

Ecologic Institute
An International Think Tank for Environment and Development

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► LEGAL IMPLICATIONS OF THE EU-US TRADE AND INVESTMENT PARTNERSHIP (TTIP) FOR THE ACQUIS COMMUNAUTAIRE AND THE ENVI RELEVANT SECTORS

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Areas of TTIP and scope of study

- ▶ market access
- ▶ regulatory issues
- ▶ shared global trade challenges

study focuses on (October 2013)

- ▶ market access: ISDS
- ▶ regulatory issues with ENVI link

Legal effect of TIA in the EU legal order

- ▶ TIA have no direct effect on EU legal order, i.e. claims cannot be brought before nation courts or ECJ based on the TIA (according to ECJ jurisprudence, except where TIA regulation was directly the source for EU law)
- ▶ Similar situation in the US (no legal effect)
- ▶ ISDS is bridging the gap, a mechanism largely unknown in other areas of international law
- ▶ But: both EU and US have a strong rule of law (and already high FDI flows)

Investor-state dispute settlement (ISDS)

- ▶ protect investors against
 - direct and indirect expropriation
 - unreasonable, arbitrary or discriminatory clauses
- ▶ ensure that investors are treated in a fair and equitable way (FET)
- ▶ umbrella clause (converts a contract claim, i.e. a claim based on a specific contract between two parties under civil law, into a treaty claim, i.e. a claim under public international law)
- ▶ allows private investors to sue a host state for the alleged violation
- ▶ possibly limiting EU and US ability to implement new environmental regulation

Arguments in favor and against ISDS

- ▶ investors would not depend on home state support in inter-state dispute resolution
- ▶ ISDS may be less politically damaging than inter-state dispute resolution
- ▶ ISDS can de facto put ,foreign‘ companies in a better legal position than ,local‘ companies
- ▶ companies may have complex models of legal registration (highly dynamic)
- ▶ ISDS decisions are case-specific

ISDS consultation based on CEFTA

- ▶ favoring precise terms and clear language
 - ▶ *transparency of proceedings*
 - ▶ *favor more narrow definition of investment*
 - ▶ *limitations to most-favoured-nation treatment*
 - ▶ *narrow interpretation of indirect expropriation*
 - ▶ *avoid multiple claims and domestic courts*
 - ▶ *avoid frivolous claims*
 - ▶ *ensure conduct of arbitrators*
 - ▶ *costs borne by losing party*
 - ▶ *introduce appellate mechanism*

ISDS in TTIP?

- ▶ consultation still open (closes on July 6 2014)
- ▶ EC promises serious overhaul of ISDS approach, addressing some of the key criticisms
- ▶ number of NGOs in the EU and US oppose ISDS
- ▶ currently no negotiation on ISDS as awaiting outcome of consultation

Regulatory harmonisation

- ▶ Genetically Modified Organisms (GMO)
- ▶ Regulation of toxic substances
- ▶ Poultry pathogen reduction treatments (PRT)
- ▶ Aviation GHG emissions

selection based on literature, past and ongoing WTO litigation, NGO statements

Genetically Modified Organisms (GMO)

- ▶ In the US, GMOs are seen as substantially equivalent to other food products and as generally safe, mere notification to USDA of new crops, voluntary guidelines
- ▶ In the EU, precautionary principle
- ▶ very little common ground, no compromise expected

Regulation of toxic substances

- ▶ US: Toxic Substances Control Act (TSCA)
 - only for chemicals on the market after 1976
 - less comprehensive data than REACH
 - EPA has limited power only
 - TSCA data mostly confidential
 - proposal for TSCA reform, pale outlook
- ▶ little to no expected convergence
- ▶ EC position paper: neither full harmonisation nor mutual recognition feasible

Regulation of toxic substances

- ▶ possible cooperation
 - prioritising chemicals for assessment and assessment methodologies
 - classification and labelling of chemicals
 - new and emerging issues
 - ▶ nanomaterials, endocrine disruptors, mixtures
 - information sharing and protection of confidential business information (CBI)
 - ▶ avoid duplication of tests involving animals

Pathogen reduction treatments (PRT)

- ▶ sanitary and phytosanitary issues (SPS)
- ▶ builds on WTO SPS Agreement
- ▶ but: chlorinated poultry
 - difference in risk assessment EU/US
 - opposition to PRTs: combination of EU food safety standards, consumer confidence and EU poultry industry competitiveness
 - no compromise expected
- ▶ EC position: go for SPS-plus

Pathogen reduction treatments (PRT)

- ▶ aim for same level of ambition for both veterinary and phytosanitary elements
- ▶ possible cooperation
 - regulatory, confidence building and technical
 - eliminate „unnecessary“ barriers
 - avoid discrimination
 - improve transparency
- ▶ maintain right to regulate differently, based on level of protection deemed appropriate

Aviation GHG emissions

- ▶ after 2016 ICAO GA, new measures by EC to go into effect from 2017
- ▶ US: EPA is taking action on stationary GHG sources, power plants for now. Next presidency could see extension to mobile sources including aviation
- ▶ but: text with climate component will make ratification in the US very unlikely, topic unlikely to be specified in TTIP

Same Same but different

- ▶ differences in regulatory culture
 - precautionary principle in the EU?
 - case law and self-regulation in the US?
 - or more nuanced picture?
- ▶ resulting levels of protection
 - no clear answer (evidence points both ways)
 - stronger EU: GMO, hormone meat, chemicals, chlorinated poultry
 - stronger US: some pollution (esp. air, PM)

Recommendations

- ▶ critical IA of TTIP by EP (in addition to EC)
- ▶ review potential impact of each clause
- ▶ careful legal and political analysis of technical language
- ▶ for each clause, it should be assessed whether the aim can be reached with other less impactful means
- ▶ critical terms need to be clearly formulated
- ▶ learn from past experience with other TIAs

Recommendations

- ▶ regulations applicable to GMOs should be carefully reviewed
- ▶ ensure no regulation unintentionally undermines REACH
- ▶ ISDS provisions need to be reviewed even more carefully due to their far-reaching nature, possibly affecting the regulatory freedom

THANK YOU!

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