Jerzy Menkes

ISDS and TTIP – Polish Prospects

RESEARCH APPROACH

TTIP[1] has been researched from a whole range of perspectives: the EU, transatlantic and global. This analysis narrows the perspective to exclusively the Polish view. In the Investor-State Dispute Settlement (ISDS) regime, Poland represents a special case in its relations with the United States. Although numerous observations and conclusions regarding ISDS in both universal and inter-regional relations (the EU and a third party) are applicable to Poland, a comprehensive Polish perspective on the maintenance of the current system of dispute settlement (regulated by a Poland-US bilateral agreement[2]), the regime (American investment in Poland) or its alteration by a TTIP-created regime, seem specific.

ISDS CRITICISM

ISDS as a TTIP component, as well as ISDS in any agreement, has been criticised on both sides of the Atlantic.[3] The common denominator of the criticism is the assumption that if regulations providing for international arbitration in the EU-USA agreement (and better yet, TTIP) are absent, then the EU, the United States and the rest of the world (including Poland) will be protected against disaster. ISDS criticism stems from systemic issues symbolized by, and based upon the cases 'Philips Morris v. Australia' and 'Vattenfall v. Germany' (two cases).[4] The ISDS mechanism -in the opinions of its critics – limits the host state's potential to protect, among other things, public health, the natural environment or human rights, depriving it of discretional authority. This allegation is not true, since even an unfavourable arbitration ruling would not force, for example, Australia to lift nicotine restrictions or Germany to withdraw its ban on atomic energy or ease environmental requirements regarding coal-fired power plants, but rather would require payment to investors for damages as a result of breaches of their 'rightly acquired rights'. This criticism of the ISDS mechanism within TTIP, and more broadly against TTIP, and indeed, against tightening cooperation with the USA, is advocated by Polish critics.

The TTIP opposition movement in Poland does not follow the standard split into an anti-market and anti-American left and a pro-market and pro-American right. This movement intersects the political and social divisions of anti-Americanism with a common denominator of Polish political (mainstream) parties being pro-American and focused on improving trans-Atlantic links (what differentiates the right-wing parties from the rest is their attitude towards the EU). However, given Poland's significant specific characteristics, this criticism disregards reality. In the event of the non-inclusion in TTIP of an investor-state dispute settlement mechanism, the situation for Poland would not change because the country, like Canada, Germany and other states, has existing investment arbitration procedures with the United States. Thus, American investors will still be able to continue to implement ISDS in disputes with Poland. The latter may change the situation, however, were it to withdraw from the treaty on trade and economic relations. Even then, ISDS would be in force for another 10 years (Article XIV). Thus, even if TTIP becomes binding, it would not worsen Poland's situation with regard to the ISDS regime. Adversely, the current trend in TTIP towards settling investor-state disputes in or before international arbitration panels clearly points to a future EU–USA agreement that would change the present Polish-American mechanism to provide for the lack of ISDS legal solutions.[5]

Poland concluded BITs covering ISDS because, when it was bankrupt in 1990 at both an international and a domestic level (i.e. with regard to both foreign and local creditors), it had neither capital nor functional state institutions. The Polish economy needed capital and knowledge, so to attract foreign investors, stable ones in particular, it had to provide them not only with potential economic benefits (obviously higher than in highly developed direct capital exporting states), but also with legal and political security for the investments comparable to the level in the countries of origin. That is why Poland is bound by a BIT concluded with sixty-one states. Thanks to that, foreign capital arrived to Poland.

The Polish-American context of the current ISDS mechanism is also significant. In 1990, Poland entered into an agreement with the United States within the broadly conceived social and economic transition and reorientation of Polish politics. Poland wanted to turn to the West and expected not only US economic aid, but also security, that is, to be covered under the American defense umbrella. The United States was perceived as a promoter of EU and NATO accession and met Polish expectations. Currently, Poland expects more American involvement in its security and actual equality among both old and new NATO members. It is hard to understand the rationale of the opponents of TTIP, and specifically regarding the ISDS mechanism in Polish-American relations, when they assume that politics and defense are independent of each other in economic

Jerzy Menkes
Warsaw School of Economics

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2 Traktat o stosunkach handlowych i gospodarczych między Rzecząpospolitą Polską a Stanami Zjednoczonymi Ameryki, 21 March 1990 r. Dz.U. 1994 No. 97 poz. 467.

3 See *European Initiative against TTIP and CETA,* https://stop-ttip.org/?noredirect=en_GB. In the United States thirteen congressmen have signed on to the Protecting America's Sovereignty Act, see http://pocan.house.gov/sites/pocan.house.gov/files/POCAN_ISDS_HR967.pdf.

4 The former case has been decided against the suitor; the latter case is still pending.

5 *Transatlantic Trade and Investment Partnership Trade in Services, Investment and E-Commerce,* http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

terms, and that the United States will be more committed to providing Poland with security even after taking unfriendly business actions.

POLISH EXPERIENCE WITH INTERNATIONAL ARBITRATION

Poland is relatively rarely sued through international arbitration. For example, in 2014 Poland was party to three arbitration proceedings and was not (in principle) the losing party.[6] Although not much comes from summarising such awards, it should be noted, however, that Poland has won two cases vitally important for the state. One is 'Schooner Capital v. Poland' (November 2015) and the other is an earlier case, 'Minolta and Lewis v. Poland' (May 2014). The effect of these proceedings showed that Poland was a state of law. No adjudications by a Polish court were as outwardly or equally convincing.

ISDS UPHOLD THE RULE OF LAW

In this context, I want to recall the case 'Saar Papier Vertriebs GmbH v. Poland'.[7] Less relevant are the substantive issues of the dispute or the arbitral award (Poland was obliged to compensate the indirect expropriation). What was interesting in this case, however, was what took place in the course of the arbitration proceedings and after its completion. Poland refused to respect the award and its enforcement. Poland paralysed the proceedings, for example, by not appointing an arbitrator and then by not meeting the obligation to pay. Although it was obliged to pay damages of 2.3 million DM in 1995 along with the lawsuit's costs (amounting to 4 million DM), Poland only paid in 2001. In the meantime, accounts were blocked, it became a political dispute and required German government inter-vention.

Poland – the state and its institutions – behaved like a crook, evading the obligation to execute or enforce the award. The conduct of the state authorities and their representatives has never been investigated as part of a competent (domestic) criminal proceeding. Similar to this, despite some differences, was the case of 'Eureko B.V. v. Poland' in which there was no doubt that Poland failed to meet its obligations as per the agreement. An evaluation of Poland's behaviour is, in my opinion, quite obvious. This is not just a Polish experience, however. The Hermitage Capital Management case proved the need to not only protect property, but also the security of the proprietor (the death of Sergei Magnitsky confirmed the need for an international law enforcement regime). Poland also has, to a relative extent, encountered similar events, although not as dramatic, such as the case of L. Jeziorny and P. Rey.[8] Perhaps the ISDS mechanism has value as a preventive instrument protecting not only property, but also the life and freedom of proprietors. Perhaps host state authorities would be less eager to attack property and proprietors if they expect court control (through international arbitration) as a response to acts against a property or proprietor. Perhaps public officers would be less likely to benefit from illegal activities if they feared the *Magnitsky Act* because they would not be able to benefit from the fruits of their crime.

6 In March 2014, ICSID had reviewed 463 disputes, including 55 cases regarding EU members and 39 internal cases. The loser and sued leaders include the Czech Republic, Spain, Slovakia and Hungary. See: Recent Developments in Investor-State Dispute Settlement (ISDS), UNCTAD No. 1, April 2014, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf; and *The ICSID Caseload – Statistics (Special Focus – European Union)*, https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Stats%20EU%20Special%20Issue%20-%20Eng.pdf.

7 Decision, http://www.italaw.com/sites/default/files/case-documents/italaw3049_0.pdf.

8 See Czuchnowski, W. and J. Sidorowicz, *Bananowa republika w Krakowie czyli sprawa Jeziornego i Reya.*, Gazeta Wyborcza, 13 February 2010.