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CONSULTATION OR COVER-UP?

The European Commission's consultation on investment protection in the transatlantic trade deal

Media briefing, Monday 12 January 2014

The first results of the European Commission's public consultation on investment protection in the negotiations for an EU-US trade deal – the Transatlantic Trade and Investment Partnership (TTIP) – are **expected to be published this week**.

The planned provisions on investment protection would grant foreign investors the privilege to use private tribunals to demand compensation for government actions, such as public health measures and environmental protection.¹

The consultation ran from March to July 2014 and had the highest number of responses ever for a European Commission public consultation.

An overwhelming majority of participants (at least 88%) have provided the Commission with a very clear message: they don't want an 'investor-state dispute settlement' mechanism (ISDS) in the trade agreement. The Commission must show now that it takes public opinion seriously.

Background

The European Commission announced the public consultation in January 2014, citing high public interest and widespread concern about the inclusion of an ISDS mechanism as its main motivation for launching the public consultation: *"The European Commission felt it was necessary to launch this particular public consultation as a response to the growing public debate and increased concerns over ISDS within TTIP"*.²

Then-trade Commissioner Karel de Gucht said: *"I know some people in Europe have genuine concerns about this part of the EU-US deal. Now I want them to have their say"*.³

However, the Commission's consultation fell short of meeting civil society expectations.

In particular, it did not address the fundamental question of whether the ISDS mechanism should be included in the transatlantic trade agreement in the first place, instead only asking for opinions on the Commission's reform proposals for the ISDS system. It was only in the last question of the complicated 44-page questionnaire that respondents had the chance to express their view on the inclusion of ISDS in the trade deal.⁴

¹ <https://www.foeeurope.org/what-greater-rights-investors-really-means-140714>

² http://europa.eu/rapid/press-release_IP-14-292_en.htm

³ http://europa.eu/rapid/press-release_IP-14-56_en.htm

⁴ <http://trade.ec.europa.eu/doclib/html/152280.htm>

A clear 'no'

The complexity of the questions asked and the technical knowledge necessary to answer them represented a significant barrier for citizens to voice their concerns about ISDS.

The consultation's format and structure, coupled with the Commission's decision not to accept e-mail contributions, showed a lack of genuine openness from the Commission to criticism of the ISDS system as a whole. The Commission rather seemed to be soliciting support for its plans to continue with ISDS.

To open up the process to the European public, a number of organisations – Friends of the Earth Europe, the Austrian Federal Chamber of Labour (OGB), the Munich Environmental Institute, and the online campaigning platforms 38 Degrees and SumOfUs.org – provided easy-to-use online tools to facilitate engagement.

There were a total of 149,399 responses to the public consultation,⁵ of which **at least 131,352 (88%) expressed a clear 'no' to the inclusion of an ISDS mechanism** in a trade deal between the EU and the United States.⁶

Despite his earlier statements about wanting citizens *"to have their say"*, then-trade Commissioner de Gucht initially called the high participation, through platforms other than the official Commission site, *"an outright attack"*.⁷

And in spite of the overwhelming majority of submissions clearly rejecting the inclusion of ISDS in TTIP, an unnamed Commission official was quoted as saying that, *"the public consultation has not delivered a clear-cut conclusion on investment protection"*.⁸

The results of the consultation are eagerly anticipated. The European Commission must show that it is taking seriously the widespread citizen concern about privileged rights for investors to sue governments as part of the EU-US trade deal, and the negative effects this could have on democracy and protection for citizens, our environment, and human rights.

The Commission's report

From a leaked version of the upcoming report, seen by Europolitics, it appears that the European Commission is attempting to downplay the overwhelming opposition to ISDS that their consultation found.⁹ The Commission seems set to ignore the vast majority (97%) of submissions because it finds them too similar. The coverage of the leaked report also seems to suggest that the Commission is preparing to argue opposition to ISDS was not in the scope of the consultation, and so will discount responses that simply declare opposition to it.

⁵ <http://trade.ec.europa.eu/doclib/html/152693.htm>

⁶ 131,352 is the number of anti-ISDS responses submitted through the online platforms of Friends of the Earth Europe, the Austrian Federal Chamber of Labour, OGB, the Munich Environmental Institute, 38 Degrees and SumOfUs.org. The total number of respondents expressing opposition to the inclusion of ISDS is likely even higher.

⁷ <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/karel-de-gucht-attacke-gegen-ttip-13055875.html>

⁸ <http://www.reuters.com/article/2014/11/26/us-eu-usa-trade-idUSKCN0JA0YA20141126>

⁹ Europolitics (8 January) 'Consultation delivers negative orchestrated feedback on ISDS'

<http://europolitics.info/external-affairs/consultation-delivers-negative-orchestrated-feedback-isds> (behind paywall)

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Further information:

Friends of the Earth Europe research (December 2014): 'The Hidden Costs of EU trade deals' www.foeeurope.org/hidden-cost-eu-trade-deals

Friends of the Earth Europe briefing (July 2014): 'What greater rights for investors really means: the myths behind the investor-state dispute settlement mechanism'
www.foeeurope.org/sites/default/files/news/foee-isds-myths-140714_0.pdf

www.foeeurope.org/isds