

CETA and TTIP sparking controversial debates on investment protection in Germany¹

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This report summarizes public, mainly non-academic debates on investment protection and, more specifically, investor-state dispute settlement (ISDS); it refers to debates mainly in Germany, and exclusively in the context of TTIP and CETA. In line with the purpose of UNCTAD's "Report-back" initiative, the focus is on suggestions that have been made on how to further develop international investment arbitration, some of them in policy papers and studies rather than during the events specified above. The report does not present the authors' own views on the matter.

CETA and TTIP have spurred a significant public debate about trade and investment issues in Germany, probably the first such debate since the establishment of the WTO and the negotiations on the failed multilateral agreement on investments (MAI). Generally, the debate is marked by significant concern over ISDS and even outrage among ordinary citizens, NGOs, trade unions and a significant part of the press, while there are more mixed voices among academics, business actors and the political establishment. In January 2015, a demonstration aimed, among others, at "stopping TTIP" assembled at least 25,000 participants in Berlin, which is a relatively high number for the German capital.

Even among those who do not oppose TTIP and CETA on principle, there is wide-spread, even though not unanimous support, for the idea that ISDS is not necessary to protect investors in well-developed legal and judicial systems such as the EU, US, and Canada. Diverse actors share this view, such as some political parties, unions, NGOs, a part of the business community, a number of academics, some associations of lawyers and judges, and some individuals within ministries. There is widespread concern that rules on investment, and more specifically ISDS, will have a negative impact on the agreement's parties' right to regulate and regulatory ambition in areas such as the environment, consumer and health protection or labour rights in the future. In addition, there are objections to bypassing the national court system, thereby discriminating against domestic investors; some have also questioned the compatibility of provisions on ISDS with the German constitution.

What complicates the debate is that some see CETA and TTIP as opportunities to create a "blueprint" or "gold standard" for agreements with other parties (notably China) or even, in the long run, a multilateral framework. In other words, some advocate for an ambitious investment chapter (including ISDS) in these agreements for strategic, political reasons rather than because they consider that the existing legal rules in the countries involved do not protect investors sufficiently. Another reason why certain actors within the EU support the inclusion of investment protection in TTIP, in particular, is that some of the "new" EU Member States seek to replace the existing BITs they have with the US by a new EU investment agreement. Finally, one argument made in support of including ISDS in CETA and TTIP is that this could prevent investors from using other BITs, with "worse" rules on ISDS, to bring claims; however, it remains rather unclear how this is to be achieved in a legally binding way.

¹ This paper was produced as a contribution to UNCTAD's "Reporting Back" initiative which is a platform for sharing the outcomes of other initiatives that address IIA reform, by means of facilitating a "report-back" on these initiatives, see <http://unctad-worldinvestmentforum.org/followup-events/report-back-project/>. It was submitted to UNCTAD in February 2015.

Even those that support the idea that provisions on ISDS are, in principle, to be included in TTIP and should be kept in CETA do not usually support provisions on ISDS in the form that they have often been included in IIAs in the past. In particular the following main deficits of the current system are often highlighted and remedies suggested:

The secrecy of proceedings and documents: This is often compared with the national judicial system in Germany where most proceedings and judgments are public. In general, the CETA draft text is seen as making progress in this regard; however, it is sometimes critically noticed that CETA provides for a considerable amount of discretion for tribunals to exclude the public from hearings or to make certain documents confidential.

The selection and potential and potential bias of arbitrators: Again, comparisons are often drawn here with the national legal rules where lawyers are legally barred from frequently switching between the roles of legal counsel and judges. Again, CETA is seen as addressing some concerns in this regard, but further improvements are suggested.

The role of domestic judicial systems: As pointed out, some of the opposition against ISDS in CETA and TTIP is motivated by the sense that investment arbitration would bypass functioning and efficient court systems that are part of a democratic order. There is at least some support for the proposition that stronger clauses on the exhaustion of domestic remedies should be included in future investment treaties than currently provided for in the CETA draft, making resort to national courts the rule.

The vague nature of certain clauses, in particular on indirect expropriation and fair and equitable treatment: It is mostly acknowledged that defining such terms, as has happened in the CETA text, mitigates risks to public policies stemming from a broad interpretation of such terms by investment tribunals. Nevertheless, some feel that clauses on indirect expropriation and fair and equitable treatment should be left out completely from investment treaties, at least between countries with legal systems that provide a high degree of protection to foreign investors in this regard.

The limited degree to which arbitration decisions can be reviewed/lack of an appellate body: There is also a degree of concern among the general public about the fact that arbitration awards can only be reviewed to a very limited degree, in stark contrast to what is possible in the national legal system. Concerns over the legal consistency of decisions taken by different tribunals are less pronounced among the general public, but are sometimes voiced by lawyers. However, there seemed to be no consensus on how to best address these matters.

It is moreover remarkable that the current debate is narrowly focused on TTIP and CETA. Even though Germany is a party to a significant number of BITs, there is little or no debate about if and how the existing BITs are to be reformed. This must be seen against the fact that the competence for investment protection has been transferred (at least partially) to the EU. However, there is little discussion, either, on what overarching position the German government should adopt in future negotiations on investment agreements at the EU level or reference to UNCTAD's Investment Policy Framework for Sustainable Development. Among the four "paths of action" outlined in UNCTAD's June 2014 Issue Note², the most common positions in the German public debate appear to be "disengagement" (at least between OECD countries) or "pursuing selective changes".

² Online at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf