



International Centre for Trade
and Sustainable Development

EU Launches Public Consultation on T-TIP Investment Provisions

The European Commission has launched its public consultation on the investment protections and investor-state dispute settlement (ISDS) mechanisms that it hopes to include in an EU-US trade pact, as part of a larger effort to respond to the growing debate over the trade deal's merits.

The prospect of including certain investor protections, particularly ISDS, in the Transatlantic Trade and Investment Partnership (T-TIP) has rankled civil society groups on both sides of the Atlantic, who fear that such measures could open the door to foreign corporations taking governments to court over hard-won public policies, such as those involving the environment or public health.

As a result, the investment portion of the trans-Atlantic talks have been on hold since late January, after the European Commission announced that it would be opening up a public consultation on the subject in order to address concerns that have been raised by the European people. (See Bridges Weekly, 23 January 2014)

European Commission officials, such as Trade Commissioner Karel De Gucht, have said that including these investment protection policies are essential for assuring that the rights of investors are upheld, and have warned against falling for "misconceptions and misrepresentations" about these policies.

The consultation comes amid reports that some EU member states - such as France and Germany - may be wavering over whether to back ISDS' inclusion in a final deal. US officials, for their part, have continued to push for the inclusion of these investor protections, with chief negotiator Dan Mullaney saying last month that a "comprehensive and ambitious" deal would need to feature such provisions. (See Bridges Weekly, 20 March 2014)

Some trade analysts, such as Daniel Ikenson of the right-leaning Cato Institute, have suggested that a bilateral deal could have a better chance at survival without ISDS, and has questioned whether it is indeed necessary. However, EU Trade Commissioner Karel De Gucht has warned

that the entire T-TIP pact could be thrown in jeopardy if these provisions are dropped from the final agreement, according to the Financial Times.

T-TIP an opportunity for improvement, officials say

Though EU officials have defended the need for ISDS and other investor protections, they have also acknowledged that some improvements are needed on past versions of these policies, touting T-TIP as a potential testing ground for better measures.

“To be perfectly clear, I fully agree with the many critics who claim that ISDS up until now has resulted in some very worrying examples of litigation against the state,” De Gucht said last week in announcing the consultation.

“Many of these existing arrangements have vague legal wording that has left the agreements vulnerable to expansive interpretation by some arbitration tribunals,” the EU trade chief said. “The only way to put a stop to this and close down such legal loopholes is to re-do investment protection standards and ISDS.”

For instance, the EU hopes to include a mechanism for appeals in ISDS; a clarification that non-discriminatory measures taken for public welfare objectives cannot be considered the same as indirect expropriation; and a clearer definition of what constitutes “fair and equitable treatment” for investors, including a clarification that ensures parties would not be able to modify or introduce new legislation.

These changes, Commission officials say, would mark significant improvements over past investment agreements, if they are included in the final T-TIP pact.

The online public questionnaire includes 12 issue areas, such as the right to regulate, fair and equitable treatment for investors, transparency of the ISDS system, expropriation, and reducing the risk of frivolous and unfounded cases. The form outlines the EU’s negotiating objectives and approach in these areas, along with providing a space for participants to provide detailed comments.

The consultation text is currently available in English, and will be made available in the other EU languages. The consultation will last 90 days from when the last EU language version has been published.

ICTSD reporting; “Official warns EU-US trade deal at risk over investor cases,” FINANCIAL TIMES, 27 March 2014.