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Germany, the Transatlantic Trade and Investment Partnership and investment-dispute settlement: Observations on a paradox

by

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The Transatlantic Trade and Investment Partnership (TTIP) currently being negotiated between the European Union (EU) and the United States (US) could become the most comprehensive international agreement on free trade and investment protection. The negotiations have mostly been met with the usual criticism that accompanies attempts to expand free trade, despite overwhelming evidence that free trade fosters global economic development.

But the debate, especially in Germany, has taken a surprising and critical turn, focusing on the investor-state dispute-settlement (ISDS) provisions that are envisaged to give the TTIP procedural teeth. Various non-governmental organizations (NGOs) argue that TTIP would establish an extrajudicial mechanism for settling disputes that would subject Germany to the caprice of the US and its multinational enterprises, while undermining its political sovereignty.¹ This criticism has had an impact on the political scene. For example, the Federal Ministry of Justice has voiced grave concerns about the inclusion of ISDS provisions in TTIP, and the Federal Council has recently followed suit, pointing to the high risks allegedly associated with ISDS.² Even agreements that seemed to be uncontroversial are called into question. For example, the EU-Canada free trade agreement (FTA), the wording of which was basically finalized in 2013 and which contains a progressive ISDS system designed to address critical issues discussed in the recent debate,³ is now the subject of reservations raised by Germany (a move that could jeopardize the agreement if Germany insists vis-à-vis the Commission that its final ratification requires the assent of the national parliaments of the EU member states⁴ - an issue the European Court of Justice would eventually have to decide).

Given Germany's contribution to the development of ISDS, the country's current stance belies its longstanding attitude toward ISDS. It was Germany that spearheaded bilateral investment treaties that form the basis of ISDS; it is Germany that has concluded more of these agreements than any other country—and with good reason: as an industrialized nation dependent on exports and, therefore, on the existence of free and legally-protected trade and investment, German investors, and thus Germany itself, would benefit most from the inclusion of ISDS provisions in the TTIP. Other EU countries would similarly benefit, as European claimants accounted for more than

half of the investment arbitration cases registered between 2008-2012. The *Loewen* case⁵ demonstrates that reliance on the US legal system alone is not a dependable safeguard for foreign investors there. On the other hand, the concern of a “regulatory chill” that would endanger European environmental and health protection standards seems exaggerated: notwithstanding the difficulty in assessing the impact of settled cases, only 31% of the almost 300 cases concluded so far have yielded an award in favor of the investor, with only a tiny fraction of these cases concerning legislative measures, as opposed to individual decisions by the executive.

So what explains Germany’s about-face on ISDS? The easiest explanation is the change in government. Whereas the negotiations on TTIP were initiated by the old coalition of Christian Democrats and Liberals, Chancellor Merkel now governs with the Social Democrats; practically all the voices cited above come from Social Democrats, who control the Ministry of Justice, as well as the Ministry for the Economy and the Federal Council. But the roots of this change go much deeper, as the Social Democrats themselves have reversed their stance on FTA’s since they last held the Chancellorship ten years ago. Accordingly, Germany’s current stance appears to be infused by a contentious mix of anti-American sentiment, most recently fueled by the NSA affair;⁶ a general aversion against globalization and international capitalism, also as a result of public perception of the US; and the confident, albeit misguided, feeling that Germany is sufficiently well-off so as not to need an agreement like TTIP. In sum, these sentiments foster indifference toward strengthening international economic relationships in general and with the US in particular -- a hazard that must be addressed seriously. Otherwise, the further build-up of a consistent international investment law regime, and perhaps the liberalization of world trade -- for which TTIP is a cornerstone -- could grind to a halt. If it becomes necessary for negotiators to abandon ISDS to save the material contents of TTIP, this would only produce a second-best solution, if any at all.

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¹ See, for instance, most recently the dossier published by LabourNet Germany on August 20, 2014, available at <http://www.labournet.de/politik/eu-politik/wipo-eu/freihandelsabkommen-mit-den-usa-tafta>.

² BR-Drs. 295/14, Resolution of July 11, 2014, available at [http://www.bundesrat.de/SharedDocs/drucksachen/2014/0201-0300/295-14\(B\).pdf?__blob=publicationFile&v=1](http://www.bundesrat.de/SharedDocs/drucksachen/2014/0201-0300/295-14(B).pdf?__blob=publicationFile&v=1).

³ See, European Commission, “Investment provisions in the EU-Canada free trade agreement”, December 3, 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.

⁴ See “European Commission denies reports that Germany is derailing CETA”, *International Business Times*, September 23, 2014, available at <http://www.ibtimes.co.uk/european-commission-denies-reports-that-germany-derailing-ceta-1466862>.

⁵ *Loewen Group v. USA*, ICSID Case No. ARB(AF)/98/3, award of June 26, 2003.

⁶ The latest survey by the Allensbach Institute shows a so-called “cross pressure” of conflicting loyalties in many Germans when assessing the US. The US appears more than ever like the big brother, triggering aversions by his rudeness but representing the only reliable force when bad boys surface

along the way. See “Der Groll ueber den grossen Bruder”, *Frankfurter Allgemeine Zeitung*, September 17, 2014, p. 8.

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