

Bundesrat

Document 295/14 (Resolution)
11.07.14

Resolution of the Bundesrat

Bundesrat resolution regarding the European Commission's public consultation on the terms of an investment protection agreement with an investor-state dispute settlement procedure in the context of the negotiations for a transatlantic trade and investment partnership between the EU and the USA.

At its 924th meeting on 11 July 2014, the Bundesrat adopted the resolution contained in the Annex.

Annex

Bundesrat resolution regarding the European Commission's public consultation on the terms of an investment protection agreement with an investor-state dispute settlement procedure in the context of the negotiations for a transatlantic trade and investment partnership between the EU and the USA.

1. Following the request of the European Parliament on 23 October 2012 and authorisation by the Council of the European Union on 14 June 2013, the European Commission began negotiating a Transatlantic Trade and Investment Partnership (TTIP) with the government of the United States of America.

2. A decision on such a comprehensive and far-reaching extension of the international agreements by which the EU, and thus also Germany, are bound can be taken in a democratic society governed by the rule of law only after an extensive, broad-based public discussion. Therefore, the Federal Ministry of the Economy and Energy has formed an advisory committee consisting, inter alia, of representatives of trade unions, social, environmental and consumer protection associations, and cultural groups. Moreover, the Commission must give all the relevant groups in society the opportunity to make an informed contribution when discussing the subject. To this end, all important documents must be published in good time, and all guidelines, objectives and issues of strategic importance in respect of the negotiations must be explained clearly to all interested citizens. Negotiations of such significance should not be held behind closed doors and should be understandable not only to experts, but to everyone.

3. The Bundesrat believes that the negotiations should be as transparent as possible. It therefore regrets the Council's decision not to publish the negotiating mandate for the negotiations.

4. The Bundesrat confirms its resolution of 7 June 2013 (Bundesrat document 464/13) in which it recognises on the one hand the opportunities for both the European and US economies that would result from the conclusion of a free trade agreement. It stated that such an agreement would enable easier market access, the dismantling of non-tariff trade barriers, the reduction of tariffs and the harmonisation of industrial standards in many market segments. On the other hand, the Bundesrat emphasised that the precautionary principle should not be eroded and that, in particular, the higher standards in each case of the partner country regarding social matters, environmental and climate protection, and food, health and data protection should be adopted or recognised.

5. At the same time, with regard to the proposed rules on investment protection, the Bundesrat called in its resolution on the Federal Government to take into consideration the reconciliation of interests when negotiating the investment rules.

6. The Bundesrat welcomes the fact that the Commission has held a public consultation on the terms of an investment agreement with an investor-state dispute settlement procedure in the context of negotiations for a free trade agreement between the EU and the USA as an important first step towards the involvement of interest groups and the broader public.

7. The Bundesrat confirms that both parties' right to regulate in the public interest is a non-negotiable fundamental principle and must be protected. It may not be jeopardised either directly or indirectly by rules on investment protection.

8. The Bundesrat is of the opinion that investors should therefore be instructed in principle to seek redress through the national courts. It considers its position on this matter to be in harmony with statements along the same lines made by the Federal Government. The Bundesrat asks the Commission to substantiate why it believes an agreement on an investor-state dispute settlement procedure in the context of a free trade agreement between the EU and the USA is necessary in view of the existing possibilities for legal redress under the rule of law.

9. The Bundesrat considers that specific investment protection provisions and dispute settlement mechanisms in the investor-state relationship between the EU and the USA are superfluous and very risky, in particular, for the following reasons:

- Both partners provide investors with adequate redress before independent national courts.
- Investor-state dispute settlement procedures could make it possible to dispense with or circumvent general and appropriate rules for protecting public-interest objectives that came about under the rule of law as the result of democratic decisions and have been legitimately applied.
- Investment protection agreements could reduce high levels of protection in the areas of health, safety, employment, consumers, the environment and the promotion of cultural diversity, in particular through rules protecting against and providing compensation for direct and indirect expropriation.
- Under the principle of most favourable treatment, there is no guarantee against the possibility of applying in each case the lowest standards from other agreements.
- The standard use of vague legal concepts in investment protection provisions, such as 'fair and appropriate treatment' creates legal uncertainty instead of removing it.
- The asset-based investment concept used by the Commission – as opposed to enterprise-based or foreign direct investment-based investment concepts used in other agreements – risks reducing transparency with regard to the scope of the agreement, and extending the right of legal action to include the protection of short-term profit interests too.
- The existing investor-state dispute settlement procedures are not transparent, because they do not stipulate the binding application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, and because the rules in the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) that are normally applied are not based on the rule of law and are not transparent. They provide, in particular, for the right of a party to prevent the publication of the dispute settlement ruling or to insist on negotiations behind closed doors.
- Investor-state dispute settlement procedures fail to conform adequately to the rule of law because the arbitrators' independence is not guaranteed, they are not required to meet standards with regards to ethics, conduct and qualifications, their permanent appointment cannot be ruled out, and the composition of courts is not specified in advance.

10. The Bundesrat is aware that it is currently possible to apply rules from the existing 131 German and around 1 400 European investment protection agreements which are also inadequate in terms of the shortcomings listed in point 9.
11. Finally, the Bundesrat points out that any decision regarding the inclusion in the agreement of rules on investment protection can be taken by the Member States only after the results of the negotiations are available.
12. The Bundesrat confirms its opinion that a free trade agreement between the EU and the USA containing the necessary clarifications on the protection of workers, the environment and consumers can be concluded only as a mixed agreement.
13. The Bundesrat is transmitting this resolution directly to the Commission.