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9. Investor State Dispute Settlement – ISDS

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Why ISDS now?



- 2013 Legis Workshop: session on remedies available to companies in case of abrupt changes of legislation
- CEFIC overview table: soon to be finalised
- Investor State Dispute Settlement (ISDS): forefront of EU-US Transatlantic Trade and Investment Partnership (TTIP) discussions
- 27 March – 21 June: Commission consultation on ISDS in TTIP context

International Investment Law



- **International investment treaties:**
 - Agreements between states, giving rights to companies
 - Bilateral Investment Treaties (BITs) / Free Trade Agreements (FTAs) with investment chapters

- **Substantive protection:**
 - Lawful expropriation
 - Compensation (*'Hull formula'*: compensation has to be prompt, adequate and effective - fair market value)
 - Public purpose
 - Non-discrimination
 - Due process

International Investment Law



- **Substantive protection (*continued*):**

- Fair and equitable treatment
 - including respect for 'legitimate expectations', transparency & stability, good faith, due process (no denial of justice)

- Full protection and security
 - Protection against physical violence and harassment
 - Legal protection

- Non-discrimination:
 - National treatment
 - Most-favoured-nation (MFN) treatment

- Free transfer of funds

International Investment Law



Balancing public interest and private rights:

- Limiting scope of protection
 - excluding certain sectors (military, finance,...)

- Restricting application of certain protection standards
 - Full protection and security: only physical violence
 - Most-favoured-nation treatment: not applicable to dispute settlement

- New: insertion of general exceptions (cfr GATT Art. XX)
 - Cultural exceptions
 - Exceptions for health and environmental protection reasons

International Investment Law



- **Who/ what is protected? Foreign investors & investments**

- Nationality of the investor?
 - Local incorporation requirement
 - Including indirect control (shareholders)
- Minimum threshold to qualify as an investment: non-cumulative *Salini* criteria
 - Duration
 - Regularity of profit and return
 - Assumption of risk
 - Substantial commitment
 - Significance for the host state's development

International Investment Law



Investor-state dispute settlement:

- Private standing
- State consent given in advance by treaty (waiver of immunity)
- No exhaustion of local remedies required

- One case = two sets of rules:
 - Substantive rules: BIT / FTA with investment chapter
 - Procedural rules: International Centre for the Settlement of Investment Disputes (ICSID), UNCITRAL, Permanent Court of Arbitration (PCA)

International Investment Law



Investor-state dispute settlement – procedure:

- Consultation phase
- Arbitration
 - Request for arbitration
 - Constitution of *ad hoc* tribunal (party appointment)
 - Jurisdiction / merits (incl. written rounds, oral pleadings, provisional measures, experts, witnesses, ...)
 - Final and binding award (incl. damages) – no appeal
- Possibly annulment (only ICSID): limited grounds
- Voluntary compliance or forced enforcement:
 - Domestic law of state where assets are located
 - ICSID Convention / New York Convention



- **Lisbon Treaty: expansion to foreign direct investment**
- **Bilateral investment treaties (BITs) between EU Member States remain applicable**
 - ECJ: *Commission v Sweden/ Austria/ Finland*
- **Transition Regulation (12 Dec 2012)**
- **Extra-EU BIT v intra-EU BIT**
- **TTIP consultation**

NGOs criticisms



Issue Brief
March 2014

No fracking way: how the EU-US trade agreement risks expanding fracking



A major trade deal currently being negotiated between the European Union (EU) and the United States (US) threatens the power of governments to protect communities, citizens and the environment from risky new technologies such as fracking.

The Transatlantic Trade and Investment Partnership (TTIP) covers a huge range of issues and sectors, including food safety, genetically modified products, toxic chemicals, highly polluting fuels and data protection. The talks threaten to weaken or roll-back democratically agreed safeguards put in place to protect the environment and citizens – for the sake of corporate profits.

The talks are likely to favour safeguards for corporate investments over safeguards for citizens and the environment, allowing companies to seek compensation when government decisions affect their profits. This could benefit companies seeking to exploit natural resources through hazardous technologies whose activities may be affected by environmental or health regulations.

Fracking – or high-volume hydraulic fracturing – is used to extract hard-to-access unconventional fossil fuels, such as shale gas and oil, tight gas and coal bed methane. Fracking will increase available gas supplies, locking us into fossil fuel dependency for several decades.

There is growing evidence of huge health and environmental risks and impacts from fracking and this is leading to widespread public opposition at the community level, both in the EU and the US.

This brief analyses how the TTIP could limit governments' ability to regulate the development and expansion of fracking. It argues that the TTIP could dangerously thwart government efforts to address climate change and to protect citizens; could expand fracking by removing the ability of governments to control natural gas exports; and could mean that states would be forced to pay millions in compensation to corporations for profits lost to regulation. It calls on the EU and the US to exclude investor-state dispute settlement rights from the agreement and from other trade deals in the pipeline – including the EU-Canada Comprehensive Economic and Trade Agreement (CETA).¹

Main NGOs criticisms



- ❖ **The system is a toxic system, non legitimate and = an investor privilege: BUT the majority of cases end up in favour of the countries and not the investors**
- ❖ **The procedure is biased as out of the Court system: BUT there are arbitration systems well recognised by international agreements and heavily regulated**
- ❖ **There is inconsistency of awards as the same provision may be interpreted differently and it is aggravated by the absence of appeals and international Court applicable BUT we are not yet there, there is international Court**
- ❖ **There is a lack of diversity (it is basically a close shop): small number of arbitrators, restricted circle of experts BUT fierce competition between them + they are submitted to ethical codes**

Main NGOs criticisms



- ❖ **Cost issue for society and the risk of investment is shifted to citizen:** compensation to be paid by the states are de facto paid with taxes revenues from citizen **BUT** in many instances these provisions are necessary for investors to confidently invest huge sums in a given country
- ❖ **ISDS has a whole have a chilling effect on state regulation powers:** countries may be afraid to pay damages **BUT** if you apply law normally and do not make abrupt changes, once you give the confidence to investors to make huge investments, ISDS will not apply
- ❖ **Lack of transparency as many details of arbitration are kept secret:** **BUT** information are available on many cases (via eg OECD) even if the making off this cases is behind close doors

Main NGOs criticisms



- ❖ **It seems unbelievable that sovereign governments would handover their policy powers to investments tribunals, allowing companies to challenge democratic agreed decisions taken to protect communities and the environment BUT the powers of the Commission to include such clauses was added in the TFEU by the Lisbon Treaty in December 2009 and reflected in the Regulation adopted in December 2012 and backed up by both the EP and Council**

Main NGOs criticisms



- ❖ **There is a need to oppose to the inclusion of dangerous ISDS in TTIP BUT the Commission has the mandate to include such chapter in any Bilateral Agreements it negotiate. This is not new and similar clauses are included in many agreements concluded by Member States**

This is not new, the first bilateral investment agreements were signed in 1959. Over the last two decades there has been an explosion of these agreements

ISDS in TTIP



- **The EU authorities have the power to include ISDS in BITs**
- **If in TTIP it will clarify matters as the national BITs with the USA (eg Germany) will not apply anymore**
- **It is an excellent opportunity to develop an improved model for ISDS together with US authorities which could be replicable in all BITs to be signed by the EU**
- **Therefore, it is important to support the Commission**

Cefic activities



- **Work with BusinessEurope: Task Force, develop comments, organise events**
- **Lead by PC Legislation and Institutional Affairs + Issue Team Legal Aspects of Energy & Climate Change + Cefic Trade group for TTIP in general**
- **Will consult our members to send Cefic response to the Commission Consultation in due time – encourage companies/individuals? to respond as well (communication plan to be developed)**
- **Participate to major events eg at the EP**
- **Integrate this into the overall TTIP advocacy/strategy**

**Thank you for your
attention**



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