

The Increasing Role of Civil Society in Investment Treaty Negotiations

Kilian Wagner (University of Vienna)

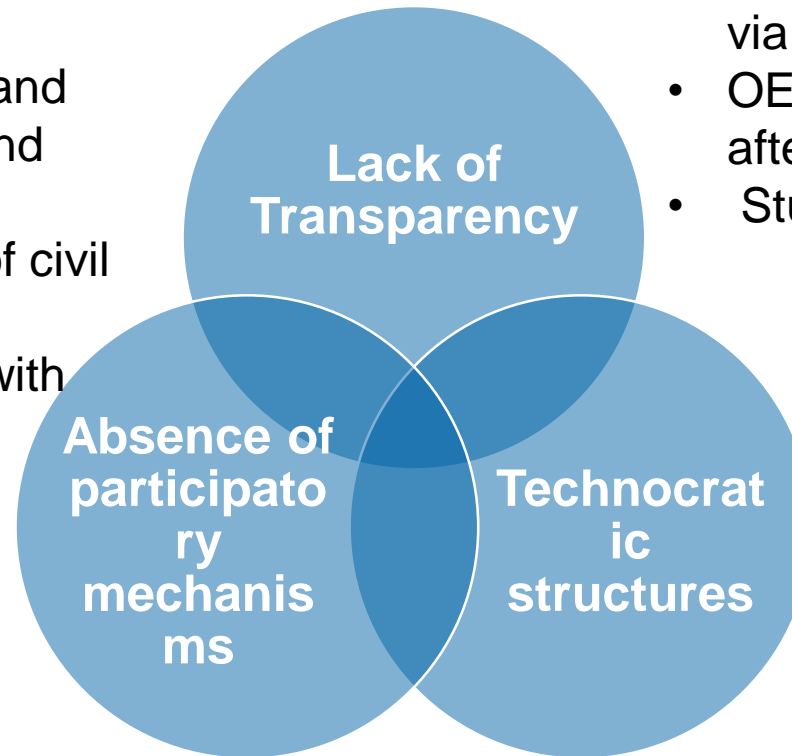
- **Civil society in the negotiations for a Multilateral Agreement on Investment (MAI)**
 - The start for a substantive shift in investment law?
 - **Towards more transparency and the inclusion of civil society in negotiations of the EU**
 - The CETA and TTIP negotiations – similar treaties, different levels of transparency?
 - **The Modernisation of the Energy Charter Treaty**
 - Learning from the experiences of the past?
 - **How to ensure more legitimacy in the future?**
-

Negotiating a Multilateral Agreement on Investment (MAI)

- **Negotiations between 1995 and 1998 within the OECD for a multilateral investment treaty**
 - Promotion and Protection of foreign investment in OECD members states, open to third countries
 - Initial confidence for expeditious results
 - High convergence on most substantive issues
- **From high expectations to the collapse of the MAI negotiations**
 - Declining support from the business sector
 - Low political interest and change in governments
 - Emergence of a global opposition in civil society
 - Structural deficits
 - Substantive concerns (ISDS, Labour and Environmental Standards)

Structural deficits of the MAI negotiations and OECD Responses being '*too little, too late*'

- Limited Involvement of business and union representatives via BIAC and TUAC
- NGOs as most important actors of civil society
- Unsuccessful informal meetings with NGO representatives



- Leak in February 1997 – Spread of the draft via the internet as a new medium
- OECD homepage on the MAI was only setup after the leak
- Study on benefits published only in April 1998

- Negotiations perceived as technical aspect
- Disregard of political implications
- No strategy / willingness to deal with protests and to openly address concerns

The Role of Civil Society in the MAI Negotiations – Substantive Criticism

- **A Backlash against Globalization**
 - Growing skepticism amid several processes of economic liberalization (NAFTA, WTO, EU enlargement)
 - The OECD as the appropriate forum?
- **An opposition against investment law**
 - A Replication of NAFTA Chapter 11?
 - Decrease of labor and environmental standards
 - Regulatory Chill
 - The emerging NAFTA experience (*Ethyl v Canada*)

The Role of Civil Society in the MAI

- **From ‘constructive outcomes’ towards a substantive shift for investment law?**
 - Chairman’s Note on Environment and Related Matters and on Labour
 - Affirmation of the Right to Regulate
 - ”Not lowering standards”
 - Interpretative Note for the Expropriation Provision:
 - ***The reference in Article IV.2.1 to expropriation or nationalisation and ‘measures tantamount to expropriation or nationalisation’ reflects the fact that international law requires compensation for an expropriatory taking [...] It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments.***

Towards more democratic legitimacy in the CETA and TTIP Negotiations

- The EU's institutional basis for negotiations

- **The new role of the European Parliament in treaty negotiations**
 - Strengthening of the EP's formal role
 - Regular reports from the Commission to the EP
 - Approval requirement
 - Requests to the CJEU
 - An increasing informal influence of the EP
 - *'[t]he EP used its powers ascribed by the Lisbon Treaty to a maximum, and, in some cases, event went beyond these provisions'* (Meissner)

Towards more democratic legitimacy in the CETA and TTIP Negotiations?

- The foundations of transparency in the EU

- **Article 15(3) TFEU**
- **Regulation 1049/2001**: Right of access to documents of the institutions
 - Article 4 (Exceptions) ‘The institutions shall refuse access to a document where disclosure would undermine the protection of [...]
 - International relations;’
 - General Court and CJEU *In’t Veld*: ***‘public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted’***
 - Negotiation documents relating to ACTA, TTIP
 - Limits to refuse access to documents if it cannot reveal strategic objectives of the EU (e.g. documents on internal legal questions, documents already in the public domain)

CETA and TTIP negotiations – similar treaties, different outcomes?

- The new Common Commercial Policy in practice

CETA

- 2009: Start of negotiations
- Document leaks in 2013 and 2014
- Conclusion of negotiations in 2014 and publication of the consolidated text
- ***‘CETA has been one of the least transparent agreements negotiated in recent years by the EU’***
(Delimatsis)

TTIP

- 2013: Start of Negotiations
- Constant pressure from the EP and civil society
 - Requests for access to documents
 - Leak of the negotiation mandate in 2013
 - Inquiry by the European Ombudsman
- Shift towards proactive transparency 2014
- Eventual end of negotiations in 2016
‘it would be fair to say that the EU has been progressively improving its transparency record in the TTIP negotiations’ (Delimatsis)

The EU's Transparency Shift in TTIP Negotiations and Beyond

- **EU Commission, *Trade for all* (2015)**
 - From **reactive transparency** to **proactive internal** and **external transparency**
- **Internal (institutional) transparency (Commission – Council – EP)**
 - Reading room access for classified documents
 - Declassification of documents
 - Inter-institutional dialogue
- **External (public) transparency**
 - Publication of negotiation mandates, text proposals, Factsheets
 - Public Consultations
 - ISDS (TTIP; CPTPP, USMCA)
 - Multilateral Investment Court

The Modernisation of the Energy Charter Treaty (ECT)

- **Energy Charter Treaty (Signed 1994, entry into force 1998)**
 - Multilateral Protection of Foreign Investments in the Energy Sector
 - Liberalisation of Energy Markets
 - Integration of new market economies

- **The ECT in a global shift towards a ‘green economy’**
 - The ECT as an outdated investment agreement
 - Renewable energy investment protection v fossil fuel investments

The Modernisation of the ECT

- **The Modernisation Process**
 - 2017-2019: Consultation; Approval of a list of topics;
 - 2020-2022: 15 Negotiation Rounds
 - 24 June 2022 Agreement in Principle
- **A proactive approach on transparency:**
<https://www.energychartertreaty.org/modernisation-of-the-treaty/>
 - Access to documents
 - Public Communications after all negotiation rounds
 - Initial documents; Progress report; Explanation of the Agreement in Principle
- **The lack of participatory mechanisms – a missed chance?**

Modernising the ECT – The EU’s Substantive Approach

- **The EU’s Approach**
 - Publication of a text proposals
- **Aligning the ECT with modern investment agreements**
 - The Right to Regulate
 - Setting the limits for investment protection
- **Bringing the ECT in line with the Paris Agreement**
 - A redefinition of ‘Economic Activity in the Energy Sector’
 - Phasing-out fossil fuel investments
 - Adopting new ‘Materials and Products’ for energy generation and storage
 - Sustainable Development

Conclusions – What to learn for future treaty negotiations to enhance democratic legitimacy?

- **Politicisation of trade and investment treaty negotiations**
 - Increasing societal interest
 - Necessity to enhance democratic legitimacy
- **Early reaction**
 - From **reactive** towards **proactive** transparency
- **Addressing concerns**
 - Facilitation of discourse
 - Substantive shifts (right to regulate, inclusion of other objectives)
 - Public Consultations: Development of Investment Law and ISDS