



# Free Trade Supporter Cato Institute Says Drop Corporate Sovereignty Provisions In Trade Agreements

from the so-that's-everyone,-then dept

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Even though the formal negotiations for TAFTA/TTIP have begun only recently -- earlier meetings were largely exploratory -- it is already clear what the most contentious chapter will be: that dealing with corporate sovereignty, or "investor-state dispute settlement" (ISDS) as it's more formally known. Indeed, even back in January, ISDS was generating so much negativity that the European Commissioner responsible for TTIP, Karel De Gucht, decided to pull the corporate sovereignty chapter from the negotiations for a three-month EU consultation in an attempt to draw the sting from the criticisms.

It hasn't worked. As the Financial Times noted this week (subscription or registration required):

Faced with an increasingly vocal opposition to a landmark EU-US trade agreement, a growing number of backers of the deal are starting to ask a simple question: might the future of transatlantic trade be better served if one of its most controversial provisions was simply dropped?

Almost nine months after negotiations opened with great hope and fanfare, opponents of the mooted Transatlantic Trade and Investment Partnership, or TTIP, are rallying against a plan that would allow private investors to use the pact to sue governments if they felt local laws threatened their investment.

One fan of free trade agreements is Daniel Ikenson, director of the Herbert A. Stiefel Center for Trade Policy Studies at the Cato Institute. He's written a great post on the Cato Institute Web site with the title: "A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement." As he points out with reference to the faltering TPP negotiations (but it applies equally to TAFTA/TTIP):

Characterizations of the TPP as a scheme to boost the fortunes of tobacco, oil and gas, banking, and pharmaceutical companies at the expense of worker protections, the environment, public health, and food and product safety have gone viral. And without so much as a single public repudiation of these claims by the president those perceptions are sticking.

As is true of most populist causes, buried beneath the enabling mythology and hyperbole are

some kernels of truth. One such truth, which this paper seeks to distill from the vacuous, anti-capitalist hyperventilation surrounding the trade agenda, is that the so-called Investor-State Dispute Settlement (ISDS) mechanism, which enables foreign investors to sue host governments in third-party arbitration tribunals for treatment that allegedly fails to meet certain standards and that results in a loss of asset values, is an unnecessary, unreasonable, and unwise provision to include in trade agreements. Although detractors may not know it by name, ISDS is a significant reason why trade agreements engender so much antipathy. Yet, ISDS is not even essential to the task of freeing trade. So why burden the effort by carrying needless baggage?

Purging both the TPP and the TTIP of ISDS makes sense economically and politically, would assuage legitimate concerns about those negotiations, splinter the opposition to liberalization, and pave the way for freer trade..

After filling in the historical background to corporate sovereignty provisions in free trade agreements, Ikenson then goes to offer what he calls "Eight Good Reasons to Drop ISDS from TPP and TTIP":

First, ISDS is overkill. Governments are competing to attract productive investment to keep their citizens employed and their economies growing. Accordingly, it is imperative to maintain smart, transparent, predictable policies that are administered fairly and nondiscriminatorily. Asset expropriation or other forms of shabby treatment of foreign companies is not likely to be rewarded by new investment.

We don't need corporate sovereignty provisions to protect investors in foreign markets because those same companies will soon shun any country where investments are seized or investors discriminated against. It's true that such investments can be risky, but Ikenson points out that multinational companies (MNCs) are actually rather good at managing that risk. And if they're really worried, they can always take out private insurance.

Second, ISDS socializes the risk of foreign direct investment. When other governments oppose, but ultimately concede to, U.S. demands for ISDS provisions, they may be less willing to agree to other reforms, such as greater market access, that would benefit other U.S. interests. That is an externality or a cost borne by those who don't benefit from that cost being incurred. In this regard, ISDS is a subsidy for MNCs and a tax on everyone else.

It is not just other companies that are subsidizing MNCs, but also the public, which must bear most of the burden of corporate sovereignty's costs. That's because awards to foreign investors that sue and win against national governments are paid out of taxes. But the benefits of ISDS only accrue to those companies actually investing abroad.

Third, ISDS encourages "discretionary" outsourcing.

This is an interesting point. Corporate sovereignty is designed to make investing overseas less risky and more attractive. But the ironic effect of this is to make the US less attractive as an investment. As Ikenson says:

Access to ISDS could be the decisive factor in a company's decision to invest in a research center in Brazil, instead of the United States. Why should U.S. policy reflect greater concern for the operations of U.S. companies abroad than for the operations of U.S. and foreign companies in the United States? Why should ISDS effectively subsidize outsourcing, and not insourcing?

His next point has been made by a number of commentators:

Fourth, ISDS exceeds "national treatment" obligations, extending special privileges to foreign corporations.

Corporate sovereignty has the effect of giving foreign corporations more privileges than domestic ones -- hardly a policy aim for either the US or EU here.

Fifth, U.S. laws and regulations will be exposed to ISDS challenges with increasing frequency. This is hugely important, because it exposes the fact that the current push for corporate sovereignty is based on a naïve extrapolation from current corporate sovereignty experiences. Hitherto, ISDS has been a weapon for Western countries to deploy against developing nations -- something that has few downsides. But if corporate sovereignty is included in TTIP, say, we will see US companies routinely challenging EU laws and regulations -- and EU companies challenging US laws and regulations. Suddenly, Western nations will be the victims, as well as the bullies.

Sixth, ISDS is ripe for exploitation by creative lawyers.

This will come as no surprise to Techdirt readers, who have seen post after post about the abuse of the patent system by trolls and their lawyers. Introducing a supranational legal system with ill-defined rules will produce a new class of more aggressive and better-funded trolls attracted by the even higher stakes involved when the defendant is not just a company, but an entire country.

Seventh, ISDS reinforces the myth that trade primarily benefits large corporations.

Some might argue that's no myth, but Ikenson is right: the revolt against corporate sovereignty and the power that it might give transnational companies is now such that the entire TAFTA/TTIP agreement is in doubt -- recently, the influential German news magazine *Der Spiegel* wrote: "The battle for TTIP seems as good as lost" (German original.)

Eighth, dropping ISDS would improve U.S. trade negotiating objectives, as well as prospects for attaining them.

The idea here is to divide the opposition to TAFTA/TTIP by sacrificing ISDS. The hope is that enough organizations and people will then support the agreement, isolating those that still do not. Yes, it's cynical, but it's also a sensible approach for those in favor of such trade agreements.

Ikenson concludes:

For practical, economic, legal, and political reasons, ISDS subverts prospects for U.S. trade liberalization. Yet it is tangential, at best, to the task of freeing trade. Any benefits to availing MNCs to third-party adjudication are all but totally overwhelmed by the additional costs. In the proverbial airplane that is down one engine and losing altitude, throwing ISDS out of the cargo hold to reduce unnecessary weight is the best solution.

It's a great piece, cogently argued, that is particularly important given the affiliations of the author. Quite apart from the specific reasons it lays out as to why corporate sovereignty should go, its mere existence is proof that ISDS now lacks support across the entire political spectrum.

Time to drop it.