



Ecologic Institute

Berlin
Brussels
Vienna
Washington DC



Environmental (and Social) Standards, and the Risks of Investor-State Dispute Settlement (ISDS) in TTIP

Christiane Gerstetter
Ecologic Institute



Ecologic Institute

Berlin
Brussels
Vienna
Washington DC



Basis: Two studies

Legal Implications of TTIP for the Acquis Communautaire in ENVI Relevant Sectors (October 2013, commissioned by the EP, ENVI Committee), <http://www.ecologic.eu/10067>

Investor-state Dispute Settlement under TTIP - a Risk for Environmental Regulation? (December 2013, commissioned by Heinrich-Boell-Foundation), <http://www.ecologic.eu/de/10400>

ISDS in TTIP: Balancing pros and cons

Structure:

- 1) Very short background on ISDS
- 2) The risks
- 3) Arguments in favour of ISDS in TTIP and their merits
- 4) Some more food for thought
- 5) Conclusion





ISDS is...

.... an arbitration procedure whereby a foreign investor can sue its host state for an alleged breach of an international investment agreement.

Different from and additional to:

- State-to-state dispute settlement (e.g. WTO)
- Lawsuit by foreign investor before national court of host state



Some ongoing environment-related cases

Vattenfall vs. Germany (Energy Charter Treaty/ICSID, 2012):

Energy company Vattenfall has nuclear power plants in Germany; these will need to be closed down as a result of German nuclear phase-out. Vattenfall brought ICSID claims under Energy Charter Treaty, allegedly claiming 3.7 billion Euro in compensation (documents not public)

Lone Pine Resources vs. Canada (NAFTA/UNCITRAL, 2012)

Mining company Lone Pine Resources sues Canada over revocation of permits for fracking in context of fracking moratorium, claiming violation of fair and equitable treatment requirement and prohibition of expropriation

Various claims brought against **Spain** over changes in **support scheme for renewable energy**



ISDS: Some background

- ▶ Usually contained in the about 3000 investment agreements (source: OECD), also contained in free trade agreements containing investment chapter
- ▶ Significant increase in numbers of ISDS cases over years
- ▶ 40% of all ca. 500 known cases until 2012 decided in favour of state, 30% decided in favour of investor, remainder amicably settled (source: UNCTAD)
- ▶ Unusual in international law, normally only states can sue each other (only known in human rights law)



Specific procedural features of ISDS

- ▶ Proceedings normally not public (only when parties agree or clause to this end in investment agreement under dispute)
- ▶ No full appellate review, only limited grounds for revision
- ▶ Investors normally claim monetary damage, because these can be enforced (different from national courts)
- ▶ Damages awarded can be very substantial; highest known award in ICSID proceedings US\$ 1.77 billion in proceedings against Ecuador 2012
- ▶ Small community of arbitrators; arbitrators in one case are often legal counsel in other cases – potential conflict of interest
- ▶ Fees not necessarily paid by losing party



Case law so far and national (environmental) regulation and measures

- ▶ No consistent or uniform case law
- ▶ Particularly relevant from the viewpoint of regulation: standard clauses on „fair and equitable treatment“, indirect expropriation and so called umbrella clause; all contained in EU negotiating mandate
- ▶ No uniform interpretation of the vaguely worded clauses
- ▶ Incalculable risks for states; potential of regulatory chill through threats of ISDS proceedings
- ▶ Significant investment of EU investors in US and vice versa = significant risks
- ▶ Some states (e.g. Australia) have announced they will not include ISDS provision in their agreements any more with a view to the risks



Pro arguments and their merits (I)

„ISDS needed to foster investment; lack of legal certainty and adequate legal protection of investors without it“

„National courts are biased against foreign investors“

Not very convincing between EU and US, because

- ▶ US so far has concluded only bilateral investment treaties with the „new“ (Eastern European) Member States (mid-90ies) – but still significant mutual investment
- ▶ Rule of law systems within the EU and the US
- ▶ Study by LSE (2012): ISDS in TTIP is not going to increase mutual investment
- ▶ Actors like the German government consider ISDS unnecessary in TTIP
- ▶ Bias against foreign investors – evidence? Likely underestimating judicial ethos



Pro arguments and their merits (II)

„US and EU courts do not apply international agreements, therefore investors cannot enforce their rights before national courts“

- ▶ True for both CJEU and US courts
- ▶ But: international agreements normally only create rights and obligations for states (exception: human rights law)
- ▶ But: national rules and principles offer protection e.g. against expropriation, arbitrary behaviour, protect legitimate expectations
- ▶ Foreign investor that has recourse to national courts is not left without adequate protection



Pro arguments and their merits (III)

„ISDS in TTIP is needed as blueprint for negotiations with other countries, notably China; it will be very offensive for other countries if EU does not negotiate ISDS with US, but insists on doing that with these other countries“

- ▶ Not all trade agreements look alike
- ▶ It is not unknown in international law/politics for states to treat different states differently (e.g. visa regulations, weapon exports)
- ▶ Take risks for EU regulation and public budgets in order not to offend China?



Some more food for thought

- ▶ ISDS gives foreign investors MORE rights than domestic ones
- ▶ Evidence in literature that states use litigation strategically and are mindful of the political issues at stake in the other country and the larger implications of a certain judicial decision – same is not true for private actors
- ▶ In a permanent international court, all states potentially affected have a say in appointing judges (e.g. WTO); in arbitration only the state affected; still what is found to be law in one case may become relevant in another (even though no rule on stare decisis/binding precedent)



Commission proposals on ISDS in TTIP

- ▶ Hearings and documents public
- ▶ Code of Conduct, requirements for qualification of arbitrators
- ▶ Dismissal of frivolous claims, losing party bearing costs
- ▶ Enhancing control of parties over interpretation
- ▶ Introduction of appellate mechanism



IF ISDS in TTIP (not recommended), then....

- ▶ All of what the Commission suggests are good ideas in principle

In addition:

- ▶ Formulate the clauses on investment protection narrowly and precisely; avoid vague legal norms without definition (e.g. indirect expropriation) – models exist
- ▶ In addition: explicit recognition of right to regulate etc.
- ▶ Think more about exhaustion of domestic remedies



Ecologic Institute

Berlin
Brussels
Vienna
Washington DC



Thank you for your attention

Contact:

christiane.gerstetter@ecologic.eu

Ecologic Institute, Pfalzburger Str. 43-44, D-10717 Berlin

Tel. +49 (30) 86880-0, Fax +49 (30) 86880-100

christiane.gerstetter@ecologic.eu

www.ecologic.eu