

Trans-Atlantic Business Dialogue

An Executive Advisory Group within the Trans-Atlantic Business Council (TABC)



Via Email

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Editor
The Economist
25 St. James Street
London SW1A 1HG
United Kingdom

Dear Editor:

Your piece on investor-state dispute settlement (ISDS) in the October 11th issue ("the arbitration game") was surprising indeed for a generally business-friendly weekly. A more balanced approach might have enlightened your readers, given the heated and fanciful debate on the issue that today has tilted towards populism. For those who are more interested in facts than dissemination of opinions, a recent study sponsored by the government of the Netherlands provides ample information for consideration.* The mere fact that individuals (according to OECD about 22 % of ISDS cases stem from individuals and small companies) and big corporations alike have resorted to ISDS in close to 600 cases in the past demonstrates that foreign investors do encounter problems that cannot be resolved in domestic courts. Outlying cases construed as threats to national sovereignty and countries' right to regulate make for convenient bogey men. The possible misuse of the ISDS instrument is in itself no argument against this legal form of remedy. The rights provided by International Investment Agreements cover a limited number of specific actions which impact a foreign investor's operations such as expropriation without compensation, denial of access to justice, denial of national treatment, and denial of the ability to transfer capital. There are facets of the ISDS instrument that could become better attuned to considerations of transparency, independence of arbitrators, openness to third party input, and the general right of states to legislate in the general interest. Such improvements could be included in the agreement being negotiated between the EU and US. But to discard this possibility of remedy in cases of unjust government expropriation seems to us a misguided approach, one that could make countries less attractive to much-needed foreign investment.

ISDS should be a vital part of investment protection since it provides for a neutral and fact-based mechanism of dispute resolution in cases of breaches of investment agreements. It does not, as opponents claim, limit the ability of individual states to legislate or regulate. And, as a result of the ongoing public consultation by the European Commission, as well as the careful development of the new model bilateral investment treaty in the US, ISDS will be more transparent and with more built-in safeguards so that frivolous claims can be avoided.

Brussels & Washington

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Sincerely,

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*"The impact of Investor-State Dispute Settlement in the Transatlantic Trade and Investment Partnership", Prof. Dr. Christian Tietje, University of Halle, and Prof. Dr Freya Baetens, Leiden University."

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