

Free trade deals highlight discord over investor protection

March 13, 2015
Foreign Policy

As the US and Europe negotiate a massive free trade pact, protesters and politicians on both sides are hesitant to allow corporations the right to sue states. But without that power, the deal could have far less impact.

When a group of more than 100 lawyers and law professors penned a letter to congressional leaders and the United States trade representative recently, their opposition to a controversial clause in the planned EU-US free trade agreement was unambiguous.

Inclusion of provisions to protect investors, they said, would offer multinational corporations an unfair advantage because they could sue governments for damages if they passed laws that hurt their bottom line.

Known to negotiators as a means for Investor-State Dispute Settlement, or ISDS, the framework has increasingly come under fire for circumventing national courts.

"ISDS threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems and privately enforce terms of a trade agreement," [read the letter released Wednesday](#) by the Alliance for Justice (AFJ), a Washington-based advocacy group.

'A level pitch'

Their contention centered on the use of arbitrators, or independent judges, to settle disputes between national governments and companies that feel they have been treated unjustly, such as by a certain law or expropriation.

Arbitrators operate independently of a country's judicial system but their decisions are legally binding. Protestors and politicians alike have expressed worry that big companies could impose undue control over governments, thereby undermining the rule of law.

But proponents of arbitration maintain that it guarantees companies' rights in countries with questionable judicial systems and that this can actually encourage [more foreign direct investment](#). They also note that of cases that go through the full dispute settlement process, a majority are found in favor of states - not corporations.

"International arbitration creates a level pitch. It's as simple as that," said Mark Appel, a senior vice president at the International Centre for Dispute Resolution. "They are paid to do what a good referee would do, which is to call it the right way."

Spotlight on global trade

Since the 1960s, 180 countries have entered into more than 3,000 agreements that had provisions to guard investors' rights, according to [information on the White House's website](#). Most of those provisions included some form of arbitration.

But the issue didn't arrive at the forefront of people's minds until several massive free trade deals between some of the world's largest economic areas entered their final stages.

The US is nearing the end of talks over the Trans-Pacific Partnership, known more commonly by its acronym TPP, and passage of a free trade deal between the EU and Canada is awaiting approval from both sides' national parliaments.

But neither of those agreements has put global trade quite as high on the public agenda as TTIP - and for good reason. The transatlantic market is already the largest in the world and TTIP would encompass more than a third of global trade.

European households would save 545 euros a year through the lifting of trade barriers, according to some estimates. Others put the [amount that an average American family would save](#) at \$900.

Risky business

TTIP has been touted as a way for Europe and the US to ensure their economic relevance for decades to come as many emerging economies log rapid growth and threaten to tip the scales away from traditional power centers in the West.

One British minister said Thursday that failing to agree on a transatlantic free trade deal would send the message that the importance of having the EU as a trading partner was ebbing.

"The alternative...is that we wake up in a few years' time and we find that the Pacific and Asian countries have set their own global benchmarked standards and Europe will be in the somewhat humiliating position of having to run after and copy what has been decided," David Lidington, Britain's Minister for Europe, was quoted by the Reuters news agency as saying.

But in order for investors to feel comfortable, there have to be certain guarantees.

"It's not about overriding the legal systems of other countries," said Nikolas Kessler, a political economist at Berlin's Free

University. "It's about investor protection in terms of realizing a certain level of security where investments are concerned."

When it comes to negotiations on the proposed Transatlantic Trade and Investment Partnership, or TTIP, Kessler said American investors were aware that the legal systems of newly appointed EU members, notably Romania and Bulgaria, were less mature than those in, say, Germany or the United Kingdom.

"It gives a signal to investors that the country respects rule of law and that it's a secure investment environment," said Kara Sutton, legislative relations project manager for the Bertelsmann Foundation in Washington, DC.

'If it ain't broke, don't fix it'

The merits of a common market between the US and Europe notwithstanding, some legal experts still question the utility of having a system of arbitration when most industrialized countries have reliable court systems. They say that all local possibilities should be exhausted before claimants are allowed to turn to other judicial bodies.

"To me it's not logical to say we replace imperfect courts with imperfect arbitrators who, unlike the courts, don't have institutional safeguards," said Gus Van Harten, an associate professor of administrative and international investment law at Osgoode Hall Law School in Toronto, Canada.

Those reservations were echoed in a recent editorial in the Washington Post by a prominent left-leaning Democrat in the US Senate, Elizabeth Warren. She argued that arbitration courts would provide powerful multinational companies with an avenue to potentially influence political decision making.

Warren, along with the authors of the letter to Congressional and trade leaders, expressed concern that although ISDS clauses

cannot require countries to change any laws or regulations, politicians may not be able to ignore the fact that decisions they make could have financial repercussions for taxpayers.

That hesitation is on display in Germany, which has been sued by Swedish utility Vattenfall because Berlin decided to phase out nuclear power following the Fukushima disaster in Japan.

"Giving foreign corporations special rights to challenge our laws outside of our legal system would be a bad deal," [Warren wrote](#).