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THE POLISH INSTITUTE OF INTERNATIONAL AFFAIRS

BULLETIN

No. 124 (719), 29 October 2014 © PISM

Storm in a TTIP-Cup? The EU Debate on ISDS

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Since the Lisbon Treaty, international trade and investment have been within the purview of the European Commission. Now, as it is negotiating the biggest trade agreement in history—the Transatlantic Trade and Investment Partnership (TTIP) with the U.S.—Brussels is facing a storm of opposition to one of the chapters of the deal, the controversial issue of investor-state dispute settlement (ISDS). However, due to the provisions contained in its current bilateral investment treaty with the United States, Poland's position is different to that of some big EU Member States, which would like to exclude ISDS from TTIP.

Why the Fuss? Investor-state dispute settlement (or ISDS) is the unlikely talk of the town in capitals across Europe. That is because this little-known but widely used instrument of public international law has become the rallying point for opposition to the Transatlantic Trade and Investment Partnership (TTIP), which is currently being negotiated by the European Union and the United States.

In essence, ISDS allows investors to bring cases against governments for what they perceive as discriminatory or unfair legislation. The number of arbitrations has been growing of late, with 2012 beating the global record for the number of cases launched in a single year (58). Disputes relate to all sectors of the economy, from oil and gas to telecommunications and waste management. Most challenge government policies such as expropriations, taxation measures, environmental and public health measures, and the conduct of national courts. In the past, EU Member States have faced claims ranging from $130,000 to $1.4 billion (although the maximum they have paid out was $270 million plus interest).

ISDS has been used in the past to the benefit of European companies. Thanks to a bilateral investment treaty, the Spanish oil company Repsol received compensation from Buenos Aires, after Argentina seized the company's local operations. However, Europeans are worried because American investors display a particular proclivity for bringing ISDS cases. Investors from the U.S. have launched the most cases in the world—127 recorded disputes (more than twice as many as the second placed nation, the Netherlands). Moreover, these cases often challenge public health or environmental policy. In a high-profile example, American tobacco giant Philip Morris is currently suing Canberra for its introduction of plain cigarette packaging in Australia. High-profile cases like this are a rallying cry for opponents of ISDS, who worry that it will erode social protections and create huge costs for governments.

A Look Behind the Headlines. Although the public mood in Europe seems set against ISDS—largely because of incidents such as the Philip Morris case—the numbers paint a less worrying picture. For one, ISDS provisions are extremely common, and can be found in almost 3,000 international trade deals. The EU alone has hundreds of investor-state arbitration systems in place—including in the recently-completed Comprehensive Economic Trade Agreement (CETA) with Canada. Despite the ubiquity of ISDS, only 568 cases have been brought in the last 50 years, according to UNCTAD data. What is more, 53% of these were launched by EU companies (22% by U.S. companies), which highlights the usefulness of ISDS for European firms (Dutch, British and German companies are particularly active in this respect). Moreover, in terms of the EU–U.S. relationship, the number of claims so far has been small. Only nine cases have been filed by American companies against EU states (representing 7% of the total number of claims filed by U.S. investors, and 8% of claims faced by EU countries). EU companies have not filed any claims against the U.S. government.

However, it could be argued that this limited number of cases is the result of the limited number of bilateral ISDS agreements between the U.S. and EU Member States. Although the bilateral EU-U.S. FDI relationship is the largest in the world (mutual FDI stock amounts to $3.5 trillion), the U.S. has so far entered into bilateral investment treaties (BITs) with only nine EU Member States, representing just 1% of U.S. FDI in the EU and 0.1% of total EU FDI stock in the United States. Even so, the EU is already the respondent in a large proportion of ISDS cases brought globally (20% in 2013). Some in Europe fear that, once an ISDS relationship is created between the EU and the United States, the number of cases will increase exponentially, and Member State governments will have to face challenges to their public-minded policies.

The EU Debate on ISDS. Although EU countries have entered into more than 1,400 investor-state agreements so far, ISDS has been the lightning rod for criticism of TTIP in Europe. This state of affairs was predicted by proponents of the deal soon after negotiations were launched, and led some to advocate for the ISDS chapter to be dropped from the agreement. Now, trade unions, environmental groups, Members of the European Parliament (MEPs) and local politicians across Europe have called for it to be abandoned, fearing it will allow multinational corporations to undermine local standards and legislation.

Aware of this rising tide of opposition, the European Commission in January suspended talks on ISDS with the United States, and launched a public consultation on the issue, prompting an overwhelming public response. The commission received almost 150,000 submissions (compared to, for example, 22,000 submissions to a recent public consultation on another controversial issue—fracking), 99% of which came from individuals. The results of the consultation are not yet known—the commission has given itself until November to release its preliminary findings—but the size of the response highlights the strength of feeling on the issue.

As a result of this rising controversy, Member States are having to declare themselves on ISDS in TTIP. Germany was opposed to its inclusion from the start, and ensured the commission's mandate contained very cautious language on investment protection. In February this year, French trade minister Nicole Bricq declared her country's opposition to the inclusion of the mechanism in the deal. While most other countries are nominally in favour of ISDS in TTIP, the situation is quite changeable, given the strength of public opinion. Particularly in countries such as Finland, Holland, Austria and Greece, fears surrounding ISDS may force a change of national position on the topic.

Moreover, although outgoing trade commissioner Karel de Gucht was supportive of including ISDS in both TTIP and CETA, the new commission may be more cautious. Incoming commission president Jean-Claude Juncker has expressed his scepticism on including ISDS in TTIP, and new trade commissioner Cecilia Malmström recognised public concerns in her opening statement during her European Parliament hearing, at which the incoming commissioner was grilled by MEPs on her stance on TTIP. As if to illustrate how hot a political topic ISDS is, there followed a small media storm, as claims and counterclaims were made regarding whether Juncker's chief of staff, Martin Selmayr, edited Malmström's speech to the effect that ISDS will be dropped, without her knowledge. Whatever direction the new commission takes on the topic, there is undoubtedly an increased awareness of the public mood regarding ISDS in Brussels, which is likely to affect its approach.

The Polish View. Poland is currently party to more than 60 agreements with ISDS provisions, and these have not served it particularly well. The country currently finds itself in the global list of most frequent respondents to ISDS cases (it ranks eighth, alongside neighbour the Czech Republic, which ranks third), and accounts for 14% of all cases brought against EU countries. In particular, the ISDS provisions in Poland's 1990 BIT with the U.S. are extremely broad. Poland is among the most frequent respondents to claims by U.S. investors (seventh, after Canada, Argentina, Ecuador, Mexico, Ukraine, and Kazakhstan).

As a result, Poland supports the inclusion of ISDS provisions in TTIP. That is because the ISDS chapter proposed by the European Commission is much narrower than the ISDS provisions in the currently extant BIT between Poland and the United States. According to the Polish Ministry of the Economy, this means TTIP could improve Poland's defences against unsubstantiated lawsuits. In particular, this would be achieved through more precise safeguard clauses (such as the introduction of a closed list of situations that signify the breaking of a fair and equitable treatment clause) and the introduction of exhaustive procedures (for example the creation of a simple mechanism for rejecting frivolous claims). What is more, including ISDS in TTIP would mean Poland would be financially responsible only for cases arising from national legislation, and no longer for EU legislation, as it is under the current BIT.

Recommendations. In her first speech to parliament, new Polish prime minister Ewa Kopacz called for TTIP to be completed as soon as possible, and described it as a priority for her government. In order to ensure its aim of a comprehensive agreement, with the inclusion of ISDS, and quickly, Poland should make its voice heard, and seek to promote intergovernmental EU discussions on the subject. In particular, Warsaw should cooperate with other staunch supporters of ISDS in TTIP (such as Spain and the United Kingdom) to convey its position on the subject at meetings of the European Council and in the European Parliament.

Poland should also ensure that the clauses necessary for the replacement of its current bilateral BIT by the new ISDS provisions in TTIP are included in the transatlantic deal. To this end, Warsaw should cooperate with the eight other Member States that currently have BITs with the U.S. (Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Romania and Slovakia).