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Investor – State Dispute Settlement

A REALITY CHECK

Investor – State Dispute Settlement (ISDS) provisions can be found in most bilateral investment treaties that are currently in place. They allow for investors to enter arbitration with states over treaty breaches and thereby aim at protecting and facilitating foreign direct investment (FDI). In recent years, however, these provisions have become controversial especially in the United States and Europe, claiming they are an unnecessary, undemocratic and illegitimate tool. Especially in the course of current negotiations towards the Transatlantic Trade and Investment Partnership (TTIP) this discussion has gained serious momentum and seems contentious, especially in Europe. In order to provide a more in depth analysis with empirical data and statistics to this current discussion about ISDS and also to ensure an unbiased dialogue, the Center for Strategic & International Studies (CSIS) hosted a panel discussion focusing on exactly these issues on October 31 2014.

The introducing remarks were given by Scott Miller, Senior Advisor at CSIS who presented the findings of a CSIS working paper[1] that empirically reviewed ISDS based on the record of disputes under existing investment treaties. He explained that they first and foremost aimed at answering the most crucial questions regarding ISDS: Who files most cases? Who is the respondent? What policy field is concerned? Who statistically wins more cases? What damage is claimed and what amount is eventually granted? It turns out, that even though ISDS provisions are popular elements in trade agreements, over 90 percent of all 2400 bilateral trade agreements currently in force operated without a single investor claim of a treaty breach. The CSIS report also shows how the increase in numbers of disputes filed in the past ten years directly correlates with the rise in outward foreign capital stock. It seems plausible that, in the same sense, investors from large capital exporting economies are active users of ISDS. The European Union, for instance, accounts for roughly 47 percent of global FDI and filed about half of all investment arbitration claims in the last decade. Similarly, the United States is responsible for 24 percent of outward FDI stock and US investors have filed 22 percent of ISDS claims.

It was also put forward that most disputes arise in economic sectors characterized by high levels of state intervention with about 40 percent of filed ISDS claims in the oil, gas, mining, and power generation sectors. More surprisingly, the CSIS findings refute the popular belief that ISDS disproportionally favors big corporations. They find that in fact the majority of U.S. investors who have filed investment arbitration claims are firms with fewer than 500 employees.

Further detailed information concerning the realities of ISDS were given by Susan D. Franck, Professor of Law at Washington and Lee University presenting her research findings concerning an evidence-based approach to investment treaty arbitration. Professor Franck analyzed other popular claims towards ISDS like its supposedly investor biased nature with investors winning most disputes. Her findings reveal, however, that investors only win about 36 percent of the cases whereas state governments win roughly 55 percent of all disputes. And when investors do prevail in a ruling, awards are only a small fraction of the initial claim: while the average damage claimed in all considered cases amounts to $622 million, the average amount eventually awarded was only $16 million. This equals approximately 2cents awarded for every dollar claimed. Moreover, Frank not only found that dispute settlements take a long time to render a verdict with an average of 3.5 years. She also came to the conclusion that ISDS is expensive for both investors and governments. The legal costs on average amount to $5 million for each party making it a very costly business decision especially for small and medium-sized enterprises.

[1] http://csis.org/files/publication/141029_investor_state_dispute_settlement.pdf

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Subsequently, among the panel discussants were the former Deputy US Trade Representative John Veroneau, Linda Dempsey from the National Association of Manufacturers and Stanimir Alexandrov, partner with Sidley Austin LLP. Their remarks especially focused on ISDS being a critical component in securing the rule of law principle in trade treaties and thereby guaranteeing no discrimination against foreign goods, services and especially investments. On the business side of the conversation it was stressed that ISDS rather is a last resort option when a company is confronted with an investment dispute. Since an ISIDS litigation is costly, time consuming and relatively hard to win it is never an easy choice. Having it as an option, however, is absolutely critical in protecting business' property and investments. The following Q&A addressed amongst other topics transparency issues as well as the controversial need for independent tribunals adjacent to the sound and established legal systems of Western democracies.