Investor-state dispute settlement under TTIP - a risk for environmental regulation?

Christiane Gerstetter
Ecologic Institute (www.ecologic.eu)

Basis: Two studies

Legal Implications of TTIP for the Acquis Communautaire in ENVI Relevant Sectors (October 2013, commissioned by the EN, ENVI Committee), http://www.ecologic.eu/10067

Investor-state Dispute Settlement under TTIP - a Risk for Environmental Regulation? (December 2013, commissioned by Heinrich-Boell-Foundation), http://www.ecologic.eu/de/10400

Structure

1) Very short background on ISDS
2) The risks: some of the most problematic clauses in case law
3) Arguments in favour of ISDS in TTIP and their merits
4) Some more food for thought
5) Conclusion

ISDS is…

.... an arbitration procedure whereby a foreign investor can sue its host state for an alleged breach of an international investment agreement.

Different from and additional to:

- State to state dispute settlement (e.g. WTO)
- Claims by foreign investor before national court of host state

Unusual in international law, normally only states can sue each other (only known in human rights law)

Contained in Commission‘s negotiating mandate and US model bilateral investment treaty (BIT)

Some ongoing environment-related cases

Vattenfall vs. Germany (Energy Charter Treaty/ICSID, 2012):

Energy company Vattenfall has nuclear power plants in Germany; these will need to be closed down as a result of German nuclear phase-out. Vattenfall brought ICSID claims under Energy Charter Treaty, allegedly claiming 3.7 billion Euro in compensation (documents not public)

Lone Pine Resources vs. Canada (NAFTA/UNCITRAL, 2012)

Mining company Lone Pine Resources sues Canada over revokation of permits for fracking in context of fracking moratorium, claiming violation of fair and equitable treatment requirement and prohbition of expropriation

Various claims brought against Spain over changes in support scheme for renewable energy

ISDS: Some background

- Usually contained in the about 3000 investment agreements (source: OECD), also contained in free trade agreements containing investment chapter
- Significant increase in numbers of ISDS cases over years
- 40% of all ca. 500 known cases until 2012 decided in favor of state, 30% decided in favor of investor, remainder amicably settled (source: UNCTAD)
- Additional to national judicial proceedings (which are also available to foreign investors)
- Most common forum: International Centre for Settlement of Investment Disputes (ICSID)
- Ad hoc decisions, with some cross-references to precedents, but no consistent body of case law

Specific procedural features of ISDS

- Usually: 3 persons tribunal
- Proceedings normally not public (only when parties agree or clause to this end in investment agreement under dispute)
- No full appellate review, only limited grounds for revision
- Investors normally claim monetary damage (different from national courts)
- Damages awarded can be very substantial; highest known award in ICSID proceedings US$ 1.77 billion in proceedings against Ecuador 2012
- Small community of arbitrators; arbitrators in one case are often legal counsel in other cases – potential conflict of interest
- Fees not necessarily paid by losing party

Case law so far and national (environmental) regulation and measures I: „fair and equitable treatment“

Example: Art. 1105.1 NAFTA

“Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

Interpretation:

- Called a „chewing-gum“ provision
- Tribunals have read a lot of different standards in it, including transparency, prohbition of arbitrary decsions, protection of legitimate expectations

Case law so far and national (environmental) regulation and measures I: „indirect expropriation“

Example: Art. 13 Energy Charter Treaty

Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation ….except where such Expropriation is:

(a) for a purpose which is in the public interest;

(b) not discriminatory;

(c) carried out under due process of law; and

(d) accompanied by the payment of prompt, adequate and effective compensation

Main question: Can regulatory measures of general application taken for public interest be considered indirect expropriation or not? Case law not uniform

Case law so far and national (environmental) regulation and measures IV: Conclusions

- No uniform interpretation of the vaguely worded clauses
- Uncalculable risks for states; potential of regulatory chill through threats of ISDS proceedings
- Significant investment of EU investors in EU and vice versa = signficant risks
- Some states (e.g. Australia) have announced they will not include ISDS provisions in their agreements any more with a view to the risks

Pro arguments and their merits (I)

„ISDS needed to foster investment; lack of legal certainty and adequate legal protection of investors without it“

Not very convincing between EU and US, because

- US so far has concluded only bilateral investment treaties with the „new“ (Eastern European) Member States (mid-90ies) – but still signifcant mutual investment
- Rule of law systems within the EU and the US
- Study by LSE (2012): ISDS in TTIP is not going to increase mutual investment
- Actors like the German government consider ISDS unnecessary in TTIP

Conclusion: ISDS not needed for this purpose in TTIP

Pro arguments and their merits (II)

„US and EU courts do no apply international agreements, therefore investors cannot enforce their rights before national courts“

- True for both CJEU and US courts
- But: international agreements normally only create rights and obligations for states (exception: human rights law)
- But: national rules and principles offer protection e.g. against expropriation, arbitrary behaviour, protect legitimate expectations
- Foreign investor that has recourse to national courts is not left without adequate protection

Pro arguments and their merits (III)

„ISDS in TTIP is needed as blueprint for negotiations with other countries, notably China; it will be very offensive for other countries if EU does not negotiate ISDS with US, but insists on doing that with these other countries“

- Not all trade agreements look alike
- It is not unknown in international law for states to treat different states differently (e.g. visa regulations)
- Take risks for EU regulation and public budgets in order not to offend China?

Some more food for thought

- ISDS gives foreign investors MORE rights than domestic ones
- Evidence in literature that states use litigation strategically and are mindful of the political issues at stake in the other country and the larger implications of a certain judicial decision – same is not true for private actors
- In a permanent international court, all states potentially affected have a say in appointing judges (e.g. WTO); in arbitration only the state affected - still what is found to be law in one case may become relevant in another (even though no rule on stare decisis/binding precedent)

ISDS in TTIP – how and how likely

Contained in both the EU‘s negotiating mandate and the US model bilateral investment treaty

BUT: EU Member States do not agree; lot of public resistance – Commission halted talks on this topic to conduct public consultation

Many actors (including Commission, industry representatives) agree that rules on ISDS in TTIP should ensure transparency, code of conduct for arbitrators, preventing frivolous claims, bearing the costs of proceedings, enhancing control by parties over interpretation, appellate mechanism

IF ISDS in TTIP (not recommended), then….

- Formulate the clauses on investment protection narrowly and precisely; avoid vague legal norms withouth definition (e.g. indirect expropriation) – models exist
- In addition: explicit recognition of right to regulate etc.
- Create full appellate proceedings
- Transparency in proceedings, adequate selection mechanisms for arbitrators, code of conduct for them
- Exhaustion of domestic remedies (?)

Thank you for your attention

Contact:

christiane.gerstetter@ecologic.eu

Ecologic Institute, Pfalzburger Str. 43-44, D-10717 Berlin
Tel. +49 (30) 86880-0, Fax +49 (30) 86880-100

christiane.gerstetter@ecologic.eu

www.ecologic.eu