Online Public Consultation on Investment Protection and ISDS Dispute Settlement in the TTIP

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The negotiations between the EU and the US, the two largest single trading blocs in the world, concerning a free trade agreement – the Transatlantic Trade and Investment Partnership (TTIP) – started in July 2013. With an ambition of making these negotiations the most open and transparent trade talks until now, the European Commission has just launched a public consultation on it. The questionnaire to be filled in, as well as additional relevant documents, can be found at http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=ISDS. The intention of the Commission is to consult the public in the EU on a possible approach to investment protection and ISDS in the TTIP and publish the contributions received by 21st June 2014 in a report, provided the contributors had previously agreed to this.

From the procedural point of view, some relevant novelties (compared to most existing investment treaties) are included in the consultation document and referred to in the Questionnaire: transparency of the investor-state dispute settlement (ISDS); the relationship with domestic courts; the rules on arbitrators' conduct and qualifications; the mechanism for a quick dismissal of frivolous or unfounded claims; the use of "filter mechanisms" and, the creation of an appellate body. For the sake of brevity, only the inclusion of the ISDS mechanism and transparency of the proceedings shall be addressed here.

ISDS and Transparency

At the outset it should be noted that there has been a strong opposition to inclusion of the ISDS in the TTIP. Interestingly enough, the Commission does not seem to question the adequacy of this ISDS in the Questionnaire, unless perhaps in the General Assessment Section, but instead goes on to include the reference to the UNCITRAL Transparency Rules which entered into force on 1st April. This is indeed a result of the ongoing public criticism regarding ISDS, displayed by the

NGOs, environmental groups and globalism activists who raised doubts on its legitimacy.

The Commission, however, did react to this criticism also by defending the necessity of keeping ISDS rather than referring the disputes to national courts, stating that the latter could in some circumstances be unattractive to investors due to the risk of home team bias (e.g., some States may deny foreign nationals access to courts). This is, of course, in line with the main purpose of having international investment agreements and that is to encourage foreign investors from one state party to invest in the territory of the other, although some reports by the World Bank cast doubts on the actual effects of this stimulation.

Even though the arguments set out by the Commission seem sensible and difficult to argue against, it is hard to believe that the US and EU are truly fearing that their investors could be treated unfairly, since the European and American legal systems do not have an investor-unfriendly reputation. In fact, both the US and the EU are currently negotiating investment agreements with China, which should provide the investors with greater legal certainty and market access. Consequently, should the EU and the US fail to include ISDS provisions in the TTIP, there is a concern that China might understand this as a signal to resist the pressure to undertake further liberalisation measures. It is, therefore, the necessity of including such a chapter in TTIP, from the economic point of view, that is still a debatable matter.

The EU's goal is to ensure transparency in the ISDS mechanism under TTIP in order to foster accountability, consistency and predictability and to that end the Questionnaire includes the reference to the UNCITRAL Transparency Rules. To remind, these rules provide for open hearings as well as disclosure of most of the documents, with an exception when it concerns confidential information, allowed by the tribunal. The additional documents whose disclosure is mandatory pursuant to Article xx-33 of EU-Canada Agreement, which is used as a reference for the consultations on transparency under TTIP, are: the request for consultations, the request for a determination, the notice of determination, the agreement to mediate, the notice of intent to challenge, the decision on an arbitrator challenge and the request for consolidation. In addition, a modification of the Rules has been made with regard to exceptions to disclosure. Article xx-33(6) stipulates an obligation for the respondent to disclose information to public if its laws so require and instructs the respondent to apply such laws in a

manner sensitive to protecting from disclosure of confidential or protected information.

Once more, due to numerous attacks on the account of lack of transparency, the Commission does not even question whether rules on transparency should be included in the TTIP but asks for views on whether the approach proposed contributes to the EU objective to increase transparency in the ISDS under TTIP. It should be added that, if the US and the EU agree on the applicability of UNCITRAL Transparency Rules, this would not be a precedent since the EU has already reached a political agreement with Canada to introduce these rules in the upcoming free trade agreement between them.

Finally, looking at a broad picture and a long-term impact, one may conclude that if the rules on transparency are included in the TTIP as well as the agreement with Canada (and both are highly likely to happen), it is to be expected that this would certainly put actors in investor-State arbitration under the pressure to allow for greater transparency. It will be interesting to see in which direction the contributions with regard to this and other issues would go until 21st June; however, it seems that the landscape of investor-State arbitration is certainly undergoing significant changes and that this will be yet another step in that direction.