CHAPTER 22

Challenges of Investor-State Dispute Settlement Mechanism in TTIP

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Introduction

Standards of State-State Dispute Settlement (SSDS), and specifically Investor–State Dispute Settlement (ISDS), operated to protect investors against law abuses in those host countries that were not law-abiding ones. The protection was required both for investors’ property, and for host countries to attract investors. In the absence of any guarantee that ‘the general principles of law recognized by civilized nations’ shall be respected both aliens needed protection against a host country’s lawlessness and the host country—its citizens—against lawlessness consequences in the form of opportunities of economic development, attracting looters’ investors. Current arguments for a particular protection—referring to rights in a state of law—of investments has significantly decreased. Bilateral Investment Agreements (BITs) are concluded between ‘states of law’, between states of investors’ origin and destination. Those states modify or resign from ISDS perceiving their faults rather than advantages.

The European Union is a new actor in the scene of BITs. Therefore it has to face all of the challenges related to it. This is especially visible on the occasion of concluding such demanding and controversial agreements as the Transatlantic Trade and Investment Partnership (TTIP). The aim of our chapter is to analyse and discuss challenges of ISDS in TTIP. In the first part we present ISDS mechanisms generally with its advantages and disadvantages. In the second part we analyse the EU legal competence, legal framework and current practice within the field of investments protection and ISDS in order to make some conclusions about possible TTIP provisions. We also discuss the current state of negotiations and doubts related to a possible investment chapter of the TTIP.

1 Origins of Investor–State Dispute Settlement

One of the fundamental factors determining an economic decision of investors is assessment of risks connected to undertaking and running a business
activity. Legal risks seem to be the most important. They are crucial for potential investors, as every foreigner has in the back of his mind the memory of legal discrimination against aliens. And, despite centuries having passed since ancient Rome split the law into *ius civile* and *ius gentium* or initiated institutions of proxeny and proxenos as an antidote to the lack of legal protection for ‘aliens’, the memory and concerns survived, as well as the specific approach. On the one hand, states consider the business activity of aliens beneficial for their own development. On the other hand, they are afraid of that presence and apply all sorts of restrictions. The restrictions are used within the whole trans-Atlantic area. In the US they are legitimate, and gained regulatory basis across Europe. Likewise, the state control of economic activities of aliens is well established.

Still, this memory of the past creates grounds for fears and legal solutions that are designed to protect against the fulfilment of those fears (today) and deriving from the falsified image of the past, at its best—for those claiming the experience, reasons selective organization of facts. It is true, that old *polis* (the formula of ethnic nation communities rather than a *Staatsvolk*) were communities, by their substance oriented on backing up ‘biological communities’—based on distinguishing between a one of us / an alien, and therefore by their nature closed. That, however, did not imply in any case either a negative discrimination or a repressiveness towards aliens.

Current connotations of the term ‘Ghetto’ refer automatically to Nazism but originally this institution often meant discrimination against aliens and religious freedom privilege. Foreign protection in the French formula was provided by the formula of *“droit d’aubaine”* or, more elaborately, *seigniors’ duty*.

Generally, however, referred to as the basis for protective regulations, discrimination against aliens in the past disregards cases of non-compliance. And yet the distant past provides for both Roman *hospitium publicum* agreements

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1 See most controversial „Exon-Florio Amendment”.
3 See “*Graham v. Richardson*”. Supreme Court of the United States, 1971.
4 For example French act *Carte de commerçant* (1938).
5 Since 1789 legislation has restricted ownership of vessels of United States registry entitled to fly the American flag to American nationals. Land and mineral rights possessed by the federal government have generally been reserved for sale or lease to citizens.