Chapter 18

It Takes Two to Tango: Regional Investment Treaties and Investor Protection on Both Sides of the Atlantic

Ana M. Lopez-Rodriguez*

Abstract

In 2009, the Treaty of Lisbon conferred the European Union the exclusive competence on foreign direct investments in Art. 207 TFEU. Together with the common commercial policy, it is now one of the main pillars of the external action of the EU. The Union has seen this new competence as good opportunity to carry out a comprehensive regulation of trade and investment issues at the European level and has applied it in the negotiation of a series of investment agreements with other States such as Canada, the United States, Vietnam, and Singapore. An intense public debate has arisen on the opportunity of entering into these agreements and whether they should include references to arbitration as an investor-state dispute settlement mechanism (ISDS). The context to this is the growing opposition to the traditional mechanisms of ISDS in some Member States and sectors of the civil society. Meanwhile, in the US, there has also been growing public opinion opposing investment treaties and external and parallel mechanisms of investor protection from both sides of the political spectrum and for various reasons. Prior to the 2016 Presidential Elections, prominent democrats opposed the Trans-Pacific Partnership (TPP) as long as ISDS mechanisms were included. The present article includes an analysis of trade policymaking in the US and the attitude of the US Congress to new mega-regionals and new investment treaties. Being a major issue in Europe, it focuses, in particular, on the policy position concerning ISDS as the method of choice for resolving disputes between investors and the host countries.

* Ph.D. (University of Aarhus), Associate Professor of Private International Law, University Loyola Andalucia, amlopez@uloyola.es.

The Transatlantic Trade and Investment Partnership (TTIP)

Trade policy has become one of the pillars of the external action of the European Union with the entry into force of the Treaty of Lisbon in 2009, which also confers the Union the exclusive competence on foreign direct investments in Art. 207 TFEU. In accordance with this new competence the European Union has adopted regulations, on the one hand, to articulate the transition from the old model of bilateral investment agreements (BITs) signed by Member States and, on the other hand, to clarify the financial responsibility between the Member States and the European Union in case of conflict. It has also undertaken the negotiation of a series of investment agreements with other States, such as Canada, Vietnam, Singapore and the United States. In this regard, the Transatlantic Trade and Investment Partnership, TTIP, a comprehensive trade agreement being negotiated between the European Union and the United States intends to reduce or eliminate barriers to trade in goods and services, legally guarantee investor rights, and promote regulatory cooperation. The first round of negotiations was held in July 2013 in Washington D.C, and although a successful conclusion of the negotiations was initially envisaged for late 2014, the 15th round of negotiations has been held in New York on 3rd to 7th October 2016, without being close to a final deal.

The transatlantic economy generates USD 5 trillion in total commercial sales a year and employs up to 15 million workers. It is the largest and prosperous marketplace in the world, accounting for three-quarters of global financial markets and over half of world trade. It represents over 50% of world GDP in terms of value and 40% in terms of purchasing power. If TTIP negotiations are successful, the EU and the US would form the world’s largest free-trade area with an economic strength of about 34 billion USD and total exports would