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ISDS: which way will the scales TTIP?

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On 29 September 2014, the European Commission (EC) and the US initiated the seventh round of negotiations for the conclusion of the Transatlantic Trade and Investment Partnership (the **TTIP**).¹⁾ The negotiations began in July 2013 after the EC received its mandate from the EU Member States. According to the EC, the TTIP aims to remove the existent trade barriers between the EU and the US in a wide range of economic sectors as well as to look at possibilities of converging regulations, opening market for services, public procurement and investment.²⁾

One of the most controversial questions in relation to the TTIP has been whether to include an Investor-State Dispute Settlement (**ISDS**) provision. Most EU Member States and the US are in favour of including this type of dispute resolution mechanism as they consider that ISDS will encourage investment flows.³⁾

For instance, the British Government believes that US state-based law is “*not quite as consistent*” as federal law and that ISDS is “*preferable*” in order to reinforce investor confidence. The British House of Lords in particular advocated that an ISDS provision with better defined substantive protections would help protect European corporations as well as American ones.⁴⁾

The Czech Government, which already has a bilateral investment treaty with the US, has adopted a similar line. It has argued that including ISDS in TTIP would be a means of improving the current system and could subsequently be used as a model for future trade and investment agreements.⁵⁾

However, not everyone shares these views. The German Government fears that ISDS might reduce the EC’s and its own policy space. Its main concerns are focused on the possibility of Member States facing investment arbitration claims when circumstances require them to adopt emergency measures such as bailout provisions. Germany also opines that, in any event, domestic legal systems in Europe currently provide sufficient protection for US investors.⁶⁾

Furthermore, certain NGOs and lobby groups have expressed concerns about providing ISDS in the TTIP as a method of resolving potential disputes. For instance, the NGO Friends of the Earth fears that, by giving access to investor-state arbitration international arbitration, the TTIP will have the effect of lowering standards of protection provided in national legislation. They consider that the current system has enabled multi-national corporations to limit States’ freedom to legislate.⁷⁾

As a result of such concerns, the EC opened a public consultation on the matter in March 2014 which ended on 13 July 2014. Over 149,399 individuals and organisations participated in the consultation, and the EC expects to publish its analysis in November this year.⁸⁾

Of particular interest is a response submitted by various professors from universities such as Sciences Po Paris, the University of Kent, the School of Oriental and African Studies, and Osgoode Hall Law School. Their contribution strongly argues against the inclusion of ISDS and outlines the EC's shortcomings in suggesting novel standards of protections that could be provided in the TTIP.⁹⁾

The authors are of the view that ISDS was developed as a means of protecting investors in developing countries whose legal systems were allegedly not advanced or impartial enough to guarantee the safety of foreign investments. In this regard, the authors contend that *"it is difficult to argue realistically that investors have cause to worry about domestic legal systems on either side of the Atlantic."*¹⁰⁾

The authors further argue that ISDS provides exclusive advantages for large corporations to sue States before a special adjudicative forum. According to them, these advantages include the prohibitive costs of investment arbitration, the role of appointing bodies accountable directly to investors or major capital exporting States, and the bargaining power that ISDS provides investors when investing in host States. In their own words:

*"The system involves a shift in sovereign priorities toward the interests of foreign owners of major assets and away from those of other actors whose direct representation and participation is limited to democratic processes and judicial institutions."*¹¹⁾

The authors also assert that the absence of binding standards of ethical behaviour and conflict of interest *"fundamentally"* jeopardises the impartiality and independence of investor-state arbitration.¹²⁾

Finally, the contributors consider that, should ISDS be incorporated in the TTIP, it will be necessary to better define and specify the scope of the investment protection standards to be provided therein. For example, the authors commented on how corporate nationality should be defined in the TTIP in order to prevent treaty shopping through *"the manipulation of corporate chains of nationality."*¹³⁾ They suggest that requiring the investor to have *"substantial business activities"* in the home country would be a welcome step to that effect.¹⁴⁾

When the EC's analysis of the public consultation is published in November, a better idea can be formed as to the development of negotiations and the approach that the EC may adopt. Negotiations are not yet over and there are many other contentious issues with respect to the TTIP other than ISDS.

The above shows that ISDS is increasingly gaining public attention in the wider public domain (this was especially the case during the 2014 European elections) and that investment arbitration is attracting condemnation from many different sources. It remains to be seen whether, should the TTIP reach the ratification stage, it will come with an ISDS provision.


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