



Speaking points on investment protection and ISDS, TTIP Stakeholder event,
12 March 2014

Initial remark- BE defends a strong Investment protection in TTIP including ISDS

General

- Investment protection chapters are included in thousands of Free Trade Agreements and Bilateral Investment Treaties. These chapters seek to describe:
 - the legal framework in which bilateral agreements can take place
 - the rights and obligations of the signatory parties under the agreement
- Investor-State-Dispute Settlement (ISDS) constitutes a part of such Investment Protection chapters. It is a practice that States traditionally follow for many decades, a routine ingredient of international economic diplomacy. (For instance, the first ISDS was included in the Germany-Pakistan BIT of 1959)

ISDS is a mechanism that allows investors that originate in one State, party of the agreement, to bring a direct legal claim before an international tribunal against the other state **in cases where the bilateral agreement has been breached – and only in these cases.**

- The purpose of ISDS is to **help in the enforcement of the agreement.**
- The existence of ISDS provides comfort to Investors- existence of an impartial mechanism that can be activated in case there is a problem. In this sense in case the State breaches an International Agreement.

Clarifications – how ISDS works in practice

- ISDS does not start automatically. FTAs and BITs offer a number of provisions in search of **amicable solutions** before the parties arrive at the setting up international arbitration.
- It is important to note that **1/3 of disputes are settled** before going to arbitration and that the majority of cases are won by States (42%) [source: UNCTAD]
- All stages of the ISDS procedure require the **full consent** of the parties.



- **Under no circumstances do rulings under ISDS require States to revoke the measure that provoked the dispute**, even in the cases where this particular measure is indeed found violating the bilateral agreement. It will only be required to pay compensation for unlawful discrimination or expropriation.
- To note that in many cases the awards are not fully implemented: the amounts paid are much lower or they are replaced by alternative measures.

Why we believe ISDS is necessary, even under TTIP

- ISDS is a neutral arbitration mechanism that does not allow the politicisation of cases.
- ISDS merely re-affirms States' obligations under public international law. States, when they regulate, they do not operate in a vacuum but within an international legal framework. In this context, the national legal framework has to be compatible with the international.
- FTAs and BITs are international agreements that fall under public international law and, therefore, they also have to be treated under public international law. For this reason, it is not guaranteed that investors will be able to receive adequate protection, even in the most developed legal systems such as those of the EU and the US.
- Concerns have been raised that TTIP may lead to the launch of numerous claims by US companies against EU Member States – or by EU companies against the US. However, US companies could already do this under the current BITs between the US and EU Member States. This is not however the case. (The number of such cases is very limited, ex. under US-Poland BIT, case against Poland's agricultural quotas).
- The EU and US are equally strong trade and economic partners. Therefore, the ISDS mechanism negotiated in TTIP would be balanced, modern, state-of-the-art, one which could set high standards for future agreements.
- Finally, the inclusion of ISDS in TTIP will also serve as political signaling. Under ISDS all States, developed, emerging and developing, are equal.
- Even in strong rule of law systems such as the EU and the US is not guaranteed that legislation will not be passed that is in breach of an International Agreement.

Being aware of the criticism ISDS is currently receiving, BUSINESSEUROPE is ready to discuss solutions that would improve the system and limit the possibilities for abuses.

**Some proposals to improve the system**

- BUSINESSEUROPE is in favour of a more open and transparent ISDS mechanism. Although certain sensitive information should not be publically disclosed, the overall ISDS procedure must be more open, especially to interest groups who would like to make expert submissions.
- As of April 2014, the new UNCITRAL Transparency Rules enter into force. We expect that the Commission will also take up on this work and include provisions that would allow for more transparency in the ISDS mechanism which will be included in TTIP.
- BUSINESSEUROPE also supports the idea of a mandatory “code of conduct” for arbitrators.
- Without precluding impartiality and independency in the decision making process, the problem of inconsistency of awards should be also addressed.
- Some definitions and sensitive concepts should also be clarified.
- Stricter rules should also be adopted to prevent frivolous and unfounded claims.