

## Review Effect of TTIP Agreement on Developing Countries from the Legal and Political Perspective

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### Abstract

Investment is essential for growth and job creation. It integrates the EU into global value chains to achieve a stronger economic recovery. EU policies are geared towards increasing investment as part of the recovery. EU is negotiating a trade and investment deal with the US - the Transatlantic Trade and Investment Partnership - or TTIP. The Investment Court System would replace the existing investor-to-state dispute settlement (ISDS) mechanism in all ongoing and future EU investment negotiations, including the EU-US talks on a Transatlantic Trade and Investment Partnership (TTIP). This research aims at reviewing a new system, by protecting the governments' right to regulate and ensure that investment disputes will be adjudicated in full accordance with the rule of law.

**Keywords:** Investment Court, ISDS, State Dispute Settlement, TTIP.

### Introduction

Over the next ten to fifteen years, 90% of world demand will be generated outside of Europe. That is why it is a key priority for the EU to tap into this growth potential by opening up market opportunities for European businesses abroad. One way of ensuring this is by negotiating agreements with our key partners.

EU is negotiating a trade and investment deal with the US - the Transatlantic Trade and Investment Partnership - or TTIP.

Free Trade Agreements are designed to create opportunities by:

- Opening new markets for goods and services;
- Increasing investment opportunities;
- Making trade cheaper - by eliminating substantially all customs duties;
- Making trade faster - by facilitating goods' transit through customs and setting common rules on technical and proper standards;
- Making the policy environment more predictable - by taking joint commitments on areas that affect trade such as intellectual property rights, competition rules and the framework for public purchasing decisions.

Europe currently faces big challenges, like:

- Kick-starting our own economy;
- Responding to conflicts close to our borders;
- Adapting to other, emerging economies outside of the Europe;
- Maintaining our influence in the wider world.

The main purpose of this study is to investigate the relationship between government and transnational corporations and private investors. This company via direct

complaint against the government can receive a lot of damages and compensation. Because governments have taken decisions, which they have been contrary to benefit of investors and multinational corporations. It seems that the power of transnational corporations has grown that actual influence and affects the sovereignty of states.

### **What is TTIP?**

The Transatlantic Trade and Investment Partnership (TTIP) is a proposed trade agreement between the European Union and the United States, with the aim of promoting trade and multilateral economic growth.(Clarke,2013).The USA government considers the TTIP a companion agreement to the Trans-Pacific Partnership (TPP).( European Commission DG Trade,2014). The agreement is under ongoing negotiations and its main three broad areas are:

Market access;

Specific regulation;

Broader rules and principles and modes of co-operation. (Blenkinsop, 2014).

The negotiations were planned to be finalized by the end of 2014, but will not be finished until 2019 or 2020, according to economist Hosuk Lee-Makiyama. (Blenkinsop, 2015). The European Commission has approved its proposal for a new and transparent system in order to resolve disputes between investors and states – the Investment Court System. The Investment Court System would replace the existing investor-to-state dispute settlement (ISDS) mechanism in all ongoing and future EU investment negotiations, including the EU-US talks on a Transatlantic Trade and Investment Partnership (TTIP).

The proposal for an Investment Court System builds on the substantial input received from the European Parliament, Member States, national parliaments and stakeholders through the public consultation held on ISDS. It is intended to ensure that all actors can have full trust in the system. Built around the same key elements as domestic and international courts, it pays attention to governments' right in order to regulate and ensures transparency and accountability. By this new system, we protect the governments' right to regulate and ensure that investment disputes will be adjudicated in full accordance with the rule of law.

### **Main elements of reform**

The proposal for the new court system includes major improvements such as:

A public Investment Court System composed of a first instance Tribunal and an Appeal Tribunal would be set up;

Judgments would be made by publicly appointed judges with high qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body;

The new Appeal Tribunal would be operating on similar principles to the WTO Appellate Body;

the ability of investors to take a case before the Tribunal would be precisely defined and limited to cases such as targeted discrimination on the basis of gender, race or

religion, or nationality, expropriation without compensation, or denial of justice; Governments' right to regulate would be enshrined and guaranteed in the provisions of the trade and investment agreements. This builds on the EU's existing approach which ensures:

Proceedings will be transparent, hearings open and comments available on-line, and a right to intervene for parties with an interest in the dispute will be provided;

Forum-shopping is not possible;

Frivolous claims will be dismissed quickly;

A clear distinction between international law and domestic law will be maintained;

Multiple and parallel proceedings will be avoided.

### **Towards an International Investment Court**

Finally, in parallel to the TTIP negotiations, the Commission will start working together with other countries on setting up a permanent International Investment Court. The objective is that over time the International Investment Court would replace all investment dispute resolution mechanisms provided in EU agreements, EU Member States' agreements with third countries and in trade and investment treaties concluded between non-EU countries. This would increase the efficiency more, consistency and legitimacy of the international investment dispute resolution system.

### **Investors-state dispute settlement**

The Annex on "Investors-state dispute settlement" proposed to allow corporations to bring actions against governments for breach of its rights (Negotiations on Investor-State Dispute Settlement, TTIP Draft, 2014). The European Commission launched a public consultation after the draft text was leaked, which led to a number of changes. However, an updated proposed text had yet to be made publicly available. In September 2015, the Commission proposed an 'Investment Court System' to replace the ISDS clauses, with the scope for investor challenge much reduced and with 'highly skilled judges' rather than arbitrators used to determine cases (European Commission.2016).

What are reasons advantage & usefulness of creating an Investment Court System in TTIP for EU & USA investors?

In relation to the WTO dispute settlement, the important innovations include: the EU and the US decide in advance which arbitrators are eligible to sit on panels, rather than choosing them on a case-by-case basis. This will increase mutual trust in the arbitrators and their rulings; our method for solving disputes under TTIP is even more transparent than the successful WTO method: hearings to be held in public interested parties, such as non-governmental organizations, to be able to give their views in writing publishing all views submitted to the panel of arbitrators.

The EU text proposal on investment protection for TTIP has a simple objective: to effectively safeguard the EU and its Member States' right to regulate while providing effective protection to European companies against unfair treatment, discrimination or other basic obligations. This will be ensured through a new fully transparent system

for resolving investment disputes, with publicly appointed judges, the highest ethical standards and the possibility to have errors corrected through an appeal instance.

When compared with “old style” Investor to State Dispute Settlement (ISDS) mechanisms, the EU text proposal has key advantages for both States and investors:

- Clear rules applied by impartial judges through a transparent and neutral process are in the interest of States and investors alike;
- A more cost effective and faster investment dispute resolution system;
- Special provisions for SMEs;
- Rules of interpretation;
- Relation with WTO obligations.
- Clear rules applied by impartial judges through a transparent and neutral process are in the interest of States and investors alike.

The EU proposal clarifies the content of key substantive standards of protection and the way that the right to regulate in the public interest is fully preserved. This means increased legal certainty for both investors and governments. Governments can regulate in the public interest. Investors can also benefit from clearer rules, as they will be protected against potential abuses (e.g. expropriation without compensation, harassment etc.) and they will avoid losing time and resources by pursuing cases that are not worthwhile. Like international arbitration, the Investment Court System (ICS) provides a neutral venue for the settlement of investment disputes.

*A more cost effective and faster investment dispute resolution system*

The system has clear procedural deadlines to ensure fast dispute settlement and to keep costs low. In investment disputes, the main costs for the parties involved in a dispute are fees for outside lawyers (legal counsel) which represent around 80 % of total costs of a dispute. Here the clearer substantive rules will help to keep the claims- and thus the extent of litigation - in check. The overall proceedings under the ICS, including appeal, are limited to 2 years (the Tribunal of First Instance must decide within 18 months and the Appeal Tribunal within 6 months).

As a comparison, the average duration of proceedings under existing investment treaties is 3-4 years, with annulment or set-aside (for procedural grounds) potentially adding around another 2 years, meaning that the total length is often around 6 years (with many taking longer).

Salaries of the members of the Appeal Tribunal would be paid exclusively by the EU and the US; there would be a cap on daily fees for judges, rather than leaving this to be negotiated amongst the disputing parties as is the case under the current ISDS system.

There are clearly defined grounds for appeal to ensure that the appeal system is not abused by the losing party.

These are:

- That the Tribunal has erred in the interpretation or application of the applicable law in the TTIP agreement;
- That the Tribunal has manifestly erred in the appreciation of the facts; and
- Procedural grounds (i.e. grounds comparable to annulment or set aside procedures).

## Special provisions for SMEs

Small and medium-sized companies investing abroad are more vulnerable to discrimination and unfair treatment and have fewer means to defend their rights than other companies. Traditional ways that States use to defend their own investors, like diplomatic protection or State-to-State dispute settlement provisions are not frequently used to defend SMEs. Under the EU text proposal, SMEs can always rely on an operational investment dispute resolution system, even where there is no other available alternative. When compared with “old style” ISDS investment agreements, the EU text proposal makes the system. Also, EU agreements are the first investment agreements ever to include a specific provision on voluntary mediation to solve the dispute amicably before the first formal steps of dispute settlement.

Mediation has been made fast and easy to use for SMEs by proposing to have an agreed EU – US list of 6 individuals that can quickly step in as mediators. It is also a low-cost option as it avoids litigation. Procedural deadlines will make proceedings faster for SMEs thus reducing the costs. Possibility to submit claims to a sole judge where claims are brought by SMEs or a number of damages are relatively small – the fact that there is only one judge will make the proceedings faster and more efficient. The appeal will be accessible for SMEs: Appeal Tribunal members will be paid exclusively by the EU and the US, thus limiting the costs of the appeal to the lawyers' fees. This stands in stark contrast to the old ISDS system where the costs to get an ISDS decision annulled are entirely borne by the disputing parties and can be as costly as the original ISDS proceedings. Specific adjustments for SMEs under loser pays principle: in case an SME loses a case or an appeal, there will be limits to how much of the costs the SME will be required to cover under the loser pays principle. However, a successful SME would have no costs to cover at all under this principle in the EU text proposal. (European Commission - Fact Sheet, 2015).

## Rules of interpretation

Any arbitration panel shall interpret the provisions referred to in Article 2 in accordance with customary rules of interpretation of the public international law, including those codified in the Vienna Convention of 1969 on the Law of Treaties. The panel shall also take into account relevant interpretations in reports of panels and the Appellate Body adopted by the WTO Dispute Settlement Body (hereinafter referred to as the “DSB”). The rulings of the arbitration panel cannot add to or diminish the rights and obligations of the Parties under this Agreement (EU-US TTIP Negotiations, 2015).

## Opinion of the opponents about the TTIP

In this section we examine from two aspects to discuss Opinion of the opponents. First, from a legal perspective:

TTIP's biggest threat to society is its inherent assault on democracy. One of the main aims of TTIP is the introduction of Investor-State Dispute Settlements (ISDS), which

allow companies to sue governments if those governments' policies cause a loss of profits. In effect, it means unelected transnational corporations can dictate the policies of democratically elected governments (Williams, 2015).

One of the reasons to the defense of Investor-State Dispute Settlements is the need to provide legal security to attract foreign investment in countries that legal systems are weak or undeveloped.

But in fact Investors should not have the right to lodge a complaint against the government to obtain court approval; the reason is that investors through this can push the domestic legal system of support of property rights. This act allows foreign investors to bypass the local courts and attack directly to the government and the country's democratic decisions by international courts. The majority of these legal instruments provides foreign investors with a substantive legal protection (including the right to "fair and equitable treatment", "full protection and security", "free transfer of means" and the right not be directly or indirectly expropriated without full compensation) and access to ISDS for redress against Host States for breaches of such protection. Some of these standards are framed in vague terms, given extensive discretion to arbitrators in their interpretation and application (Recent Developments in Investor-State Disputes, 2014).

If TTIP includes ISDS be this deal will have the right to investors who are registered in the US to claims for compensation from the governments of Europe Union, if they follow implement policies that have benefit for the public, but will cause profit decreasing of investors, For example, the Public Health Service. One of the risks about TTIP is actually a creation of an especially right for foreign investors, only those who investing in another country, they can use it. These investors can make challenge laws, regulations and administrative legal structures or other governments to any decision.

The proposed agreement has been criticized and opposed by unions, charities, NGOs, and environmentalists, particularly in Europe (Jeffries, 2015). The Independent summarizes the negative impact of TTIP as "reducing the regulatory barriers to trade for big business, things like food safety law, environmental legislation, banking regulations and the sovereign powers of individual nations", or more critically as an "assault on European and US societies by transnational corporations". ( Williams,2015). German economist Max Otte stated that the proposed (ISDS) court of arbitration and protection of foreign investment would mean a "complete dis-empowerment of politics "and that, regarding labour economics, free trade agreements typically enforce lower standards and that TTIP would put European workers into direct competition with Americans (and in effect because of the North American Free Trade Agreement with Mexicans), which would impact European social models (Heute,2016).

There are other projected benefits. US ambassador to the EU Anthony L Gardner argues that TTIP is if you'll pardon the expression, geopolitically pertinent and that it would "provide an economic equivalent to Nato" that would settle "the rules of world trade before others do it for us". Think about it this way: right now, Vladimir Putin can, if he chooses, strip to the waist for a photo op in which he turns off the gas pipe from Russia to Europe. That's not good enough. Instead of being dependent on nasty Russian gas and oil, then, as a result of TTIP, the EU might become dependent

on lovely American and Canadian gas and oil. That's one reason behind the EU's call for a dedicated chapter in TTIP on energy and raw materials. Instead of Russia that could isolate the EU, the EU could isolate Russia. Sweet (Jeffries, 2015). Also critics argue that if TTIP involves, as the EU hopes, a commitment that would guarantee automatic licenses for all future US crude oil and gas exports to Europe, that would result in a boom in US fracking to keep Europeans powered with shale gas, not to mention greater exploitation of oil from Canadian tar sands. Such developments argue critics, would undermine not just the EU's fuel quality directive but ruin what is left on the planet worth ruining (Jeffries, 2015).

Dozens of groups have sprung up to oppose the planned pact, like Stop TTIP (whose website describes the deal as "a corporate coup that will put power and money into the hands of corporations and away from the elected government.") and No TTIP ("TTIP would lock in the privatization of our public services, erode government protection for people and the environment and threaten a new round of unjust economic reforms forced on the poor"). The most incendiary part of TTIP concerns the proposed investment tribunals that allow companies to sue governments whose policies treat them unfairly. Known as investor-state dispute settlement (ISDS), it has been included in trade deals since the 1960s as a way to protect investors against threats such as nationalization. But now opponents say it undermines democracy, deterring elected governments from enacting popular health or environmental policies out of fear of legal action from a foreign investor (Cendrowicz, 2015).

When it comes to criticism of the planned TTIP agreement, there is the talk of the private arbitration courts quickly. Both the EU and the US are two economic powers with functioning legal system. What do we need as ever private investment protection agreements "were originally intended for countries with underdeveloped legal systems now everything is reversed: Corporations can sue states if they suffer economic disadvantages due to the policy of these states. Naturally, policies often cost slightly and it is the point. Political activity, companies have to adapt to it. The arbitration related to the investment protection means the complete loss of power politics. Also in FTA, the lowest standards set by tending. So the wage and social dumping floodgates will be open. One important thing is considering the United States through NAFTA form a free trade zone with Mexico. So Americans compete with Mexicans - and Europeans than in the future even more with Americans. And the social system of these countries, we do not really (Heute,2016).

## Conclusions

Developing countries because of the need to make progress in economic, political and legal are always trying having most interacted and communicate with the international community and the developed countries. But joining some conventions and treaties and international multilateral or regional agreements maybe be causing damage and limiting to sovereignty in these countries. The concept of adoption and joint is too limiting for government sovereignty. It is clearly visible the impact of adoption and ratification of TTIP in the domestic courts of the economy, social welfare, environment, health. The reasons for these effects are differences in standards, political, economic

and legal developed countries and developing countries in Europe and USA. The next reasons are immense power and influence of multinational companies worldwide, which have been able to as major players make globalization theory and practice in the international arena. TTIP will make rights for foreign legal entities. Those multinational companies will be able to complain about the host state according to these laws and international conventions and treaties in a domestic court. It is a big challenge for governments, if obtain these rights by multinational corporations cause their entry into the privacy of sovereignty and ownership. International and regional treaties are instruments for entering multinational corporations in countries. And these legal rights under the treaties allow to multinational corporations for their complaints against the government in internal and local courts. These companies can effect on government sovereignty by penetrating into economic, political, rights and courts. More influence of this penetration to government sovereignty is on developing states and governments who are weak in their economic and legal system.

One of the reasons of Investor-State Dispute Settlements defense's the need to provide legal security to attract foreign investment in countries which their legal systems are weak or undeveloped. But in fact investors should not have the right to lodge a complaint against the government to obtain court approval in the series; the reason is that investors through this can push the domestic legal system of support of property rights. This act allows foreign investors to bypass the local courts and attack to the government and the country's democratic decisions directly by international courts. The majority of these legal instruments provide foreign investors with a substantive legal protection (including the right to "fair and equitable treatment", "full protection and security", "free transfer of means" and the right of not being directly or indirectly expropriated without full compensation) and access to ISDS for redress against Host States for breaches of such protection. Some of these standards are framed in vague terms, given extensive discretion to arbitrators in their interpretation and application.

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