The Costs and Benefits of Trade Agreement Disputes

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Last month, Germany voiced concerns over the inclusion of an Investor-State Dispute Settlement (ISDS) in the free trade agreement between the European Union and Canada. German objections also call into question the inclusion of an ISDS in the trade deal currently being negotiated between the EU and the United States. In an email interview, Timothy Josling, senior fellow at the Freeman Spogli Institute for International Studies at Stanford University, discussed the settlements and their role in international trade agreements.***WPR: What is an Investor-State Dispute Settlement and how common is it in free trade agreements?*****Timothy Josling**: Investor-State Dispute Settlement clauses provide a foreign investor access to an international tribunal where the company, or person, can challenge the government of the host country for violation of an investment or trade agreement into which that government has entered. Such clauses are common in Bilateral Investment Treaties, of which there are over two thousand in existence. The incorporation of ISDS provisions in free trade agreements is becoming more common as the scope of FTAs becomes broader. NAFTA is one of the first examples of such an FTA with an ISDS clause. The U.S. considers that such clauses are necessary in the agreements now under negotiation, specifically the Transatlantic Trade and Investment Partnership (TTIP), between the U.S. and the EU, and the Trans-Pacific Partnership, between the U.S. and 11 Asia-Pacific nations. An ISDS provision in the Comprehensive Economic and Trade agreement between Canada and the EU has caused some

controversy, both in its own right and as a possible model for the TTIP. ***WPR: Why are national courts not sufficient to handle international trade disputes?*****Josling**: Foreign investors generally have the same rights as domestic firms and individuals to recourse under the laws of the host country. Therefore, for most issues the national courts are the appropriate place to handle disputes. But in the case of specific provisions included in bilateral investment treaties and trade agreements, the domestic courts may not have the appropriate jurisdiction. Those agreements may contain provisions that only obtain to the foreign investor and not to domestic firms or individuals. The host country is bound by public international law insofar as it has entered into a treaty. Arbitration by a panel that is not a part of the host-country legal system is therefore a common way of dealing with such international disputes. ***WPR: What are the main arguments in favor of and against the inclusion of an ISDS in trade agreements?*** **Josling**: The main argument in favor of ISDS clauses is that investors need some recourse if host governments enact rules or otherwise behave in a way that is not in compliance with an investment or trade treaty. ISDS provisions give some protection against policy instability following changes of government. Host governments agree to such clauses either to attract investment from abroad or to protect their own investors in foreign markets. The main concern of those who oppose such provisions is that host-country governments will be hesitant to pursue environmental and social programs for fear of being challenged by a foreign firm—or individual—in a legal venue that is less than transparent and somewhat removed from democratic scrutiny.This debate occurs within the broader context of the costs and benefits of globalization. Those seeking to expand investment and trade favor such investor protection. Those that find fault with trade and investment agreements on other grounds are often critical of such protection. Trade officials search for the correct balance between giving investors more security and preserving the right of sovereign governments to act in the best interests of their citizens.