rationally based on the best available evidence and a reasonable deduction from that evidence?

Dr Siles-Brügge: I can only speak for myself, and I stand by what I have said to the Committee today. There is a risk in terms of some deregulation, and there is a risk from ISDS. Of course, you will have heard a number of statements that I would call exaggerated, particularly from civil society groups, on the impact of TTIP, but in a way, I am sympathetic to some of those arguments, in so far as they raise important concerns.

My role as an academic is to separate the scaremongering from the true analysis, but there are plenty of organisations out there that do very good, well-argued critical analysis, such as Corporate Europe Observatory. They have done some in-depth studies of whatever texts are leaked, and they are built on a wealth of expertise on trade and European Union issues. Just as there has been some exaggeration in the “No to TTIP” campaign, on the whole, there are some valid concerns, and they should not necessarily be drowned out by wholesale dismissal of perhaps more exaggerated arguments.

Q192 Chair: As politicians, we will inevitably be very aware of the concerns. My difficulty is that some of those concerns are actually portrayed as facts.

Dr Siles-Brügge: Sure. You have to be intellectually honest. Much as you cannot put a figure on the trade agreement, at this stage, we do not even have full access to the documents, so it is very difficult. This is exactly why I would push the Committee, if I may make another recommendation, to push the UK Government to allow for greater transparency. I know that there is currently a transparency initiative going on in TTIP, and it goes beyond what was in previous trade agreements, but the key issue, which is seeing the consolidated text, is still not resolved.

Chair: At this stage, I cannot anticipate the recommendations that we will make, but they may not be totally inconsistent with the observations that you have just made.

Q193 Paul Blomfield: Gabriel, this is a general question. You have been at pains to stress on a number of occasions that you are primarily a political scientist. This arises from part of an answer that you gave to Rebecca earlier. Given the changing players in the world economy, and particularly the rise of China, do you not think that a debate needs to be had on TTIP around the geopolitical benefits or not of consolidating the relationship between the EU and the US?

Dr Siles-Brügge: I think it was Hillary Clinton, former US Secretary of State, who said that TTIP represented an economic NATO—a way of cementing that relationship. I think it can go two ways. Some people see it as a last hurrah by the US and the EU to set global standards before they are eclipsed by China, and this is definitely being negotiated with an eye towards China. But there is a risk of alienating China.

I am a believer in resolving issues of global economic governance in a multilateral setting, because I think that is inherently less conflictual. Much as there is talk of the geopolitical gains, at the same time, I think there are considerable geopolitical risks. I don't think there is a clear-cut answer. Some people would argue that this undermines European integration, so there might be risks in that respect as well.

Q194 Paul Blomfield: Is the geopolitical risk alienating China?

Dr Siles-Brügge: Potentially, but the geopolitical gains may not be substantial. For example, the thing that is always mentioned is that this is a way of stimulating imports of shale gas from the US as a way of reducing energy dependence on Russia, but I do not think that that is necessarily going to be the case, because the infrastructure to import shale gas is not yet in place. A more long-term solution would be to wean Europe off fossil fuels, rather than prolong that dependence.

Generally, the signal that TTIP sends is that the US and the EU are moving away from multilateral economic governance and are, in a way, antagonising China, and that carries all sorts of risks with it.

Q195 Chair: Okay. That concludes our questions. Thank you very much for assisting us with our inquiries. We will be having other sessions and will report in due course. It may be that some of the observations you have made will be incorporated. Thank you very much.

Dr Siles-Brügge: Thank you.

Chair: If we have further questions that we should have asked, but did not, we will be in contact.

Dr Siles-Brügge: Fantastic. Thank you very much.

Examination of Witness

Professor Sir David Edward, KCMG, QC, PC, LLD, Drhc, FRSE, Professor Emeritus, University of Edinburgh, gave evidence.

Q196 Chair: Good morning and welcome. Thank you for agreeing to assist us with our inquiry. I understand you do not profess to be an expert on TTIP, but that you do have a huge body of experience in investor-state disputes.

Professor Sir David Edward: I would not say it was huge, but I have experience.

Q197 Chair: Okay. May I start with a general question and perhaps you can enlighten the Committee? What is the role of the International Centre for Settlement of Investment Disputes in assisting in investor-state disputes under international trade treaties?

Professor Sir David Edward: ICSID was set up under the auspices of the World Bank in the 1960s. As you know, the World Bank is concerned with promoting investment, particularly into the less developed countries. There was perceived to be a problem about investors having complaints about the way they were treated by the host countries. In particular, there were only two methods by which they could get remedies. One was to sue in the courts of the host country, which many considered to be unsatisfactory. The second was by invoking what is called diplomatic protection under international law, by which the country of the investor would seek a remedy under international law against the host country of the investment, and it was felt that it would be a good idea to create a system for conciliation and arbitration of these disputes.

ICSID exists solely to provide the mechanism for conciliation and arbitration. It has certain rules, but they are rules relating to the mechanism of arbitration and conciliation. They do not lay down the basis of the dispute or how the dispute should be resolved. The member states of ICSID, the signatory states, each nominate a panel of arbitrators and a panel of conciliators. If a dispute arises that is submitted to the jurisdiction of ICSID, the parties will seek to nominate their own choice of arbitrators—one on each side, and then they choose a president—or, alternatively, a single arbitrator. In general, the procedure is consensual. Initially, it largely depends on the consent of the parties—the investor and the state—and ICSID only steps in if there is a failure in an agreement. That is the broad outline of what ICSID is about, but it is not the only mechanism for the resolution of investor-state disputes.

Q198 Chair: There seems to be, within the context of the TTIP debate, a great deal of emphasis put on the sort of secretive arbitration procedure that would exist in this particular area in the event of TTIP becoming a treaty and this particular element being incorporated into it. From your perspective, as someone who has been involved in arbitration, do you think that is justified?

Professor Sir David Edward: It is in the nature of arbitration not to be public. It is exceptional for any arbitration to be public. In ICSID arbitration, the fact of the ongoing arbitration is published with just the name of the dispute: such and such against somewhere else. To that extent it is public. The arbitral awards are not public unless the

parties agree to them being made public. I have experience of it both ways, of the parties agreeing for it to be published—there is a huge ICSID website with the text of arbitral awards—and sometimes of the parties, or one party, objecting to it being made public.

Q199 Mike Crockart: I just want to ask you to expand a bit on that experience, the types of thing you have gone through and examples of where they have or have not been made public. What is the general flow of arbitration?

Professor Sir David Edward: I think that the publicity issue depends partly on whether it is the investor in question. I think it would be rare for an investor to object to publication, but it might object if it had lost spectacularly, particularly if there were severe comments—there usually are not—about the evidence given by an officer of the investing corporation. The investor then might not wish it to be made public.

The defendant state might object if, for example, it has made an objection to jurisdiction and it has lost on that issue. It might then wish the decision not to be public in order not to encourage other people to follow the same route against it.

Q200 Mike Crockart: When you say an issue of jurisdiction, what sorts of thing do you mean?

Professor Sir David Edward: Well, does it fall within the jurisdiction of ICSID? Let me explain that. Most bilateral investment treaties contain, at the very beginning, a definition of who is to be considered an investor and what is to be considered an investment. The matter is only within the jurisdiction of an ICSID tribunal if there is an investor, as defined, and an investment, as defined.

There can be a question as to whether the person or company is an investor. For example, in the case of human beings, a human investor cannot sue the state of which he or she is a national. A corporation can be a national of the host state but controlled by foreign nationals. Some investment treaties provide that, in that case, the fact that the corporation is a corporation of the host state does not necessarily mean that there cannot be an ICSID dispute. Questions can arise such as: is this company controlled by people who are not nationals of the host state? Does this constitute an investment? Was that payment made for the purpose of an investment or not? It depends very much on the four corners of the definition clauses, which are either very short or sometimes very detailed. So that would be an issue of jurisdiction.

Q201 Mike Crockart: You have outlined why some investors might not wish it to be public, but what is the general process then followed for the actual arbitration proceedings?

Professor Sir David Edward: The proceedings begin with a request for arbitration. That is, normally speaking, by the investor. In legal theory, the bilateral treaty agreeing to arbitration is considered to be an offer to arbitrate. That offer is accepted when the investor makes a request for arbitration; that it constitutes consent. At that point, the defendant state can raise a preliminary objection to jurisdiction or, in a relatively recent addition to the ICSID Convention, on the grounds that the application is manifestly

without legal merit. So you can start off with an objection. At that stage, the arbitral tribunal would have to consider that.

Assuming that you have a preliminary issue of jurisdiction, the parties will exchange what are called memorials, in which they set out their position in writing. They annex to their memorial factual exhibits—letters and so on—and legal exhibits, which are copies of treaties, copies of previous cases, opinions of lawyers and so on. It is normally a ping-pong with two goes: memorial for one side and then answer, reply and rejoinder. After that, the arbitral tribunal can decide the matter without a hearing, but it will normally have a hearing.

If there is no jurisdictional issue or if it is agreed that jurisdiction should be heard at the same time as the merits, the same procedure applies—written pleadings, two goes each side and then a hearing. An advantage of that process in a multinational and multilingual situation such as TTIP, given that many of the European member states are not English-speaking by nature, is that it is a written procedure. It is extremely difficult to conduct the kind of procedure that we are used to in the courts of the common law countries, in countries which have no tradition of that kind of procedure.

Q202 Mike Crockart: Surely, that then means that it will extend the amount of time it will take.

Professor Sir David Edward: Not necessarily, because, as you probably know, big commercial disputes can take ages in the courts, both in America and in Britain; and the hearings in ICSID tribunals normally take a week. They are just for clarifying points and giving people the last—

Q203 Mike Crockart: From start to finish?

Professor Sir David Edward: Yes, from start to finish.

Q204 Ann McKechin: You have mentioned about how arbitration is normally held in private, Sir David. There has been criticism about the ISDS process and I just wondered, in terms of your experience of disputes facilitated by the ICSID whether or not, for example, if the written pleadings were made public or the transcript of the evidence was made public, do you think that would improve the process? Or, because people have criticised multinational companies for dominating these processes, do you think it would actually eliminate the process?

Professor Sir David Edward: If you are an arbitrator, you have to keep quite a lot of shelf space for this. The pleadings and exhibits are huge. The transcript of the hearing would be absolutely meaningless if you had not looked at the files. So the chances of the public or the media really trawling through all this to find something interesting would be extremely small. But it is of the nature of arbitration that these things are not revealed.

On the other hand, having said that, the awards normally set out in considerable detail what the position of each party is. An award will typically begin by saying who the parties

are, what the procedure has been, what the essence of the dispute is, what position people have taken on each issue, to the extent of 60 to 80 pages, sometimes. That which is essential to a public understanding is almost inevitably there, but it is not there unless the parties agree that it should be public. Put it this way: nothing is impossible if there were to be an agreement in TTIP that the awards of the arbiter or tribunal should be public. It would be perfectly possible to provide that.

Q205 Ann McKechin: And your view that the one advantage of arbitration is that the speed of dealing with the very complex cases, which these inevitably are, is likely to be better than if you tried it through—

Professor Sir David Edward: It's not Jim Clark speed by any standards, but then nor is normal commercial litigation.

Q206 Ann McKechin: I am just wondering whether, compared with normal commercial litigation, it offers any—

Professor Sir David Edward: Let me say that I have just been asked to fix a date for a hearing in December 2016, and the pleadings are just beginning. So the timetable is fixed in advance, but the parties normally have three, four or five months for each stage of it.

Q207 Ann McKechin: Are there any limits on the legal costs and resources available to either side in these types of case?

Professor Sir David Edward: No. I have heard it said that TTIP might have a provision that the state always pays. Well, that is not the case with ICSID arbitrations, unless the parties so agree; but in the ICSID convention and the ICSID rules, it is for the tribunal to determine who shall pay the costs.

Another point to mention is that when ICSID arbitration begins, because the ICSID infrastructure is not heavily financed by the World Bank, each party is normally required to put up a sum of money—an equal sum on either side—for the costs of the procedure. At the end of the day, the tribunal decides who shall bear the cost.

Q208 Ann McKechin: It does appear that a small business will never go through the process given, as you say, the costs and the time and the outlays. This arbitration will only involve very large entities.

Professor Sir David Edward: I think a small business will hesitate about litigating in the United States and possibly also in Europe. Special provisions could be made for cases of small value, but that might be a thing worth putting in.

Q209 Ann McKechin: One other criticism has been that the clauses potentially have a chilling effect on a state's ability to regulate, because they are afraid of the burden of costs

and the risks. With greater levels of litigation coming through this process in recent years, that has begun to—

Professor Sir David Edward: That has been said particularly about some of the issues mainly between US corporations and some of the South American republics and a few countries elsewhere. The view being that, when faced with an economic crisis, the Government concerned have to decide what to do in the general public interest. The argument is that they should not be faced with a multi-billion claim for damage caused by measures to solve a crisis. That is the typical issue. Actually, there are some awards like that. The criticism has some basis or justification, but to some extent, it is because the bilateral investment treaty on which the claim is based does not have a protective clause in that respect.

I did have one case where I was a member of what in the ICSID procedure is called an annulment committee, which is the nearest thing to an appeal. One of the issues was the interpretation of the investment treaty and whether the measures taken by the defendant state were necessary in the public interest. The arbitral tribunal had interpreted the word “necessary” according to normal international law and the annulment committee—this is public—said that it had got it wrong, because the word “necessary” was in the bilateral treaty and should therefore be interpreted in the context of the treaty. Therefore, the annulment committee quashed the award in favour of the American corporation against Argentina.

It is perfectly true, however, that some of the South American republics have given notice of withdrawal from the ICSID system, because they feel that they are being put upon. The contrary argument—I am not making a political point—would be that they caused the mess in the first place.

Q210 Chair: Can I just intervene at this point? I would welcome your opinion on the idea that when a corporation does invest, you can do without the ICSID procedure as they should just insure themselves in the market for any eventualities that take place. Have you any views on that?

Professor Sir David Edward: They could do, yes; but they can do so at the moment. Given the extraordinary variations that could arise, it would be very difficult to write an insurance policy that would cover them at a tolerable premium.

Q211 Chair: Have you any evidence of this taking place?

Professor Sir David Edward: No. That is just off the top of my head.

Q212 Mr Bain: Some of the NGOs have argued that ISDS clauses would require a state to pay costs even if the company was to lose the case. From what you said in answer to the previous question, I take it that in your experience that is not the case.

Professor Sir David Edward: Well, it is certainly not the case in ICSID. ICSID is quite explicit that it is for the tribunal to decide who pays. Of course, it is always possible

that the treaty on which the arbitration is based provides that the defendant state will always pay the costs. So you always begin with what the interstate treaty provides. That is what gives you the legal basis. The interstate treaty can provide whatever the states decide, so they vary very considerably, these investment treaties. Additionally, the parties to the arbitration can make an agreement. For example, assuming that there is a great issue of principle that the state wishes to have resolved and agrees to go to arbitration with corporation X to get an answer that will apply in all future cases, they might agree that the state should pay because it is a test case. That, again, is purely off the top of my head. It may be true that the current drafts of TTIP provide this, but I do not have any evidence for that.

Q213 Mr Bain: How have some of the previous treaties that you have seen managed to avoid vexatious or frivolous claims being brought by commercial interests against states?

Professor Sir David Edward: There was no express provision in ICSID until relatively recently. Now, as I said before, the defendant state can ask for the request for arbitration to be dismissed straight away on the grounds that it is manifestly without legal merit. There have been two cases, I understand, where that has happened, so there is provision under the ICSID system. There would not necessarily be that provision if the parties chose to go to a different form of arbitration. They are not required to come to ICSID unless the bilateral treaty provides that it will be done under ICSID procedure.

Q214 Paul Blomfield: Sir David, you may have heard the previous witness—

Professor Sir David Edward: A little, yes, I did.

Paul Blomfield: You may have heard him make the point that ISDS provisions are important in relationships where there is no symmetry between legal systems—indeed, a number of witnesses in evidence that we have received made that point—but that really is not the case between the UK and the EU, where there are properly developed legal systems. Why, then, would ISDS provisions be necessary in a trade agreement between the EU and the US? Or maybe you agree that they would not be?

Professor Sir David Edward: I don't know what the provision will be, but for the moment I will assume that it would be a claim by an American investor against an EU member state. You have 20-plus EU member states, of which only two belong to the common-law system. They are the United Kingdom and Ireland. All the others have different legal systems. Some of them are perceived as less reliable than others, so you can imagine that perhaps there would be a reticence among US investors to sue in some of those countries.

From my experience as a judge in Luxembourg, the other but so far unspoken of problem is language, because the witnesses of the defendant state may not be able to give evidence in English, which would be the normal one between the UK and the US. Let's suppose that all the host state documents are in Estonian or Romanian. A UK/US common-law-style investigation would be extremely difficult because you would have to have interpreters, and I can tell you that conducting legal process through interpreters is extremely difficult.

Q215 Paul Blomfield: I can understand that that may well be difficult, but the problem has been successfully navigated in the European Court, hasn't it?

Professor Sir David Edward: At colossal cost.

Q216 Paul Blomfield: So presumably that experience could translate—

Professor Sir David Edward: Well, into arbitration. You are normally operating only in two languages. In the example that I was talking about, of an American corporation and Argentina, we had English and Spanish interpreters present and all the pleadings were submitted in both languages. You only have to have two languages going, but normal court procedures in the member states do not normally provide for interpreting.

Paul Blomfield: But I—

Professor Sir David Edward: It is perfectly true that the UK and the US have comparable legal systems, but it is a wholly false comparison to say that the UK and the US have comparable legal systems and therefore the EU and the US have comparable legal systems, because they don't, and moreover the EU has, what, 20-plus languages? Written procedure is far more efficient where there is a language problem.

Q217 Paul Blomfield: I think we can understand the language problem, but I guess that it is not beyond the wit of an agreement to resolve it. I think the argument was not that the legal systems are comparable, but that the legal systems in the EU are developed and sophisticated legal systems and therefore there is an opportunity, through those systems, for disputes to be resolved without the need for ISDS provisions.

Professor Sir David Edward: That is true, but remember that in middle and Eastern Europe the legal systems have been coming out of the dark ages of the Communist system. They have been doing so at a fair speed, but there is still a problem about the legal system in some of these countries. I am not going to be specific, but there is a problem, and they are most likely to be the host state for an investment.

Chair: William, you wanted to ask a supplementary question.

Q218 Mr Bain: Yes, thank you. Ultimately, if there is an agreement, it will be between the United States and the European Union, and we know that the ultimate legal authority for determining disputes involving issues of EU law within the European Union is the European Court of Justice. One issue that we have put to witnesses in other sessions is that by creating a separate process you potentially undermine the rule of EU law, because you divert some issues that ultimately would properly be resolved by the ECJ into a special process that may not be binding on all the EU member states in any case. Do you see some serious theoretical problems with having ISDS clauses, given the very special nature of the European Union law that has been created by the treaties?

Professor Sir David Edward: The answer is yes. It is possibly overcome-able by providing in the treaty that an arbitration tribunal under TTIP ISDS can have the power to make a reference to the Court of Justice for a ruling. That kind of ruling is not unknown in the United States. The curious thing is that it works the other way there: the United States federal courts can ask state courts for a ruling on the state law that is applicable, but not the other way around. Still, the procedure is known. The difficulty is that it could add up to two years to the procedure. Nevertheless, there is always the possibility that a decision of an arbitral tribunal could, in some fashion, on a technical issue such as state aid, public procurement or something like that, be inconsistent with EU law.

I do not know what protection the Commission is seeking for the coherence of EU law. Of course, if you are talking about the United States, again, if you have had an investment in one of the states, the law of that state might not be the same as federal law.

Chair: Paul, I think you wanted to come back in on that.

Q219 Paul Blomfield: That was helpful, but I want to push a little further on the existing position, drawing on your experience as a European Court judge. What provisions exist under EU law to protect US companies that wish to invest in the EU?

Professor Sir David Edward: There are international provisions about fair treatment, but normally, if a US investor wishes to invest in an EU member state, there will be a bilateral treaty between the US and that state. So it already exists, but it is piecemeal, so to speak. One of the concerns of the Commission has been to bring this very variegated system under a single umbrella, because, under the Lisbon Treaty, the Commission has for the first time been given competence in relation to foreign direct investment, so they are wanting to bring it clearly within the common commercial policy.

Q220 Paul Blomfield: But as you said in your answer to William, that could be done through the European Court—it need not necessarily be done through an ISDS arrangement.

Professor Sir David Edward: No, because currently arbitration tribunals are not able to get a ruling from the European Court on EU law.

Q221 Paul Blomfield: But that might be a provision of TTIP.

Professor Sir David Edward: TTIP could provide for that. I am not entirely sure, but it probably would not require a treaty amendment to give the EU Court jurisdiction in that issue, as long as it was provided for in the TTIP agreement.

Q222 Paul Blomfield: Thank you. You said earlier that most of the potential disputes would be US corporations against EU countries, but—

Professor Sir David Edward: No, I said ‘if’ it’s in that direction. If it is a US corporation investing in Europe, the probability is that the investment will be into the

middle European and Eastern European countries rather than, for example, the UK, but not necessarily.

Q223 Paul Blomfield: Although there has been lots of experience of those sorts of case.

Professor Sir David Edward: Sure.

Q224 Paul Blomfield: I just wonder what the protections are under existing US law to protect European companies wishing to make an investment.

Professor Sir David Edward: Well, they could sue in the US court or they could go to arbitration under their bilateral treaty the other way around. The experience of foreign corporations in some of the US courts is said to be unhappy.

Q225 Paul Blomfield: And has that been at state or federal level?

Professor Sir David Edward: Both. I have very limited experience of this, but I remember one case involving a South American country where the issue was whether the US courts had jurisdiction on an issue that, on the face of it, only concerned nationals of that South American country. The court in New York asserted jurisdiction on the plain ground that it was well known that the courts of the South American country were corrupt and unreliable.

If I have given the impression that investment is always likely to be that way, that is not so. TTIP is worthless for the EU unless it promotes the possibility of investment going west rather than east. Under the existing arrangement, the bilateral treaty between whichever country it was and the United States would provide for arbitration anyhow.

Paul Blomfield: Thank you very much.

Q226 Mr Walker: You mentioned the existing bilateral treaties with various countries and the United States. Do you know what proportion of EU members have bilateral treaties with the United States?

Professor Sir David Edward: I was told that it was all of them.

Q227 Mr Walker: That is interesting. Within existing investor-state dispute mechanisms, do you feel there is any disparity of power between the state and companies?

Professor Sir David Edward: Put it this way, if it is a large corporation with a pocket deep enough to employ one of the highly specialised US law firms, they could be at an advantage compared to a state with limited resources and a governmental system that cannot produce an efficient defence.

I have had experience of a South American country where the equivalent of the Attorney-General changed in the middle of a particular stage of procedure. They claimed

to have to start again because he or she had to be briefed and give instructions before any document could be launched. Most of the states tend to employ these specialist law firms anyway.

Q228 Mr Walker: If we are talking about states when we are looking at TTIP, in this case the EU and the US, they are both resourced sufficiently enough that they can afford pretty good lawyers themselves.

Professor Sir David Edward: One would expect so.

Q229 Mr Walker: But do you think there are any procedural safeguards, or is there any particular approach that could be taken to dispute resolution, to make sure that the companies are not given a disparate position versus state, and vice versa?

Professor Sir David Edward: My experience, although it is not vast, is that the arbitral tribunals attempt to be utterly fair and give both sides complete opportunity to state their case, even—some people would say—to a rather extravagant extent. It is not, in my experience, common for arbitrators to say, “We’ve heard enough about that. We don’t want to hear any more.” No, you must let them put forward every point they wish to put forward. Normally, the courts with which I’m used, except the European Court—the British courts—would be much more ready to cut them short.

Q230 Mr Walker: That, potentially, partly explains the length of procedures at the arbitration process.

Professor Sir David Edward: Yes, but remember that that is also true of domestic arbitration. Domestic arbitration can be extremely slow.

Q231 Mr Walker: In a bilateral agreement such as TTIP, is it clear who is actually the state in this case? You mentioned, obviously, that various EU states will have bilateral treaties with the US and under the current system they would be the state engaged. If TTIP were to come into force, is it your understanding that the role of the state, and therefore the potential liability to costs, would sit with the member state or the EU as a whole?

Professor Sir David Edward: Nobody knows this in detail, but my understanding is that the purpose of TTIP, vis-à-vis the United States, is to replace all bilateral treaties between member states and the United States by a single treaty, which ensures the coherence of the EU position. At the moment, the EU—the institutions of the EU—does not have a proper locus standi; there is no standing before an arbitral tribunal. Sometimes the arbitral tribunal allows the Commission to make submissions. The idea, I think, is to have a coherent system and that would supersede all the bilateral treaties of the member states with the United States.

Mr Walker: Out of interest—I appreciate you may not know the answer to this—do you know when the UK’s bilateral treaty with the US was last looked at or updated?

Professor Sir David Edward: No idea.

Q232 Mr Walker: Potentially, it would be worth us having a look at that, because obviously its quality, or otherwise, would have a bearing on whether this is in our interests.

Professor Sir David Edward: Go to www.worldbank.icsid.org and you will find a link to all the bilateral treaties.²

Mr Walker: Thank you.

Chair: Any further questions? No. That concludes our questions. Thank you once again for helping us with our inquiry. I should state, as I do to most panellists, that if we feel there is a question we should have asked you, we will write and will be grateful for a response.

Professor Sir David Edward: Please feel free.

Chair: Similarly, if there is anything that you feel that you should add to any comments that you have made, we will be happy to receive it.

Professor Sir David Edward: I hope I have been able to be helpful. There is a limit to experience.

Chair: No, I think you have been very helpful indeed.

² Note by witness: <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/Bilateral-Investment-Treaties-Database.aspx>