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The transatlantic free trade agreement – the dispute over dispute settlement

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The transatlantic free trade agreement – the dispute over dispute settlement

Bonn, 4 March 2014. One week from now the European Union (EU) and the US begin the fourth round of negotiations regarding the *Transatlantic Trade and Investment Partnership* (TTIP), a free trade agreement that would cover one third of global trade. Following the euphoric launch of the project in July 2013 the hard work is now well underway for the transatlantic summiteers. The EU and the US are now engaged in bitter trench warfare with their national audience. US President Obama is fighting for congress approval of the *Trade Promotion Authority*, which should facilitate ratification of trade agreements. The European Commission finds itself confronted by growing resistance from civil society, which fears that the TTIP could lead to the lowering of environmental and consumer protection standards. There are also fears regarding the inclusion of a dispute settlement mechanism that would enable foreign investors to bring actions against their host countries before international tribunals.

Why all the fuss?

On 21 January 2014 the European Commission executed a spectacular U-turn, announcing a pause in negotiations regarding the investment chapter in order to consult with the European public. The Commission is set to present its position at the beginning of March. It is expected to come out in favour of the inclusion of investments in the TTIP and hopes that critics will be placated by reforms to the investor-state dispute settlement mechanism.

Why all the fuss about a technical-sounding subject that was long outside of the focus of public debate, which concentrated primarily on chlorinated chicken and GM corn? A consensus appeared to exist between the parties regarding the investment chapter. The TTIP investment chapter was one of the low-hanging fruit in a negotiating agenda otherwise filled with difficult topics.

The US and EU are not driven by the fear that their investors could be treated unfairly in the respective economic areas. Foreign investors face few access barriers in the EU or US. In addition, the European and American legal systems do not have a reputation for treating foreign investors in an unfair or discriminatory manner. There is therefore scarcely any economic necessity in introducing additional transatlantic investment rules. The German government now also admits this much.

The elephant in the room

The real reason for the inclusion of a comprehensive

investment chapter in the TTIP lies in the Far East. Independently of one another, the US and the EU are both currently negotiating investment agreements with China, which should give their investors greater legal certainty and market access. The prospects for enhanced transatlantic co-operation serve to increase pressure on Beijing to undertake further liberalisation measures. If the EU and the US were to fail to include an investment chapter with an investor-state dispute settlement mechanism in the TTIP, it is feared that China could interpret this as a welcome signal and withstand the pressure exerted by the EU and the US.

In the TTIP negotiations the transatlantic partners should thus not only have an eye on the interests of their companies in China. In particular, the EU should not lose sight of the fact that by including a comprehensive investment chapter it is granting foreign investors the right to take legal action against a range of political measures before transatlantic tribunals. Examples of such arbitration cases are on the increase, also affecting environmental and health policies: for example, the energy utility Vattenfall is contesting the German decision to abandon nuclear power, the tobacco group Philip Morris is resisting the introduction of standardised cigarette packaging in Australia, whilst pharmaceuticals giant Eli Lilly is challenging the decision of Canadian courts to facilitate the manufacture of generic products.

US companies are viewed as particularly quick to bring legal action and in view of the € 1.3 trillion US investments in the EU, a large number of actions is anticipated. Even if a significant amount of these actions are not successful, the mere increase in disputes with investors can trigger protectionist counter reactions from governments, a trend that can already be observed in many developing countries. Negative effects on transatlantic economic relations could not be ruled out.

The negotiating parties must be aware of the fact that including an investment chapter is associated with risks that cannot be wholly eliminated by reforming the dispute settlement mechanism. The EU and US would be well advised to think carefully about the advantages and disadvantages of international investment regulations. Ultimately, a weighing of the economic and political costs could result in the decision to refrain from including any arbitration mechanism for investors in the TTIP.