

# 6. TRANSATLANTIC INVESTMENT TREATY PROTECTION – A RESPONSE TO POULSEN, BONNITCHA & YACKEE *FREYA BAETENS\**

---

## 1. Introduction

A number of preliminary comments apply to the *Poulsen, Bonnitcha & Yackee* chapter as a whole: firstly, while its focus on investor-state dispute settlement (ISDS) is valid, it is important to keep in mind that there is more to the investment chapter in TTIP than solely its dispute settlement clause. As such, it would be productive for future work to address how the bulk of the investment chapter, namely its substantive standards, could be improved upon. Secondly, the authors chose not to cover pre-establishment national treatment – a regrettable exclusion, as this might well be included in the final text of the agreement, following the US approach in its other investment treaties. Furthermore, the authors' assumption that post-establishment investment protection will be enforceable by way of ISDS is not necessarily correct, in light of the ongoing debate of the issue, and as such it would have been interesting to conduct a cost-benefit analysis of investment protection in TTIP *without* an ISDS clause, if only to assess whether this is a viable option.

---

\* This chapter is intended as a response to the thought-provoking ideas presented in chapter 5 by Lauge Paulson, Jonathan Bonnitcha and Jason Webb Yackee, focusing on some of their findings that are open to discussion and structuring the arguments made below along the lines of their chapter. As such, the present chapter does not intend to raise any new topics in this debate but serves only as a response to the original chapter.

The author would like to express her gratitude to Sophie Starrenburg for her assistance in preparing this chapter.

## 2. Treaty provisions: The likely content of the ‘T’ in ‘TTIP’

*Poulsen, Bonnitcha & Yackee* offer an overview of US practice in negotiating investment treaties, for example drawing attention to the prudential measures taken to ensure its ability to regulate the finance sector, but also including references to safeguard domestic labour laws and the environment in order to preserve the host-state’s policy space. Another pertinent example is the manner in which the ‘minimum standard of treatment’ is defined in Annex A of the US model BIT as “the customary international law minimum standard of treatment of aliens”. However, one aspect of this practice – relevant when it comes to assessing the legitimacy and desirability of such treaties – is *not* mentioned, namely the fact that the US has been among the first states to include provisions concerning an ISDS appeals mechanism in several investment agreements (Annex 10-H of the US-Chile FTA, Annex 10-F of CAFTA, and the 2012 US model BIT). Admittedly, none of these proposals has yet materialised, but the foundation stones have been laid, making clear that the US is open to creating such a mechanism.

One further aspect of US practice – the transparency of ISDS proceedings as for example adopted in NAFTA Chapter 11 disputes – is only cursorily mentioned. However, this increased level of transparency might prove vital in the future, as “justice should not only be done: it must also be seen to be done”, and this will contribute to the legitimacy of the entire ISDS process.

## 3. Potential benefits of ISDS

*Poulsen, Bonnitcha & Yackee* note that the benefits of TTIP could materialise in two possible ways: firstly, by promoting US investment in the EU; and secondly, by protecting EU investment in the US.

### 3.1 Protection of US investment in the EU

On the question of whether TTIP – or any other investment agreement – will promote US investment in the EU, the authors argue that past practice has shown that investment treaties with investment protection chapters have negligibly (or not at all) affected investment flows. As such, TTIP would not provide much benefit to the EU in terms of higher investment rates by the US, as the region is already considered ‘safe’ from the perspective of US investors. However, this argument is made on the basis of limited empirical evidence, and such evidence often cuts

both ways: for every study that claims that there is a significant economic benefit that can be gained by the inclusion of an investment chapter,<sup>1</sup> another can be found that says that this is not the case.<sup>2</sup>

In any event, just because there may be no impressive increase in FDI as a result of the conclusion of a BIT, this does not mean that BITs are valueless. They may not be a direct gateway to massively increased investment rates, but rather a tool that is considered by a given company as part of its investment strategy. Ultimately, a company's decision to invest in a country will be based upon a range of factors about the country or region in which they are seeking to invest, of which the availability of ISDS is one, serving as a "confidence and credibility-inspiring signal".<sup>3</sup>

There are several other aspects of this discussion that merit further mention. Firstly, *Poulsen, Bonnitza & Yackee* argue that the types of risks an investment protection chapter would cover are generally not considered present in most EU member states. However, one type of risk that is certainly present in several EU member states relates to the possibility of not being granted a fair trial before a domestic court. According to a recent country ranking of 'judicial independence' performed by the World Economic Forum,<sup>4</sup> some EU countries are among the best in the world (Finland and Denmark are in the top five), but others perform rather poorly (Slovakia ranks at 130 out of 140, Bulgaria at 126) – at place 30, the US is still below countries with which ISDS is planned to be concluded, such as Canada (place 9) or Singapore (at 20), or with which it can be expected to be concluded, such as Uruguay (at 21) or Saudi Arabia (at 26). The extensive jurisprudence of the European Court of Human Rights shows that some EU member states such as Italy, France and Germany have repeatedly violated Article 6 of the European Convention on Human Rights through their

---

<sup>1</sup> See e.g. Sauvants & Sachs (2009); UNCTAD (1998), Banga (2003), Tobin & Rose-Ackerman (2006), Salacuse & Sullivan (2005), Neumayer & Spess (2005), Aisbett (2007) and Busse et al. (2008).

<sup>2</sup> See e.g. Hallward-Driemaier (2003), Tobin & Rose-Ackerman (2003) and Gallagher & Birch (2006).

<sup>3</sup> Interview with Eric Neumayer, Kevin P. Gallagher and Horchani Ferhat at [www.iisd.org/itn/2009/04/30/do-bilateral-investment-treaties-lead-to-more-foreign-investment/](http://www.iisd.org/itn/2009/04/30/do-bilateral-investment-treaties-lead-to-more-foreign-investment/);

<sup>4</sup> See <http://reports.weforum.org/global-competitiveness-report-2014-2015/rankings/>

inability to provide a hearing and/or a decision within a ‘reasonable time’.<sup>5</sup> This also shows why investors may prefer international arbitration: in the large majority of cases, a final decision will be rendered much sooner than if such disputes were to be decided through the domestic court system.

Secondly, the authors mostly focus on whether US or Chinese investors consider the EU a safe place to invest, but do not address whether the converse is true.

Thirdly, *Poulsen, Bonniticha & Yackee* rely upon a 2010 survey of legal counsel within the 100 largest American multinationals in order to underscore their argument that investment treaties have little impact on investment flows, given that the majority of counsel stated that these treaties did not play a (critical) role in their decisions to invest abroad. However, the ISDS system is not employed to a great extent by the large multinationals, but rather by middle-sized or smaller ones. An OECD survey concluded that 22% of all ISDS claims are brought by individuals or “very small corporations”.<sup>6</sup> Medium and large multinational companies account for 50% of the claims, and the rest of the cases (28%) were brought by investors about which there is little public information. The fact that larger companies do not rely as frequently upon ISDS as one might expect due to their relative size, is arguably because the largest companies have other means of leverage,

---

<sup>5</sup> See, e.g. landmark cases: *H. v. France*, 24 October 1989, Series A no. 162-A; *X. v. France*, 31 March 1992, Series A no. 234-C; *Caloc v. France*, no. 33951/96, ECHR 2000-IX; *Kress v. France* [GC] no 39594/98, ECHR 2001-VI; *Frydlender v. France*, [GC] no 30979/96, ECHR 2000-VII; *Katte Klitsche de la Grange v. Italy*, 24 October 1994, Series A, no 293-B; *Scordino v. Italy (no. 1)* [GC] no 36813/97, ECHR 2006-V; *Capuano v. Italy*, 25 June 1987, Series A no. 119; *Bottazzi v. Italy*, [GC] no 34884/97, ECHR 1999-V; *Di Pede v. Italy*, 26 September 1996, ECHR 1996-IV; *Vocaturo v. Italy*, 24 May 1991, Series A no. 206-C; *Cappello v. Italy*, 27 February 1992, Series A no. 230-F; *Fisanotti v. Italy*, 23 April 1998, ECHR 1998-II; *Bock v. Germany*, 29 March 1989, Series A no. 150; *Pammel v. Germany*, 1 July 1997, ECHR 1997-IV; *Probstmeier v. Germany*, 1 July 1997, ECHR 1997-IV; *Sürmeli v. Germany*, [GC] no 75529/01, ECHR 2006-VII; *Blake v. UK*, no 68890/01, 26 September 2006; *Robins v. UK*, no. 22410/93, 23 September 1997; *H. v. UK*, 8 July 1997, ECHR 1997-VIII. For a more complete overview see European Court of Human Rights, *Guide to Article 6 – Right to a Fair Trial* (2013) p. 51 et seq.

<sup>6</sup> OECD (2012), “Investor-State Dispute Settlement”, Public Consultation Doc, p. 16 ([www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf](http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf)).

and thus do not need to resort to the courts in order to achieve their goals.

This author agrees with *Poulsen, Bonniticha & Yackee* that, in Europe, BITs have not been widely publicised or ‘politicised’ – at least not until quite recently. It is important that the public is informed of the role that BITs play in the international realm, as the current level of knowledge about these instruments – even amongst media and NGOs claiming to specialise in this area – is shockingly low. This is dangerous because they play such an important role in informing civil society – as was evident by their impact on the recent consultation of the European Commission. There, many of the replies to the survey circulated by the Commission indicated fears that ISDS inclusion in TTIP would place too great a limit on states’ policy space. However, the majority of these replies “were based on copy-and-paste templates circulated by non-governmental organisations campaigning against TTIP”,<sup>7</sup> much like pressing a ‘dislike’ button on Facebook or signing an online petition, without the need for any actual knowledge or substantiated contribution to the debate. Such tactics are not new; they were applied by Philip Morris in order to allege that public opinion was against the EU Tobacco Products Directive<sup>8</sup> – an example which suggests that mass automatic replies ought to be interpreted cautiously.

### 3.2 Protection of EU investment in the US

Turning to the second strand of *Poulsen, Bonniticha & Yackee’s* argument – whether TTIP will protect EU investment in the US – several comments can be made. The authors argue that TTIP is unlikely to improve the situation for EU investors in the US, because, in general, the protection level of foreign investors in the US is already high, and TTIP will not offer much additional protection. In general, it is indeed true that there is no evidence of systematic, serious flaws in the US system. But do *Poulsen, Bonniticha & Yackee* mean to state that domestic courts should deal with all private claims in countries where the rule of law is strong, to the exclusion of international judicial review?

Following this line of reasoning to its logical conclusion, they should in that case also be advocating the abolishment of the various regional courts for human rights as the legal systems of the European

---

<sup>7</sup> C. Olivier, “Public Backlash Threatens EU Trade Deal with the US”, *Financial Times*, 13 January 2015.

<sup>8</sup> See e.g. article at: [www.theguardian.com/society/2013/jun/07/tobacco-firm-stealth-marketing-plain-packaging](http://www.theguardian.com/society/2013/jun/07/tobacco-firm-stealth-marketing-plain-packaging)

member states and the US already contain strong human rights protection. The only difference would be that the European Convention on Human Rights for example, does require applicants to exhaust local remedies – as a result, there can easily be 10-15 years or more between the injury and the remedy. However, an argument could be made for allowing a state to first attempt to address a violation in relation to a protected investment via its own court system and only if this does not result in an appropriate solution within an acceptable time frame (for example, two years after bringing a claim), the investor could revert to an international tribunal. This option is further discussed below, in the Conclusions.

To state that domestic courts should ‘suffice’ for the handling of investment claims overlooks the fact that many domestic courts are not allowed – meaning that it is not within their legal scope of jurisdictional competence – to apply public international law, such as BITs, directly. Moreover, US courts that are in theory allowed to do so have a track record of nevertheless not accepting any claims of individuals based on any form of international law.<sup>9</sup> (Indeed, the same is true in Europe.<sup>10</sup> For example, on 13 January 2015, the Grand Chamber of the European Court of Justice held, inter alia, that the NGO *Stichting Natuur en Milieu* was not entitled to invoke the Aarhus Convention of 1998 on access to information, public participation, and access to justice in environmental matters, in spite of an explicit reference in the EU regulation implementing this Convention.<sup>11</sup> Importantly, this was decided upon at the request of the European Commission, Council and Parliament – some members of which are now arguing that investment protection standards in international treaties should be enforced by domestic and EU courts. Why would private investors be allowed to rely upon international treaties before such courts, while NGOs are not?)

Hence stating that “the appropriate response by the EU would be to insist in its negotiations that the US pass implementing legislation securing a right to access US courts for certain TTIP violations”, as

---

<sup>9</sup> See e.g. Haljan (2014), Wojcik (2013) and Hix (2013).

<sup>10</sup> See Bronckers (2015).

<sup>11</sup> Joined cases C-404/12 P and C-405/12 P, *Council of the European Union and European Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, Judgment of the Court (Grand Chamber) of 13 January 2015, not yet published (Court Reports - general).

*Poulsen, Bonniticha & Yackee* do, shows a lack of knowledge about US negotiation policy and the actual practice of domestic courts. Looking at US practice concerning domestic enforcement of individual rights under international treaties,<sup>12</sup> it is highly unlikely that the US would ever agree to pass legislation that would make substantive treaty standards domestically enforceable. For example, the US only ratified the International Covenant on Civil and Political Rights on the condition that its standards would not be enforceable before US courts.<sup>13</sup> In practice, if substantive protection for investors is included in TTIP, the only option of redress for violations of such standards would be through some form of international dispute settlement mechanism.

Another common misconception is that investment arbitration is consistently more expensive than national court proceedings; this is not necessarily the case. *Poulsen, Bonniticha & Yackee* argue that “it is impossible to say whether investor-state arbitration is more cost-effective than resolving disputes through national court proceedings in the absence of significantly more comprehensive evidence than is currently available”. But they proceed to examine precisely that question, making four points. First, EU countries will need to maintain court systems regardless of whether they agree to ISDS. That may be so, but referring more cases (and in particular, more complex cases concerning matters in which domestic judges are not specialised) to domestic courts, already overburdened and prone to delays, is not an obvious remedy.

Secondly, it is true that the parties’ legal and witness costs constitute the vast majority of costs associated with investment treaty arbitration (although tribunal costs are not negligible either). For this reason, the ‘loser pays’ principle, whereby the claimant who brings a manifestly unfounded claim has to reimburse the state’s legal and witness costs, would form a valuable safeguard – one that cannot be offered under most domestic court systems (including the US). In *Chemtura*, to take a salutary example, the unsuccessful claimant was ordered to pay Canada’s costs, including an allowance for the time

---

<sup>12</sup> See Powell (2001, p. 245); Roth (2001, p. 891); Spiro (1997, p. 567); Kaye (2013, p. 95).

<sup>13</sup> International Covenant on Civil and Political Rights, adopted 16 December 1966, S. Exec. Doc. E, 95-2 (1978) 999 UNTS 171, ratified by the US 8 June 1992.

invested by government officials in preparing Canada's defence.<sup>14</sup> Other cases in point are *ADC v Hungary*, *Plama v Bulgaria*, *Europe Cement v Turkey*, and *Gemplus v Mexico*.<sup>15</sup>

Thirdly, arbitrators who are specialised in the interpretation of 'vague and imprecise' standards should have less trouble deciding the factual and legal questions in an investment dispute than local judges would have who would be called upon to decide such cases (particularly if investment standards would be 'copied and pasted' into national legislation, as the authors seem to envisage). This is not to say that some investment standards such as 'fair and equitable treatment' or 'indirect expropriation' as such would not benefit from the incorporation of more clearly defined standards. Additionally, if treaty standards would have to be implemented in national legislation, this risks exacerbating interpretation problems due to the well-known problem of translation differences across the EU.<sup>16</sup> The same standard in Portuguese, for example, may be interpreted by local courts as meaning something different in Latvian - thereby nullifying the stability and predictability that a uniform treaty could bring.

Finally, in the majority of cases, arbitral proceedings offer a complete and final resolution of a dispute. Under any ISDS system, except the one set up by International Centre for Settlement of Investment Disputes (ICSID), annulment and appeal are not possible. The ICSID system cannot be included in TTIP because the EU, as a regional organisation is not, and cannot, be a member of the Convention; but even if it were, its annulment procedure is intended to be rare and limited to five strictly defined grounds,<sup>17</sup> unlike an appeal before a national court which reviews the entire case. In most countries, even an appeal is not the end of the dispute: there is a possibility to ask for a third consideration of the case before a supreme court or court of cassation. Furthermore, arbitral awards and national court decisions

---

<sup>14</sup> *Chemtura Corporation v. Government of Canada*, UNCITRAL (formerly *Crompton Corporation v. Government of Canada*) 2 August 2010.

<sup>15</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, 2 October 2006; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 27 August 2008; *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, 13 August 2009; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3 16 June 2010.

<sup>16</sup> See for example, Künnicke (2013, pp. 243-260) and Pozzo (2006).

<sup>17</sup> Article 52 of the ICSID Convention.

alike can subsequently be subjected to review as soon as the claimant attempts to enforce them in a different country – so there is no difference in this regard. Admittedly, annulment procedures have become more frequent in recent years and as the European Commission proposal for TTIP is putting forward the inclusion of an appeal mechanism, the gap in time and cost is, in this respect, narrowing.

#### 4. Potential costs

In their fourth section, *Poulsen, Bonniticha & Yackee* posit that the costs of the agreement significantly outweigh any possible benefits to the EU in general. However, this argument is not systematically supported by evidence and appears to be based on a number of challengeable extrapolations. Firstly, they argue that the likelihood of claims against the EU can be expected to increase roughly in proportion with the size of the investment stock in the EU covered by the treaty, but do not properly underscore why this would be this case. The authors make a number of further claims in their chapter, without specifying how they arrived at or calculated them, such as the fact that a great number of investment projects are of sufficient size to make the economics of an investment claim viable in theory; or that, with respect to sectors, US companies have made significant investments across virtually all sectors of the EU economy.

They also state that an investment treaty with the US would be disadvantageous given that ‘American’ investors tend to be the most litigious. This statement is, however, outdated; in 2013, it was investors from the Netherlands, Germany, Luxembourg and the United States that brought the largest number of claims. This also corresponds with overall trends throughout the history of ISDS.<sup>18</sup> By the end of 2013, US investors had brought 125 claims against states, followed by the Netherlands (61), the United Kingdom (42) and Germany (39). Comparing US investor claims to all EU investor claims helps put this hypothesis into perspective – six of the top ten home states for investors are member states of the European Union, which have brought a total of 225 claims.

*Poulsen, Bonniticha & Yackee* note that there remain several important factors that would increase the risk of adverse awards, one of which is the fact that certain important terms within investment law remain undefined (such as ‘fair and equitable treatment’) and are thus capable of being interpreted expansively by an arbitral tribunal in a

---

<sup>18</sup> Tietje & Baetens (2014, p. 26).

manner unfavourable to the EU. Whilst this is true, one must pause to consider the other alternative: would this situation not be as bad if such treaty provisions were to be interpreted by various domestic courts?

The mere fact that arbitral tribunals have significant discretion to interpret the terms of investment law should not be an argument against the conclusion of an investment treaty, as this role is also performed by domestic judges – interpretation is what adjudicatory bodies do for a living. Another option would be through state-to-state dispute settlement, i.e. espousal of investors' claims by their home state. However, it was precisely to prevent the problems arising from the essentially political and arbitrary character of espousal that ISDS procedures as well as human rights adjudicatory bodies were created, establishing private standing for injured individuals.

*Poulsen, Bonniticha & Yackee* furthermore argue that the legal costs of investment disputes are disproportionately high, even if the respondent state 'wins' the case. As stated above, several tribunals have recently adopted some form of the 'loser pays' approach, ordering the losing party not only to bear all arbitration costs of an adverse award, but also to make a substantial contribution to the winning party's legal fees – in particular when a case concerns a frivolous claim. This approach has also been taken in the discussions surrounding the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, where frivolous claims can be terminated at an early stage in proceedings, and generally the unsuccessful party is required to cover all the costs made in the process of a case.<sup>19</sup> Ultimately, even if the costs of ISDS are considered too high, there are ways of lowering them. One could think of negotiating the fees with the registry office and arbitrators, or capping lawyers' fees and negotiating an hourly rate – given that the market for arbitrators and lawyers is sufficiently saturated in order to survive a payment cap.

Two risks are raised as possible political costs of TTIP: i) the risk of reduced policy space, and ii) the risk of controversial claims or adverse awards. Particularly the first emerged as one of the main grounds of concern in the results from the recent consultations on TTIP conducted by the European Commission. The results from these consultations indicated that one of the most prevalent fears amongst

---

<sup>19</sup> Kuijper (2014, p. 111).

respondents was the perceived negative effects that the inclusion of ISDS in TTIP would have on national sovereignty.<sup>20</sup>

Essentially, all obligations that a state undertakes, ‘limit’ its policy space: promising to do A, may affect how one can do B. Also, governments will not infrequently wait with the enactment of new legislation until the result of a domestic or EU court case emerges, the same as if a state would postpone a certain measure pending the outcome of an arbitral award. Investment claims are mostly brought against executive decisions made with respect to one particular investor or in the context of a particular concession, permission or promise granted to an investor, *not* against legislative acts (with a limited number of notorious exceptions). When looking at all ISDS disputes, the respondent states have *won* in approximately 60% of the cases.<sup>21</sup> In the few cases where claims have been brought against acts of legislation, the investor quasi-invariably ended up on the losing side, as tribunals recognised and protected the policy space and the right to regulate of the respondent state.<sup>22</sup> As such, the inclusion of ISDS would not threaten or reduce policy space, because most arbitral awards would not encroach upon it.

An example of this was the *Vattenfall/Germany* arbitration, where the government first granted licenses to a coal plant (which resulted in the awarding of voluntary damages to the investor) and for a nuclear plant (of which the case is still pending), and subsequently retracted these licences.<sup>23</sup> These cases have not had a measurable impact on Germany’s environmental regulations – only on the procedures followed with regards to transparency in the decision-making process (benefitting not only investors but also other stakeholders), as well as the fact that ‘disclaimers’ are now incorporated into any licenses granted by the state; such developments could hardly be seen as negative. Even if there is an adverse award, one must recall that the state will *not* be forced to make any changes in policy: a tribunal can only require a state to pay appropriate damages to the individual investor, and investors usually receive much less compensation than what they asked of the tribunal (as the authors show). Ultimately, the

---

<sup>20</sup> C. Olivier, “Public Backlash Threatens EU Trade Deal with the US”, *Financial Times*, 13 January 2015.

<sup>21</sup> Tietje & Baetens (2014).

<sup>22</sup> Tietje & Baetens (2014, p. 47).

<sup>23</sup> Tietje & Baetens (2014, p. 103).

fear of regulatory chill expected from the inclusion of ISDS, due to which states allegedly would refrain from adopting certain legislative, executive or administrative acts, has not been empirically (beyond the mere anecdotal or purely hypothetical) established.<sup>24</sup> In other words, there is no scientific ground to assume there would be more regulatory chill because of the risk of ISDS cases, than there is based on the looming possibility of domestic court cases.

Furthermore, the apparent widespread fear of ISDS inclusion in TTIP might appear more endemic than it actually is, when one takes into account that many of the negative responses to the consultations that vocalised this fear “were based on copy-and-paste templates circulated by non-governmental organisations campaigning against TTIP”, as stated above.<sup>25</sup> Similarly, with regard to the risk of controversial claims, public controversy also surrounds domestic court decisions. One would be greatly pressed to prove that the societal impact would not be demonstrably greater than a ‘notorious’ case at the national level. If fears still remains that ISDS inclusion will limit policy space to too great an extent, the stakeholders could opt to include “an express general clarification in TTIP and other investment treaties that foreign investors should get the same high levels of protection as domestic investors receive in domestic law, but not higher levels of protection”.<sup>26</sup> They could also make explicit statements that the treaty is not to impinge upon the good-faith exercise of public policy objectives by the state; such statements would need to be taken into account by arbitral tribunals in their interpretation of the relevant investment agreement.<sup>27</sup> Another option, would be to restrict ISDS access for the more controversial issues which are related to the exercise of public policy objectives of the State, such as *bona fide* environmental measures.<sup>28</sup>

*Poulsen, Bonniticha & Yackee* posit that it is unlikely that TTIP will change much of the already close relations between the EU and the US, nor would it, they argue, make it more likely that China and India

---

<sup>24</sup> Tietje & Baetens (2014, p. 48).

<sup>25</sup> C. Olivier, “Public Backlash Threatens EU Trade Deal with the US”, *Financial Times*, 13 January 2015; see also [www.viewws.eu/eutradeinsights/exec-to-struggle-for-way-out-of-controversy-after-release-of-isds-consultation-results/](http://www.viewws.eu/eutradeinsights/exec-to-struggle-for-way-out-of-controversy-after-release-of-isds-consultation-results/)

<sup>26</sup> Kleinheisterkamp & Poulsen (2014).

<sup>27</sup> Kuijper et al. (2014, p. 42).

<sup>28</sup> Kuijper et al. (2014, p. 87).

would enter into an investment treaty with the EU. The US and the EU member states have to date concluded many more BITs with developing than with developed countries. It is important to keep in mind the signal that might be sent out if the EU somehow refuses to incorporate ISDS into TTIP, given that “the EU has 1,400 bilateral ISDS agreements ... Rejecting ISDS completely would open up European countries to a charge of double standards in that they are seeking to deny US companies the same safeguards that their businesses enjoy”.<sup>29</sup> Apart from being a potentially detrimental starting position in further treaty negotiations, this is ultimately sending out a signal of distrust and inferiority towards developing states, forming a strong and, in this author’s opinion, highly unfortunate reminiscent of certain colonial attitudes.

## 5. Conclusion

Four possible alternatives to the inclusion of ISDS in TTIP are frequently mentioned. The first would be to opt for state-to-state arbitration. However, such an option would hardly be preferable, as it will invariably politicise a dispute and blow it far out of proportion, potentially influencing the international relations between states as a whole. As these cases are not actually located at the inter-state level, they should not be framed as disputes between states. In order for such cases to proceed to the inter-state level, investors would need to rely upon diplomatic protection, which is sporadic, arbitrary in its incidence and prone to politicisation, as there is no control over the process or any form of remedy for the individual whose claim is espoused. Furthermore, the decision whether to espouse a claim is often not taken on legal grounds but is rather dependent upon other factors such as the relative size of a state and potential need for foreign aid. As such, espousal of claims has rightly been superseded by investment protection and human rights law.

A second option would be for the home state to be able to block any claims brought by investors. Some of the problems of this second approach could be mitigated by allowing the home state to be a third-party intervener – which is perhaps a route that could still be explored.

The third option would be to require the exhaustion of local remedies before allowing a claim to be brought under ISDS. However, the problem with this is that the amount of time and costs required are

---

<sup>29</sup> C. Olivier, “Public Backlash Threatens EU Trade Deal with the US”, *Financial Times*, 13 January 2015.

significantly higher for all parties involved. A possible solution to such issues would be to rely upon ‘fork-in-the-road’ clauses (where the investor has to initiate national court proceedings or international arbitration, but not both). Also, one could establish mediation as a mandatory precursor or alternative to ISDS proceedings.

Another possible solution would be to adopt a fixed or elastic time period for pursuing local remedies. The latter could be based on a “third-party index measuring the potential of domestic courts to produce effective solutions to claims of remedies rule”. The more such an index would indicate that a domestic court system is ‘reliable’, the greater emphasis would be placed upon domestic courts being the first port of call, as opposed to other, more internationalised paths to dispute resolution.<sup>30</sup> Other potential procedural safeguards could include protection against frivolous claims, by virtue of offering tribunals a way to reject manifestly unfounded claims at a preliminary stage or by forcing a frivolous claimant to pay not only its own legal costs but all costs of the proceedings and potentially the legal costs of the respondent also.

The fourth, and ultimately most honest option, would be to exclude substantive investment provisions from the agreement entirely. If TTIP is to include a right, there should also be a remedy for violations of that right; if one is to take away the remedy of ISDS, then it is better not to grant the right.

One final issue that was raised during the discussion of the original paper at the Brussels Conference in 2014 was the question of whether a standing court for investment claims would be preferable over an *ad hoc* method of procedure, as is currently the case. Poulsen (presenting the paper) argued in favour of the former and this author recognises the merits of such argument – in part because of the aversion the term ‘arbitration’ seems to provoke among the general public. However, some important problems remain. Crucially, there is no single legal instrument giving jurisdiction to a single court, but instead there is a network of BITs. As such, to argue in favour of a standing court raises the issue of how one could confer competence upon such a court – or would the idea be to create a standing court for each and every treaty the EU concludes? In the latter case, possibly the TTIP Court could serve as a model court for subsequent treaty partners. Further potential problems would arise in the appointment of the judges to the Court – who is to be appointed, and what would happen

---

<sup>30</sup> Kuijper et al. (2014), p. 44.

if the integrity of a judge is called into question? Such problems could be solved by careful treaty drafting.

However, at present it seems unrealistic to hope for the creation of an overarching international investment organisation with a separate dispute settlement body, such as the WTO. Both options – a standing court or a permanent international organisation – have been tried and failed, notably in the case of the Multilateral Investment Agreement and the International Trade Organisation, which was to be established by the Havana Charter. Ultimately, the issue with ISDS, as often becomes clear in heated public discussions, is that certain segments of civil society simply do not want ‘foreigners’ to examine the legality of state actions – whether this examination is done by a standing or *ad hoc* body could be seen as being of little import, in the broader scheme of things.

*Poulsen, Bonniticha & Yackee* distinguish broadly two camps in the discussion surrounding ISDS in TTIP: those who see its inclusion as an unmitigated good, and those who see it as the exact opposite. But there remains a large number of scholars who choose the middle path, arguing that the system currently catering to the settlement of investment disputes needs to be reformed but that the risks of ISDS inclusion are overestimated. The present author would see herself in the last category, based on her view that domestic law *does* sufficiently protect investors most of the time and that domestic courts *do* a good job at applying the law in most disputes. As is the case for the European and American Conventions on Human Rights and their respective courts, investment law and its international enforcement (whether by means of arbitration or a new court) should serve only as a safety net, to provide a remedy in those cases (no doubt rare but by no means unknown) where the domestic system has not been able to provide a fair remedy.

It is necessary that, in the future, investment disputes are depoliticised, and that a general international standard of treatment is established. Much work remains; one can think of further defining and limiting of the scope of application of investment law, so that not all and sundry qualifies as an investor; or further definition of the scope of the more vague standards of protection, such as fair and equitable treatment and indirect expropriation. There is a need to incorporate more justifications for state action with regard to environmental, health and labour issues; the inclusion of an appeals system within the ISDS framework; greater transparency, or a review of the methods to

calculate damages. Unfortunately, few of these issues are discussed in *Poulsen, Bonniticha & Yackee's* chapter.

There are many ways in which safeguards could be built into the arbitral process, in order to refine the current procedures and make them more amenable to those stakeholders currently opposed to ISDS inclusion. Firstly, with regards to transparency, one can think for example of the publication of information about the dispute at hand; whilst final awards are in the large majority of cases already in the public domain, further actions can be taken, such as allowing open hearings, or making written submissions and evidence publicly accessible online (where the information concerned is not classified information or confidential business knowledge, as determined by the tribunal). Secondly, there should also be an active role given in proceedings to other states that are parties to the treaty, as well as third-party stakeholders, such as NGOs, industry groups, or international and regional organisations. Furthermore, it would be desirable to establish a code of conduct with clear disclosure rules and methods of avoiding conflicts of interests, as well as to create a roster of arbitrators ahead of any conflict between states and investors.

Fourthly, one could perhaps envisage the creation of an appellate mechanism, as suggested by the European Commission. It is frequently argued that such a mechanism would add to the stability, predictability and legitimacy of investment law; whilst the opportunity for appeal would add to the duration and cost of proceedings, it is likely that – over time – the number of appeals would decrease (as has been the case for the WTO Appellate Body), thus offsetting a potential increase in cost by the probable increase in stability within investment procedures. If such an appeals mechanisms were to prove politically unfeasible, one could envision the creation of a treaty committee or an *ad hoc* procedure through which the parties to TTIP could give “authoritative interpretations of the provisions of the investment instrument”,<sup>31</sup> thus ultimately providing for some measure of consistency and perceived fairness between cases. Such an option – the establishment of a treaty committee that interprets controversial treaty provisions in order to provide clarity and consistency – appears to also be currently taken by the EU and Canada in the context of the CETA negotiations, with the establishment of a Committee on Services and Investment.<sup>32</sup>

---

<sup>31</sup> Kuijper et al., pp 40-41 and p. 68.

<sup>32</sup> Kuijper et al., p. 70.

In sum, an investment chapter in TTIP offers an unprecedented opportunity to reform and improve the system of investment law, in a way that gradual renegotiation of individual BITs never would be able to achieve. This author hopes that the EU and the US will grasp this opportunity to rewrite international investment law by setting an important precedent in treaty-drafting, allowing for the incorporation of public policy objectives, thereby protecting states' right to regulate. Ultimately, the type of concerted strategy that could result from TTIP is likely to be far stronger than the individual country strategy necessitated by the present system of over 3,000 international investment agreements (IIAs). Perhaps the most important conclusion that should emerge from the current discussions – irrespective of whether TTIP will actually include an investment chapter – is that there is a need for correct, timely and complete information for law and policy-makers as well as the broader public, in relation to international investment law and ISDS procedures.

## References

- Aisbett, E. (2007), "Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation", CUDARE Working Paper 1032, University of California at Berkeley, Department of Agricultural and Resource Economics and Policy, Berkeley, CA (<http://repositories.cdlib.org/are.ucb/1032>).
- Banga, Rashmi (2003), "Impact of Government Policies and Investment Agreements on FDI Inflows", Working Paper No. 116, Indian Council for Research on International Economic Relations, New Delhi, November.
- Bronckers, M. (2015), "Schizophrenia in the EU about International Law", 21 January (<http://ssrn.com/abstract=2555622>).
- Busse, M., J. Koeniger and P. Nunnenkamp (2008), "FDI Promotion through Bilateral Investment Treaties: More Than a Bit?", Kiel Working Paper No. 1403, Kiel Institute for the World Economy, February.
- Gallagher, K.P. and M.B.I. Birch (2006), "Do Investment Agreements Attract Investment? Evidence from Latin America", *Journal of World Investment and Trade*, Vol. 7, No. 6, pp. 961-974.
- Haeck, Y. and E. Brems (eds.) (2014), *Human rights and civil liberties in the 21st century*, Dordrecht: Springer.
- Haljan, D. (2013), *Separating powers: International law before national courts*, The Hague: T.M.C. Asser Press.
- Hallward-Driemaier, M. (2003), "Do Bilateral Investment Treaties Attract FDI?. Only a bit and they could bite", World Bank Policy Research Paper, WPS 3121, World Bank, Washington, D.C.

- Hix, J.P. (2013), *Indirect effect of international agreements: Consistent interpretation and other forms of judicial accommodation of WTO law by the EU courts and the US courts*, Volumes 3-13 of Jean Monnet Working Papers, NYU School of Law, New York, NY.
- International Covenant on Civil and Political Rights, adopted 16 December 1966, S. Exec. Doc. E, 95-2 (1978) 999 UNTS 171, ratified by the US 8 June 1992.
- Kaye, D. (2013), "State Execution of the International Covenant on Civil and Political Rights", *University of California at Irvine Law Review*, Vol. 3. No. 1.
- Kleinheisterkamp, Jan and Lauge Poulsen (2014), "Investment Protection in TTIP: Three Feasible Proposals", Global Economic Governance Programme and Blavatnik School of Government (<http://www.globaleconomicgovernance.org/sites/geg/files/Kleinheisterkamp%20and%20Poulsen%20December%202014.pdf>).
- Kuijper, P.J., I. Pernice, S. Hindelang, M. Schwarz and M. Reuling (2014), "Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements", Vol. 2, study requested by the European Parliament's Committee on International Trade, Brussels, September.
- Künnecke, M. (2013), "Translation in the EU: Language and Law in the EU's Judicial Labyrinth", *Maastricht Journal of European and Comparative Law*, Vol. 20, No. 2, pp. 243-260.
- Neumayer, E. and L. Spess (2005), "Do bilateral investment treaties increase foreign direct investment to developing countries?", *World Development*, Vol. 33, No. 10, pp. 1567-1585.
- Neumayer, E., Kevin P. Gallagher and Horchani Ferhat (2009), "Do Bilateral Investment Treaties Lead to More Foreign Investment?", interview in *Investment Treaty News*, April ([www.iisd.org/itn/2009/04/30/do-bilateral-investment-treaties-lead-to-more-foreign-investment/](http://www.iisd.org/itn/2009/04/30/do-bilateral-investment-treaties-lead-to-more-foreign-investment/)).
- OECD (2012), *Investor-State Dispute Settlement, Public Consultation Document*, Paris.
- Olivier, C. (2015), "Public Backlash Threatens EU Trade Deal with the US", *Financial Times*, 13 January.
- Poulsen, Lauge, Jonathan Bonnitcha and Jason Yackee (2015), "Transatlantic Investment Treaty Protection", CEPS Special Report No. 102, CEPS, Brussels, March and chapter 5 in this volume.
- Powell, C. (2001), "Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States", *University of Pennsylvania Law Review*.
- Pozzo, B. (2006), *Multilingualism and the harmonisation of European law*, Amsterdam: Kluwer Law International.

- Quinn, Ben and Mark Sweney (2013), "Tobacco firm begins 'stealth-marketing' campaign against plain packaging", *The Guardian* ([www.theguardian.com/society/2013/jun/07/tobacco-firm-stealth-marketing-plain-packaging](http://www.theguardian.com/society/2013/jun/07/tobacco-firm-stealth-marketing-plain-packaging)).
- Roth, B.R. (2001), "Understanding the 'Understanding': Federalism Constraints on Human Rights Implementation", *Wayne Law Review*, Vol. 47, p. 891.
- Salacuse, J.W. and N.P. Sullivan (2005), "Do BITs really work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", *Harvard International Law Journal*, Vol. 46, pp. 67-130.
- Sauvant, Karl P. and Lisa E. Sachs (2009), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, Oxford: Oxford University Press.
- Spiro, P.J. (1997), "The States and International Human Rights", *Fordham Law Review*, Vol. 66, p. 567.
- Tietje, C. and F. Baetens (2014), *The Impact of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, study prepared for the Ministry of Foreign Affairs of The Netherlands ([www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.html](http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.html)).
- Tobin, J. and S. Rose-Ackerman (2003), "Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties", William Davidson Institute Working Paper No. 587, Ann Arbor, MI: University of Michigan Business School.
- \_\_\_\_\_ (2006), "Bilateral Investment Treaties: Do They Stimulate Foreign Direct Investment?", Yale University, mimeo, June.
- UNCTAD (1998), *Bilateral Investment Treaties in the Mid-1990s*, United Nations Conference on Trade and Development, United Nations, New York and Geneva.
- Wojcik, M.E. (2013), "Legislative Attempts to Prohibit the Use of International Law and Islamic Law in US Courts", in Kyriaki Topidi and Lauren Fielder (eds), *Transnational Legal Processes and Human Rights*, Farnham, Surrey: Ashgate.
- World Economic Forum, Global Competitiveness Index (GCI), Competitiveness Rankings (<http://reports.weforum.org/global-competitiveness-report-2014-2015/rankings/>)