

TTIP AND THE ARBITRATION CLAUSE

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TTIP and arbitration: Juncker's birthday headache

On Tuesday (9 December) an estimated 60 "Stop TTIP" activists will give Commission President Jean-Claude Juncker a giant 60th birthday card signed by one million opponents of the Transatlantic Trade and Investment Partnership.

But Juncker needs no card to remind him that TTIP – and in particular the issue of whether it should include an Investor State Dispute Settlement mechanism within it – poses his presidency with an early test of its authority.

Investor-State Dispute Settlements (ISDS) are legal provisions often included within investment treaties between two states, which offer public and private sectors recourse to arbitration with the states which have signed the treaty if they allege a breach.

Supporters believe such clauses guarantee the terms of treaties, since they offer an independent resolution mechanism for parties who did not sign the treaty.

Arbitrations are carried out by a number of specialised bodies, proceedings are usually conducted in private, and often result in a settlement between the parties, rather than leading to formal tribunal decisions. However such decisions are made where the



parties cannot come to an agreement.

Although investor-state arbitration clauses have been included in investment deals since the late 1950s, arbitration has emerged strongly in the last two decades.

Since the 1950s, EU member states have concluded over 1,400 bilateral investment treaties (BITs) with a large number of third countries, representing roughly half the total number of BITs world-wide.

According to the United Nations Conference on Trade and Development, of the 247 concluded cases known by the end of 2013, around 43% were decided in the state's favour and 31% in favour of the investor. The rest (26%) were settled.

There has been no ISDS case between the United States and an EU-15 country, but a handful of cases between US investors and member states that joined the EU in the 2000s.

Last week, NGO Friends of the Earth released research into 127 known ISDS cases brought against 20 EU member states since 1994.

"The total amount awarded to foreign

investors – inclusive of known interest, arbitration fees, and other expenses and fees, as well as the only known settlement payment made by an EU member state – was publicly available for 14 out of the 127 cases (11%) and amounts to €3.5 billion," FoE claimed.

Detractors claim that such clauses allow big business to sue governments, enabling corporate interests to challenge the sovereign will of democratic states in un-transparent fora.

Trade unions, consumer groups and environmentalists have all been vociferous in their opposition. In addition, the European Parliament's centre-left groups – including the large Socialists & Democrats grouping – have voted against it. So have the French and Dutch Parliaments.

Arbitration a regulatory threat?

The surrounding debate has seen a barrage of statistics and soundbites coming

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from all sides.

Noted cases highlighted by opponents include tobacco giant Philip Morris's ongoing arbitration cases against Uruguay and Australia over health warnings on cigarette packs, and Swedish energy giant Vattenfall's call for damages from Germany following its government decision to phase out nuclear energy.

In a communication on ISDS, BusinessEurope, the group representing European employer organisations, has stated that "under no circumstances does a ruling under ISDS require a state to revoke a law, regulation or any other measure, even in cases where the particular law, regulation or measure has been found to violate the bilateral agreement".

Detractors have argued that Philip Morris' request that Australia should suspend or revoke its plain packaging laws shows this is not true.

However, what Philip Morris has requested is not a benchmark for arbitrations, since its case against Australia is not yet concluded.

Meanwhile, Trade Commissioner Cecilia Malmström has indicated that any EU agreement concluded by her will provide "absolute clarity that a state cannot be forced to repeal a measure".

That will not silence those critics who believe that governments can be effectively bullied by the threat of arbitrations, however.

"Even if arbitrators cannot force states to revoke a law, this won't stop governments from doing so 'voluntarily' once a multi-billion-dollar lawsuit has been filed or threatened in order to avoid the potential risk of a huge fine," according to a paper by Corporate Europe Observatory (CEO), a campaign group.

Bruno Maçães, the Portuguese minister for European affairs, said that the Commission's mandate is unambiguous on the issue.

"It [the mandate] states very clearly that the inclusion of ISDS in TTIP will never touch the public power to regulate in the public's interest in the areas of health, labour standards, safety and environment,"

according to Maçães.

"The high standards in these areas are an asset to the EU. They are a reason why investors want to invest in the EU; to jeopardise them would be foolish," he said.

National courts or arbitration procedures

Opponents of the ISDS clause have emphasised that they believe arbitrators have a vested interest in pleasing investors, and that investor-state arbitration has a built-in pro-investor bias.

Since arbitrators are effectively "judges for hire" and depend on their appointments for their fees "in a system where only the investors can bring claims, this creates a strong incentive to side with them – as investor-friendly rulings pave the way for more claims, appointments and income in the future," according to CEO's paper.

"These private tribunals are comprised of three for-profit arbitrators who issue their decisions behind closed doors and often have a conflict of interest as they have a commercial interest in keeping the system alive, and they often work for the same companies that file cases," according to Friends of the Earth.

It is true that arbitrators often have experience gleaned from the industry or sector for which they consider claims. However arbitration is by its nature an attempt to build trust and agreement between disputing parties.

To achieve this, it is essential that both sides in the dispute have confidence in the machinery of the arbitration.

If an arbitrator attracted a reputation for bias, that would render his or her appointment unlikely in a system which gives both parties equal input into the choice of arbitrator. Choosing arbitrators is often one of the most time consuming aspects of such cases.

What began as a small protest against TTIP has developed into an all-out battle between those who consider ISDS as a tool to protect investors, and those who see it as a way for multinationals to undermine national law.

Having consulted on the issue, the EU executive is expected to publish a report on the issue early in the new year, indicating how it will proceed.

It seems certain that some tweaking of an ISDS proposal is likely. Leopoldo Rubinacci, the head of investment policy at DG Trade, acknowledged at a policy forum held in Brussels last month that ISDS is not transparent enough, and that there were problems arising from the fact that tribunal decisions are not appealable.

Portugal's Bruno Maçães has suggested policymakers should seize this opportunity to reform ISDS.

"With the high level of public scrutiny on TTIP, there has never been a better time to do so," he said.

ISDS also an issue in the US

Although the debate has led to expressions of fear about Europe accepting a lowest common denominator US-approach to regulation; this leaves US parties baffled and insulted.

The blanket expression – voiced in some quarters – that US regulation is 'weaker' or less enforced than that in Europe is simplistic and many American policymakers and trade negotiators find it insulting.

Indeed Juncker should take solace from the fact that ISDS is a problem in the US too, where inverse fears: that European companies will exploit the arbitration process to the detriment of their US counterparts, is one that policymakers have to address.

The US has recently updated its regulatory framework regarding ISDS, a process that started in 2009 and was concluded in 2012, after extensive public consultation.

The goal was to improve the procedures in order to ensure the balance between the need for investor protection and the government's prerogative to regulate in the public's interest, according to Elena Bryan, the senior trade representative of the US mission to the EU.

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The new US model included the introduction of a mechanism enabling third parties to get more involved in the arbitration process, to address transparency issues.

This is an idea that the EU executive might reflect in some form in its own conclusions.

Whatever these conclusions are, however, it will face a considerable political battle. Once the Commission's report has been published a new round of consultation will begin with the European Parliament, where considerable opposition remains.

This can already be seen in the parallel issue surrounding the conclusion of the negotiations over the EU-Canada trade agreement (CETA), a blueprint for TTIP and the first EU-wide deal including investor-state arbitration which the European Parliament must pass first.

No agreement has been reached on CETA, and with Greens such as Reinhard Bütikofer labelling ISDS a "corporate lobby Christmas tree agenda", resistance to ISDS in TTIP remains fierce in some quarters.

MEPs have nuanced views on ISDS

Behind some of the bluster, however, possibilities for compromise appear available.

The centre-left Progressive Alliance of Socialists & Democrats group in the Parliament has issued a clear signal that it wants ISDS dropped from TTIP.

"The ISDS mechanism, where applied, has already shown how much power corporations have wielded in the name of profit. It is time the EU [...] scrapped ISDS in the CETA and in the EU-US Transatlantic Trade and Investment Partnership (TTIP)," according to Gianni Pittella, the Socialists

& Democrats' president.

However colleagues have adopted a more nuanced approach. Italian socialist MEP Alessia Mosca, said recently she regretted that the general public and the media has underestimated the possible advantages of a TTIP and ISDS within it.

"The crucial point isn't the possible inclusion of ISDS," Mosca said, "but rather the form in which it would (or would not) be included."

Mosca said "the procedure needs to be modernised and updated so that there is a better balance between investor protection and democratic regulation."

She said she was confident, however, "that the EU institutions and civil society together had the capacity to bring ISDS into the 21st century."

Some birthday cheer for President Juncker.

ISDS clause: a gateway to future trade deals

Trade officials negotiating the ISDS arbitration clause within the EU-US trade agreement have half an eye on their next deals, since the wording is likely to shape other key trade treaties on the table.



Container ship enters San Francisco Bay. Marin Headlands, June 2013. [John Morgan/Flickr]

Asia and the lucrative Chinese markets are at the top of policymakers' minds as Brussels and Washington engage in talks over the Transatlantic Trade and Investment Partnership (TTIP), which started in July 2013.

The future shape of the arbitration clause in the EU-US trade talks will be paramount in this global context.

The US and EU are holding separate talks with China, with a view to future bilateral trade treaties. The Trans-Pacific Partnership is a trade agreement covering the Pacific countries that the US has prioritised for completion. The European Union is also negotiating with Asian countries such as Japan and Vietnam, with a view to future trade deals.

Arbitration would be a key chapter in any such deals, and would probably play a more crucial role than in TTIP.

The investor-to-state dispute settlement (ISDS) is an arbitration clause in TTIP designed to protect investor rights but which critics argue would allow companies to sue governments and limit their ability to regulate in the public interest.

Investor-state arbitration is often the only means for companies to obtain redress,

especially in countries with weak judicial systems. The US and EU court systems are largely seen as reliable in the business communities, whereas in many Asian countries, they are viewed as politicised or erratic.

"A government could expropriate an investor (e.g. through nationalisation) or pass laws which render their investment worthless, for example, by suddenly banning a product," the European Commission argues in a briefing note about the ISDS.

In a position paper published in May 2014, BusinessEurope, the European employers' group, said that "the separation of powers and judiciary independence and impartiality is not always evident in some states". Arbitration, it said, "provides an opportunity to seek for independent and impartial judicial decisions, based on technical and legal grounds."

Including ISDS within the landmark TTIP would therefore serve as much as anything as a benchmark, according to BusinessEurope.

"It would seem inconsistent, arbitrary,

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unjustified and unreliable from the part of the EU to view ISDS as a central element in an investment treaty with emerging and developing countries while insisting on not having such a mechanism in a treaty with OECD members,” the BusinessEurope paper added.

“Such a precedent would weaken the ability of the EU to include ISDS in future [bilateral investment treaties and free trade agreements] with non-OECD countries, for instance with BRICS (Brazil, Russia, India, China, South Africa),” the group claimed.

An existential struggle for market capitalism

According to Jan Kleinheisterkamp, an academic from the London School of Economics, “international commitments by the US to European investors can very well be made applicable in US courts and even confer right of action to individuals.”

So, it is possible that EU investors could enforce the rights granted to them in TTIP by suing the US government in US courts.

But if the EU signs an investment arbitration clause in TTIP, “this would move the world a significant step further towards a global corporate super-constitution, enforced by corporate ‘courts,’” according to the Corporate Europe Observatory (CEO), a corporate accountability watchdog.

Corporate Europe claimed that – faced with challenges from combating climate change to preventing another financial crisis – this would leave our societies “stuck in a legal straight-jacket, with the constant threat of multi-billion corporate disputes against policy changes”.

A deal with China along the same lines would be just as dangerous, it claims, “allowing Chinese corporations to sue EU governments – and vice versa – when they change their laws.”

“It is precisely because of negative impacts against the public interest that more and more countries are disengaging from investor-state arbitration globally,” CEO said.

Wider ideological battle at play

Proponents of ISDS point out that the impact on future trade deals of not including an arbitration clause would be twofold: economic and theoretic.

“The competitiveness of EU investors in third countries, especially in sectors with high government involvement, is likely to be damaged,” said the The European Centre for International Political Economy (ECIPE), a think tank.

In a recent paper, ECIPE said there would be strong consequences if EU member states pull out of their existing bilateral agreements – many of which already include ISDS clauses.

Bruno Mações, Secretary of State for European Affairs in Portugal, said removing ISDS clauses from trade deals would have a chilling effect on the economy. “Why aren’t critics of ISDS in TTIP demanding the repeal of ISDS-clauses in general?” he asked.

Aside from the predicted economic effects, all sides agree that there is a wider ideological battle at play.

“ISDS is an outdated instrument from post-colonial times, when the unreliable judiciary systems in developing countries somewhat justified the inclusion of a mechanism that would protect foreign investors,” according to German Green MEP Reinhard Bütikofer.

“This has changed, and important emerging economy countries such as Brazil, South Africa and Indonesia are either repealing ISDS-clauses or are refusing to include them in their bilateral trade and investment agreements,” Bütikofer added.

However, proponents of ISDS claim that allowing treaties with emerging countries to develop without a recourse to arbitration is a recipe for trade ungoverned by rule of law.

Here, the EU and US have expressed common goals through the Transatlantic Economic Council.

These “demonstrate that the EU and the US still share the same goal in terms of global trade: free and open investment regimes governed by the rule of law”, according to Elena Bryan, the senior trade representative of the US mission to the EU.

Such broader shared objectives and common values matter to the ISDS, Bryan stated, adding that “being able to have a

discussion about this issue is of course the beauty of living in a democracy; everyone is entitled to their own view”.

“In fact, the core investment protections and investor-state enforcement are about ensuring the rule of law and baseline protections that all individuals and enterprises should be accorded,” Bryan claimed.

Leopoldo Rubinacci, the EU executive’s senior official within the European Commission’s trade department (DG Trade), has expressed puzzlement at the criticism of the EU’s broader aims in this context.

At a forum in Brussels organised by the European Policy Centre last month, he said that fairness, equity and compensation for expropriation – key-elements in any ISDS-procedure that would be included in TTIP – were key founding principles of the EU. He wondered why their translation into law under an international trade agreement caused so much uproar.

Critics, such as Bütikofer, have attempted to take some of the ideological sting out of their positions.

“We don’t want to frame the debate as a conflict between the US and the EU/ It is more a struggle between corporate and public interests,” he said.

But for proponents, the faultline lies not between between the Western democratic capitalist model, and how it trades, as against the more dirigiste, emerging economies.

This was what the US Council for International Business and Danish and Swedish Industry Federations alluded to in a joint letter to the Financial Times in March this year.

“We have a unique possibility of making a modern ISDS agreement which can balance the legitimate needs of governments to regulate public priorities with the legitimate needs of businesses to have reasonable and predictable protection of investments,” it said.

Such an agreement, they argued, would “create a global gold standard” which other countries would look to as a model.

To some extent, the fate of the ISDS clause in TTIP will determine the weight that is accorded to a US-EU model of trade agreement, as against models emerging from the developing world.

TTIP elephants hiding behind ISDS

The controversy surrounding the inclusion of the Investor-State Dispute Settlement clause in the Transatlantic Trade and Investment Partnership (TTIP) is seen by some as a smokescreen for ideological opposition to the treaty, and is perceived as a way to divert attention from other likely hotspots in the negotiations.

Fredrik Erixon, the director of Brussels-based think tank ECIPE, has claimed that underlying the broader campaign against ISDS, there is opposition from member states to the idea of Brussels negotiating an investment treaty on behalf of the EU.

The EU gained the mandate to negotiate on behalf of the bloc following powers conferred by the Lisbon Treaty, signed in 2007, which came into force in 2009.

Erixon said that the British, French and Germans were all circumspect about allowing central negotiation on investment treaties.

The British have reconciled themselves to the fact that they will no longer be negotiating on the issue, according to Erixon, but in Germany, where there has been a fear that the EU will not be as accomplished as German negotiators, it has been less easy to accept. Hence, he claimed, German political opposition to the ISDS clause.

German politicians have spearheaded opposition to ISDS

At its most recent party convention, the German coalition partners, the Social Democrats, agreed to reject the ISDS provision.



Museum of Natural History, New York. [Guian Bolisay/Flickr]

The German Minister of Economic Affairs – Social Democrat Sigmar Gabriel – fully supported his party's opposition to the international arbitration provision both in the EU's planned free trade agreement with Canada (CETA) as well as TTIP.

The Economic Affairs Minister went so far as to link German support for TTIP with omission of the clause.

Gabriel has since rowed back on this opposition.

"It will not be possible to have the arbitration procedure taken out of CETA. We are acting in a European environment and should also listen to the opinions of other countries," Gabriel said in Berlin on 27 November.

"If the rest of Europe wants this agreement, then Germany must also approve. There is no other way," said Gabriel.

As Social Democratic Party leader, Gabriel runs the risk of sparking considerable criticism from the party's left wing, however. Their opposition feeds into the broader German reticence to release power to negotiate such treaties to Brussels, according to Erixon.

That opinion was echoed by Italian MEP Alessia Mosca – herself a member of the EU Progressive Alliance of Social Democrats – at a recent seminar on ISDS organised by the European Policy Centre.

Mosca wondered how much of the protest is inspired by the fear of a number

of member states of losing some of their trade policy sovereignty as a result of this agreement.

When the smokescreen lifts: data, energy flashpoints ahead

If ISDS is being used as a shield for broader concerns about trade sovereignty, however, it is certainly diverting attention from other issues that could cause more problems within the negotiations.

The almost exclusive focus of popular opposition to TTIP on the arbitration clause has diverted attention from other key issues hampering the negotiations.

In the case of two of these – data protection and energy – the key problem lies in the fact that they are not on the table for discussion at all.

Though it was a political decision by the US and EU to cut data protection from the ambit of the TTIP negotiations, it came against a backdrop of accelerating competition between EU and US data sector companies.

Significantly, it also came shortly before the Prism scandal began to seep revelations of data espionage, which have since soured EU-US relations.

Fallout from the Prism scandal has shown how difficult the TTIP negotiations would have been had data protection been

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kept on the agenda.

The EU executive has been keen to ensure the swift passage into law of controversial new data protection rules, which after long delays are currently still being debated by member states and the European Parliament, with the aim of agreeing legislation next year.

Various clauses within the proposed regulation would effect the larger US companies offering so-called “over-the-top” data services, such as Google and Amazon, and more significantly the burgeoning cloud computing sector.

US-based cloud service providers – including Google, Amazon and Microsoft – currently account for around 85% of global markets.

With Germany and France – and new Digital Affairs Commissioner Günther Oettinger – notably hardening their stance on Google in recent weeks, and calling for a stronger EU response to perceived competition abuse by the US giant, the scope for data issues yet to effect TTIP is immense.

One source close to the US industry

who spoke on condition of anonymity told EurActiv last year: “At the moment, it is looking like a trade dispute over the data sector is as likely to emerge between the US and EU before any trade agreement emerges.”

His remarks are beginning to look prescient.

“In the end, data flows will have to come onto the table. The TTIP cannot be agreed before that happens,” one senior negotiator close to the TTIP talks told EurActiv last month on condition of anonymity.

US industry is keen to see such ‘data flows’ brought within the discussion.

US wants data on table; EU wants energy on table

For its part, the EU is pushing for the inclusion of an energy chapter in TTIP, currently also off the negotiating table.

During talks with US Secretary of State John Kerry, the EU’s foreign affairs chief Federica Mogherini last week (3 December) pushed for the chapter during the EU-US Energy Council.

Mogherini argued that an energy chapter in the free trade agreement would “set a

benchmark” in terms of transparent, rules-based energy markets to the rest of the world, according to a senior EU official at the talks.

US and EU TTIP negotiators have discussed the possibility of an energy chapter. But the US, while it has not ruled out the idea, is less keen than the EU.

Under US law, the US can supply gas to countries with which it has free trade agreements. So, under TTIP, US energy companies could sell to the EU, the official said.

EurActiv understands that the US would prefer the market to drive supply. At the moment, any US gas imports to the EU would likely be sold onto other markets, that pay higher prices.

Any energy chapter in TTIP would likely draw criticism from environmental campaigners, many of whom are already opposing the deal on the grounds it will lower EU environmental standards.

Data protection is another issue that could attract as much popular attention as ISDS, which might in time come to be seen as simply the first of many bumps in the road to TTIP. The real elephants are yet to enter the room.

Economist: ‘ISDS disconnect between rhetoric and reality’

The integrity of EU trade policy, and the European Commission’s capacity to negotiate, are on the line in the current ISDS debate, according to a proponent, economist Fredrik Erixon.

A Swedish economist and writer, Fredrik Erixon is the director of Brussels-based think

tank the European Centre for International Political Economy (ECIPE). He previously worked as an economist for the Swedish government and the World Bank.

He spoke to EurActiv’s Jeremy Fleming in Brussels.



Fredrik Erixon [ECIPE]

How do you assess the way in which the ISDS debate is being conducted?

It has become a very ideological debate, at least as far as the general debate is concerned. There is a general disconnect between the rhetoric and the reality of investment agreements and how they are used. That is unfortunate and it has put some governments around Europe on the defensive. They now make policy via press releases rather than thinking about what is necessary for investment too to be subject to international rules and disciplines.

Are you surprised by how contentious the issue seems to have become?

Yes and no. I was around during the big debate over a Multilateral Agreement on Investment in the 1990s and I have seen this travelling band of globalisation sceptics congregating on many other issues in more

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recent times. There are real issues to address around the current design of investment protection, but I don't see the anti-ISDS crowd being interested in that discussion.

How important is it from your point of view to include ISDS in TTIP?

ISDS is generally important, also in TTIP. Political interference in investment issues is growing, also in the US and the EU. Investment agreements with ISDS give companies recourse to dispute settlement and arbitration when they believe their rights have been squashed by government. It is especially important to have it in investment agreements, because such agreements don't have mechanisms to ensure that governments actually make laws and regulations that are compatible with what they have signed up to in investment protection agreements. Some people now say that it is enough that companies have access to local courts.

But what if a government has not introduced changes to their laws and regulations as a consequence of an

investment treaty, and if they still allow for say uncompensated expropriation? Companies can't then claim their right in local courts because the investment agreement is not the law of the land. Given the attack on ISDS, it has become even more important - it is the integrity and authority of EU trade policy, and the Commission's capacity to negotiate meaningful trade deals, that are on the line. If ISDS is discharged from TTIP, I am afraid that is the end of TTIP. Europe's trade negotiators could take a long holiday, because other countries that the EU are negotiating with would rightly worry about the EU's capacity to command authority in trade policy.

How much chance does TTIP have of succeeding without ISDS?

I think it would be the end of TTIP. If ISDS is discharged before the negotiations have finished, the criticism will move on to other parts of TTIP. The idea that NGOs then will become silent and accept TTIP is just naive. That is not the way they operate. I expect the US to lose faith in EU's capacity to stand up for an ambitious trade

agreement, if it gave up on ISDS.

What are you expecting from the Commission report on the issue?

I expect the Commission to set out a policy pretty much along the same lines as the ISDS model used in the Canada-EU agreements. Agreements will be tightened up, and there will be more transparency.

How can issues relating to redress be dealt with through the WTO?

Investment protection is not covered by the WTO. I see no development in that direction in the foreseeable future. A multilateral approach to investment protection and arbitration would anchor them in a treaty and give opportunities to regulate in agreements what governments are not allowed to do. If we build a similar approach to investment as we have done to trade in the WTO, we would get far better rules that would protect against discrimination and unfair practices in a way that BITs (bilateral investment treaties) can't do.

Commission ISDS report: Fireworks for the new year

An imminent Commission report on the use of ISDS in TTIP will re-ignite the explosive debate between negotiators and politicians who favour pushing ahead with an arbitration clause in the treaty, and a broad coalition of vocal opponents.

Having closed a public consultation on the issue over the summer, the report is expected to outline a way forward on the issue early in the new year.



New Year's Eve, Brussels. [Jean-Etienne Minh-Duy Poirrier/Flickr]

The EU executive will also publish contributions to the consultation, where respondents agree for these to be made public, which are expected to be posted

on its web site before Christmas.

MEP Marietje Schaake (the

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Netherlands; ALDE), a member of the European Parliament's committee on international trade, said that following the many concerns regarding the current system of ISDS voiced over past months, "there is general agreement among all stakeholders, including civil society, legislators and the business community, that improvements are needed."

"Hopefully the answers to the consultation will provide some form of answer to whether ISDS is needed in TTIP and if it is, what form it should have," Schaake said.

Vital Moreira – a professor at Coimbra University's law school in Portugal and a former Socialist MEP who until this year chaired the European Parliament's trade committee and acted as its rapporteur on ISDS – told EurActiv that significant opposition to ISDS in public opinion "must be reflected in the consultation".

Drop ISDS, at least in name

However he does not expect the EU executive to withdraw the arbitration clause from the TTIP negotiations.

According to Moreira, the Commission is expected "to respond convincingly to a number of concerns about ISDS that deserve to be addressed".

He believes these will build on existing adaptations already achieved within negotiations over the EU-Canada trade agreement (CETA), a blueprint for TTIP and the first EU-wide deal, including investor-state arbitration, which the European Parliament must also pass.

These changes included fine-tuning the normal wording of foreign investors' protection in order to safeguard the host governments' right to regulate and providing for a more transparent and consistent arbitration procedure.

However ISDS should go in name, if only for cosmetic reasons, Moriera said.

"I think that the very acronym ISDS should be dropped (because of its

bad name), being replaced by a more neutral "arbitration clause", in order to underscore that this is a brand new type of alternative dispute resolution," said the professor.

The director of Brussels-based think tank the European Centre for International Political Economy (ECIPE) agreed that a CETA-style amendment of ISDS is in the pipeline.

"I expect the Commission to set out a policy pretty much along the same lines as the ISDS model used in the Canada-EU agreements. Agreements will be tightened up, and there will be more transparency," Fredrik Erixon told EurActiv in an interview.

Indeed Trade Commissioner Cecilia Malmström has herself indicated that the Canadian model of change will act as a blueprint for the Commission's thinking.

"We have tried to reform ISDS in CETA. That is a decisive step forward in reforming the old system of arbitration which clearly did not work. We tried in the Canadian agreement to limit and list the cases in which companies would turn to arbitration," Malmström told a recent policy forum in Brussels.

Malmström explained that the CETA amendments mean that the use of ordinary state courts – rather than arbitrations – should be the preferred option, and the amendment includes "an obligatory code of conduct when it comes to arbitrators".

However she also held out the possibility that the report on ISDS in TTIP may go further.

"The Canadian way is a very good way forward, possibly we can go even further in making sure that [future arbitrations] are limited to genuine cases and there are no abuses," Malmström said.

Marietje Schaake stressed that the Commission report will represent the beginning of a fresh debate on the issue, rather than a conclusion.

"This will not be the end of the process. The Commission must decide which course of action to take

in consultation with the European Parliament and the Member States, who gave the Commission the mandate to take up an ISDS clause in TTIP in the first place," Schaake said.

She lamented the fact that discussion on ISDS, however worthwhile, "has overshadowed other parts of the negotiations, such as procurement, energy, financial services, operating US domestic flights, shipping and maritime and air services which should also be discussed."

"If the debate does not also focus on these topics, it will be harder for negotiators on the EU side to take a clear position which can address the needs and concerns of all stakeholders," Schaake said.

"In general, we should not only focus on fears, but look constructively at what we may be able to gain," according to Schaake.

It is clear that suggested reforms to ISDS – even if these go further than those incorporated within CETA – will not silence all critics, however.

More transparency needed to slay imagined monsters

"ISDS should be scrapped from CETA and not included in TTIP," according to Cecile Toubeau, sustainable trade policy officer at T&E, an NGO which campaigns for sustainable transport policy.

"When it comes to ensuring secure investment, multinational corporations certainly have the means already to evaluate risk, seek awards in national courts, take out private insurance, and participate in public investment guarantees," Tourbeau said, adding: "Governments should be safeguarding their ability to protect people and the environment – not giving away this power to please multinational corporations."

Pia Eberhardt, a researcher and campaigner with Corporate Europe

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Observatory, a campaign group, agreed.

“I expect the Commission to continue business as usual. They will probably say: ‘Thank you European people for your thought. Some of you complained that we were going too far; others said we were not going far enough; so we think that we are perfectly in the middle of the debate when we continue with our reform agenda for investor-state dispute settlement in TTIP,’” Eberhardt said.

Instead she believed that the EU executive should “ditch” what she described as “the extreme investor privileges from TTIP”.

“Several experts have explained in the consultation that the Commission’s so called “reforms” won’t tame investor arbitration - because these very same reforms have failed to do so in the past. If investor state arbitration remains in TTIP, we can expect a wave of corporate lawsuits against the EU and its member states - and taxpayers and regulators will

pay the price,” according to Eberhardt.

When the debate comes to Parliament, it will be against more clamour to scrap the ISDS, but there are MEPs who are equally vocal in pushing for it.

“There are two main problems with a free trade agreement with the US as far as some Europeans are concerned: the US and free trade,” said MEP Fredrick Federley (Sweden; Alliance of Liberals and Democrats for Europe).

“We have to try and stem this demonisation of business and trade in Europe because trade is where our strength comes from,” according to Federley. He too, however, acknowledged the need for reform.

“We have to slay some of these monsters, but that means being more transparent in the TTIP: If Europe and the US does not make the negotiations and the ISDS apparatus more transparent then these monsters in the public imagination will keep on growing.”



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