Seven things you should know about EU-Singapore ISDS

Ante Wessels, FFII

In October 2014 the European Commission published the draft text of the EU-Singapore trade agreement (EUSFTA) investment chapter. It contains investment protection rules for foreign investors and the controversial investor-state dispute settlement (ISDS), which gives foreign investors special rights in conflicts with governments.

1 Seven things you should know about the EUSFTA investment chapter

1. The agreement creates a lock-in. Unlike most investment agreements ratified by European countries, it is not a stand-alone investment treaty, from which parties can withdraw. The investment chapter is part of a trade agreement, from which it is near impossible to withdraw.

2. The text lacks basic institutional safeguards for independence, creates perverse incentives and does not observe the separation of powers. (See below.)

3. The EU and Singapore would give automatic consent to arbitration. (article 9.19.2 EUSFTA)

4. The text contains broad investor protection rules, including the Fair and Equitable Treatment protection. Dan Ikenson: “ISDS is ripe for exploitation by creative lawyers.” (See also Scientists, answer to question 3)
5. The text does not exclude sovereign debt instruments. Last summer over 110 Scientists wrote: “In light of the social misery and hardship the sovereign debt crisis has brought, it requires little discussion to conclude that the mere thought of speculative investors in government bonds seeking damages before investment arbitration Tribunals is utterly unacceptable.” (Scientists, answer to question 1)

6. Open to the world: multinationals (and speculative investors) from other countries can use the EU-Singapore agreement.

7. A strategic mistake: like in the trade agreement with Canada (CETA), executive officials with a link with the United States would play a role in appointing arbitrators and decide conflicts of interest. How smart is that in and of itself, and in agreements that are models for an agreement with the US?

Lock-in, no institutional safeguards for independence, perverse incentives, no separation of powers, automatic consent, ripe for exploitation, sovereign debt instruments included, open to the world, and a strategic mistake. Former trade commissioner De Gucht left us a Gordian Knot.

2 Some details

2.1 No institutional safeguards for independence

The text lacks basic institutional safeguards for independence: tenure, prohibitions on outside remuneration by the arbitrator and neutral appointment of arbitrators.

2.2 Perverse incentives

Arbitrators are paid for their task at least 3000 US dollar a day. This creates perverse incentives: accepting frivolous cases, letting cases drag on, letting the only party that can initiate cases (foreign investors) win to stimulate more cases, pleasing the officials who can appoint arbitrators.

See also Scientists, answer to question 8.
2.3 No separation of powers

Both the claimants and the executive have a 50% influence on the make-up of tribunals. In a court neither the claimant nor the executive has an influence on appointments, as both parties are not neutral.

A government may dislike a law by the former legislative and appoint an arbitrator accordingly. Only independent courts should decide on constitutional matters and questions of law.

The ISDS mechanism does not observe the separation of powers a core aspect of modern democratic societies. See also the next section.

2.4 US influence

The International Centre for Settlement of Investment Disputes (ICSID) is the most used ISDS forum; investors can choose this forum. In practice the US appoints the president of the World Bank. This president

- is ex officio chairman of the ICSID Administrative Council (article 5 ICSID),
- nominates the ICSID secretary-general (article 10 ICSID),
- appoints all three the arbitrators in annulment cases under ICSID rules (the only possible appeal, article 52.3 ICSID).

The secretary-general of ICSID

- appoints arbitrator(s) if parties fail to appoint one, or fail to agree on the presiding arbitrator (articles 9.21.2 and 9.32.7 EUSFTA),
- may decide a request for consolidation is manifestly unfounded (article 9.32.4 EUSFTA),
- appoints the presiding arbitrator in consolidation cases unless parties agree otherwise (article 9.32.6 EUSFTA),
- will decide on conflicts of interest (article 9.21.10 EUSFTA).

Executive officials who have a link with the US would take important decisions. How smart is that in and of itself, and in an agreement that is a model for an agreement with the US? (The same is true for CETA, except article 9.32.6 EUSFTA.)
2.5 Arbitrator power

Based on these procedural rules, the small club of arbitrators can maximise their power by benefiting investors (without being too obvious) and not harming the US.

It seems this is already happening under existing treaties. A study finds that claimants from the US were 91% more likely to benefit from an expansive resolution than claimants from all other states combined. (Van Harten, 2012) The US never lost an ISDS case.

3 Differences with consultation reference text

EUSFTA is mostly similar to the reference text the European Commission published this spring for the ISDS consultation (and to the CETA text). Main differences are: no filter (consultation question 10); no most-favoured nation (MFN, consultation question 2), other than compensation for losses owing to war, etc (article 9.5 EUSFTA); explicit umbrella clause (consultation question 3, article 9.4.5 EUSFTA); a code of conduct (page 37) instead of a reference to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration; consultation question 8).

The code of conduct does not have a clear prohibition on outside remuneration by the arbitrator; it is in conflict with the ISDS system itself, as ISDS creates perverse incentives.

Submissions to the ISDS consultation are still mostly valid for EUSFTA.

See for instance:

Over 110 scientists published a “Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)”

FFII submission: “ISDS: A rigged system, avoid lock-in”

4 On line

http://people.ffii.org/ante/ISDS/EU-Singapore-ISDS.pdf
http://people.ffii.org/ante/ISDS/EU-Singapore-ISDS.html