TRANS-ATLANTIC BUSINESS COUNCIL

ISDS in TTIP

The EU and U.S. are the world's largest sources and destinations of foreign direct investment. In 2012, the two combined represented 57% percent of the global inward stock of FDI and 71% of global outward stock of FDI. Much of this investment stock is accounted for by EU investment in the U.S. and U.S. investment in the EU. However, market access barriers to FDI remain in certain sectors, such as aviation, maritime, and communications in the U.S., and these issues might be addressed in an investment chapter in the TTIP agreement. The inclusion of an Investor State Dispute Settlement (ISDS) mechanism within such a chapter has proven to be extremely controversial, especially among certain groups in the EU.

ISDS is a procedure that allows foreign private investors to sue a host state for possible violations of an investment agreement between the host country and the investor's home country. Claims are primarily filed in alleged instances of discriminatory treatment or direct or indirect expropriation. While foreign investors usually have access to the legal system in the host country, those courts often do not have the authority to address obligations provided for under international agreements. Further, ISDS avoids possible biases against foreign investors in domestic courts by providing a neutral, fact-based, and non-politicized forum. It avoids the difficulty of investors asking their home government to intervene on what would often be diplomatically sensitive issues, especially when there might be broader foreign policy issues at stake between the two governments.

While there have been very few ISDS cases involving EU investors in the U.S. and vice versa, inclusion of an updated ISDS mechanism in the TTIP would provide clear investor protection and, equally important, establish the template to be followed globally in future international investment agreements. Accordingly, the debate on the TTIP investment chapter's protections and ISDS should focus on how existing mechanisms can be improved, rather than whether to include them at all.

Key points:

- **ISDS does not limit the right of governments to adopt laws and policies** (even where those laws or policies infringe ISDS provisions); it merely offers compensation to players whose investments are jeopardised as a result of government infringement.[1] **Awards are specifically limited to monetary damages.**

- ISDS offers depoliticised, neutral investment dispute resolution with fair and equitable treatment for the parties. The purpose is to avoid government engagement for disputes of individual investors.

[1] DG Trade – Factsheet Investor-State Dispute Settlement, 3 October 2014 (www.trade.ec.euroa.eu)

- SMEs (firms with fewer than 500 employees) represent the bulk of ISDS claimants. Extremely large MNCs represent only 8% of the total number of claimants.[2]

- There is no typical ISDS claimant. Firms that have brought cases under ISDS belong to sectors as diverse as food, paper, construction, and tourism.

- Governments win the majority of ISDS cases (43%); investors win 31% and the remaining 26% are settled by the parties.[3]

- Under the new UNICTRAL (United Nations Commission on International Trade Law) Transparency Rules, ISDS cases will be more transparent than most domestic courts.[4] The CETA provisions exceed the UNCITRAL rules.

- There are today more than 3,000 investment agreements with ISDS provisions.[5]

- The cost born by taxpayers is not higher under an ISDS system than under national courts. ISDS may in fact prove more economical, as cases are streamlined and often brought to expedient resolution.

- TTIP should aim to set a global standard for all facets of international commercial activity, including on investment and ISDS.

- Over 90 percent of the nearly 2400 BITs in force have operated without a single investor claim of a treaty breach.[6]

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[2] OECD – Public Consultation Document, 16 May - 9 July 2012 (www.oecd.org)
[3] UNCTAD – Recent Developments in ISDS, April 2014 (www.unctad.org/diae)
[4] UNCITRAL - www.uncitral.org
[5] Stockholm Chamber of Commerce – A guide to ISDS (www.sccinstitute.com)
[6] CSIS Working Paper, http://csis.org/files/publication/141029_investor_state_dispute_settlement.pdf