Conference Documentation

"Suing the State" Lessons learnt from existing experiences in Investor State Dispute Settlement

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Introductory remarks

Werner Raza

Welcome to C3-Center for International Development and thank you for your interest in tonight's conference. My name is Werner Raza, I am the director of ÖFSE – Austrian Foundation for Development Research, and it is my pleasure to offer a few words of introduction.

The United States (US) and the European Union (EU) are currently negotiating a free trade agreement: the Trans-Atlantic Trade and Investment Partnership (TTIP). This is the latest agreement in a series of bilateral trade negotiations, the European Union has engaged in during the last years. It is nonetheless an agreement that stands out both in terms of its economic importance and with regard to its scope. It is indeed very comprehensive and includes a plethora of topics and issues, including services & investment liberalization, public procurement, and cooperation in all matters of trade-related regulations with a view to dismantle so-called unnecessary regulation or harmonize diverging regulations between the EU and US. The latter involves many sensitive areas like consumer protection, social and environmental regulations.

Trade liberalization in the conventional meaning of the term is thus only a minor issue, with average tariff rates between the EU and US already standing at a very low 3%. In other words both trade and investment between the two economic areas are already very open.

Nonetheless major proponents such as the European Commission nevertheless argue that TTIP would give a boost to economic growth in the EU and US. Most prominently, the European Commission estimates the potential economic stimulus because of TTIP at €120 billion for the EU economy, €90 billion for the US economy and €100 billion for the rest of the world. But how are these benefits of TTIP derived?

In a recent study, ÖFSE has scrutinized these claims together with a team of US academic economists. The study is titled "ASSESS_TTIP: Assessing the Claimed Benefits of the Transatlantic Trade and Investment Partnership (TTIP)", and can be downloaded via the ÖFSE website. In a nutshell, we see limited economic gains, but considerable downside risks. The results of our assessment are as follows:

1. The estimated gains from TTIP are very small: All studies report small, but positive effects of TTIP on GDP, trade flows and real wages in the EU. However, all effects are estimated to be below 1%. In addition, all of these changes are long-term, i.e. will accrue only over a transition period of 10 to 20 years.

2. The estimated gains critically depend on the reduction of Non-Tariff-Measures: with average tariff rates already at very low levels (less than 3 %), roughly 80 % of TTIP gains are derived from the elimination or alignment of Non-Tariff-Measures (NTMs), such as laws, regulations and standards. Assumptions on actionable NTM reductions in the studies are however overly optimistic. On the basis of more realistic assumptions, the economic gains from TTIP would become even smaller.

3. The social costs of regulatory change might be substantial: NTM reductions entail both short term adjustment and long term social costs, which are completely neglected in most studies. Most importantly, the elimination of NTMs will result in a potential welfare loss to society, to the extent that this elimination threatens public policy goals (e.g. consumer safety, public health, environmental safety). The analysis of NTMs in the studies completely ignores these problems. Instead, it is assumed that around 25% to 50 % of all existing trade related regulations between the EU und the US can either be eliminated or aligned to some common standard. This includes sensitive sectors such as foods & beverages, chemicals, pharmaceuticals and cosmetics. In order to arrive at its optimistic welfare estimations, the studies assume strong reductions/alignments of NTMs in precisely those sectors, where the safeguarding of public policy goals is perhaps most crucial. Though subject to considerable uncertainty, the incurred social costs of TTIP regulatory change might be substantial, and require careful case-by-case analysis.

4. Macroeconomic adjustment costs, including costs of unemployment and revenue losses for public budgets are not negligible and should be dealt with by EU policy-makers: our estimation hints at adjustment costs between € 30 – 60 billion over a transition period of 10 years.

5. Other potential adverse effects of TTIP are downplayed in the study. These include:

   - Exports of developing countries to the EU will possibly suffer from TTIP, resulting in a reduction of real GDP for LDCs of up to 3 %.

   - Intra-EU trade will decrease due to TTIP. Some studies expect a modest reduction, while one study estimates intra-EU exports to decline by 30%. This calls for further examination.

As a consequence of these results, which highlight a number of problematic aspects of the agreement, I think it is very timely that the European Commission has initialized a three month consultation on a particularly sensitive component of TTIP, namely the investor-to-state-dispute settlement mechanism, and has thus opened a space for a broad public debate on TTIP.

Tonight's discussion is intended to make a contribution to this on-going debate. I am therefore pleased to welcome a distinguished panel of international and national speakers. I am particularly delighted that we have two international experts present, which will report on their hands-on experience with investment arbitration and will also bring in a development oriented view. So welcome to Vienna and welcome to the C3-Center of International Development to all of you.

Finally, I would like to thank our partners, the Austrian Chamber of Labor and the Vienna University of Economics and Business for the fruitful cooperation in organizing this event. It is now my pleasure to ask Valentin Wedl from the Chamber of Labor for his introductory remarks.

Summary

Karin Küblböck

Investor-state dispute settlement (ISDS) is a form of international dispute arbitration that allows foreign investors to sue states directly under international law. Decisions are taken by arbitration tribunals composed of three persons, without possibility to appeal. The primary aim of ISDS is to protect foreign investors from abusive treatment by governments, and – from a host country perspective to encourage foreign direct investment.

ISDS is part of more than 90 % of almost 3.000 existing bilateral investment treaties and of various free trade agreements with investor provisions, such as NAFTA. Today, investment policy making is at a crossroads: The number of newly signed International Investment Agreements continues to decline. While in the 1990s, around 200 BITs and other Investment Agreements were signed per year, this number declined to around 30 per year since 2011. Germany has signed the highest number of BITs signed (almost 140 BITs at the end of 2012).

Global FDI inflows rose by 11% in 2013 to an estimated US$1.46 trillion, a level comparable to the pre-crisis average, after a fall of 18 per cent to $1.35 trillion in 2012 (UNCTAD 2013). For the first time, FDI-flows to in developing countries exceeded FDI-flows to developed countries. APEC countries (Asia-Pacific Economic Cooperation) received around halve of global FDI-flows, the BRICs countries (Brasil, Russia, India, China) received about one fifth.

While the number of new Investment Agreements is declining, the use of ISDS has increased exponentially over the last 15 years. In 2013, 57 new ISDS cases were initiated. At the end of 2013 there were 568 known ISDS cases filed with different arbitration courts, more than half of all known ISDS cases are directed against developing countries.

The most active claimants are US companies, which have filed more than 120 cases. More than half of all claims are put forward by EU investors, out of which investors from the Netherlands, UK and Germany are the most active claimants (Netherlands ~ 60, UK and Germany each ~ 40 cases) followed by France, Italy and Spain. Countries that have had the highest number of cases filed against them are Argentina, Venezuela, Czech Republic and Egypt. Claims against EU countries account for 21 per cent of all cases (mostly against "new EU Member States") Most intra-EU cases are brought against the Czech Republic and Hungary (total as of end 2013), followed by Poland, Slovakia, Spain, Bulgaria, Romania, Croatia. The US- Government has never lost an ISDS case as they have a very dedicated inhouse legal department and experienced lawyers. (and arbitrators)

A large part of existing bilateral trade agreements were negotiated in the 1990s, however most claims on the basis of those agreements only started to be filed in 2000s. This means that agreements were negotiated at a time when many governments did not yet have experienced possible consequences of provisions of those treaties. The rising number of cases that countries have faced in the last years has led to an intensive and controversial debate about risks posed by investment treaties and the debate on reforming current ISDS provisions has intensified. This holds especially for those countries which have faced investor claims that have attracted public attention or where ISDS is on the agenda of negotiations.

Proponents of ISDS argue that this form of dispute settlement is needed in order to protect foreign investors from abusive treatment by governments, and to provide them with a stable investment climate, which will in turn increase FDI-flows countries. However, critics state that ISDS is increasingly used to challenge public policy decisions and that states always lose out because - even if they win a case - they have to pay their arbitration costs and suffer from a reputation loss.

Currently, several countries are reviewing their BITs such as Nigeria and Slovakia, or decided to abandon ISDS or to consider treaty termination (eg. Ecuador, Bolivia, South Africa and Indonesia) in order to increase policy space for eg. developmental and ecological objectives and in order to reduce the budgetary risks.

Nigeria is one of the countries that have formulated a new model BIT in order to reduce its risks and to maintain the right to regulate and to increase public policy space for developmental and environmental policies. Various institutions have participated in the formulation of the new model BIT and the parliament also had to approve it, as it also does with new BITs that are negotiated.

Austria currently has 62 BITs, all of them contain ISDS. The Austrian BIT is based on a model BIT that was revised in 2008. The revision included Austrian stakeholders and was also discussed in parliament. Until now there was no claim brought against Austria, but Austrian companies have been using ISDS to protect their investments abroad and are therefore in favor of ISDS provisions. Negotiations of new BITs are thus driven by considerations to support Austrian investors, as this should have positive effects for the Austrian economy.

As for the currently negotiated EU-US Transatlantic Trade and Investment Partnership (TTIP), the European Commission recently decided to consult the public on the envisaged investment provisions following unprecedented public interest. The Austrian Ministry for Europe, Integration and Foreign Affairs welcomes the consultation and will consider the results also for future Austrian BITs.

Concerns with the current ISDS system that were voiced in the discussion relate, among others to questions of public policy space, to the danger of business dominating public policy and the “privatization of justice” and to a shifting of risks. Investors increasingly sue against public policy decisions such as tobacco laws or phase out of nuclear power. This in a way shifts the risk of regulatory change investors are facing from the investor to the government.

Another concern is the unpredictability of the system for both investors and states as decisions depend very much on the composition of tribunals. The current system also lacks transparency as most decisions are not publicly available, not even to parliaments and other official institutions. Independence and impartiality of arbitrators was another concern raised in the discussion, as arbitrators sometimes act as lawyers in one case and as arbitrators in another case. Moreover, they are paid by case (in opposition to judges in a public court) so they have an imminent interest in having as many cases filed as possible. In this context, it seems to be especially problematic that there is no possibility to appeal against decisions of the tribunals and therefore no way to correct inconsistent decisions.

Another question that was raised is the relationship between national judiciary and arbitration tribunals. Foreign investors may choose between national courts and international tribunals, whereas national investors do not have this choice (eg. in Germany, only Vattenfall (a Swedish company) can sue against termination of nuclear power via ISDS, whereas the other companies such as RWE have to go to national courts).

A key point of discussion that was raised several times was the question whether it makes sense to introduce ISDS provisions when treaty partners have well-developed legal systems and independent judiciaries, as is the case in the European Union and the United States – also considering the very expensive costs of the procedure, the long time of the procedures and the often very high amount of compensation. The average cost of only filing a case is 800.000 US$, costs of lawyers and compensation costs often account for tens of millions of US$. Currently, in about 40 % of known cases states win, in about 30 %, companies prevail and 30 % of cases are settled, which also involves the probability of concessions granted by the state. However, for a state, even winning a case is a somewhat empty victory, particularly when it comes in consequence of using the right to regulate in the public interest. Many times states don’t even receive compensation for their costs incurred.

Various alternatives to the current form of investment dispute resolution have been brought forward in the discussion, such as the introduction of an appeals facility or the creation of a standing international investment court. Even if the positions and opinions differed substantially, there was a general consensus that there is room for improvement of the current dispute settlement system and that public debates on this topic are important.

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