Brussels, 23 May 2014

ESF POSITION PAPER ON BUSINESS SUPPORT FOR KEY PRINCIPLES IN BILATERAL INVESTMENT AGREEMENTS

Executive Summary:

- FDI plays a crucial role in creating jobs in the EU and abroad. Investment agreements encourage foreign investors to invest overseas by providing reciprocal investment guarantees regarding, for example, expropriation, transfer of funds and fair and equitable treatment.
- The EU is by far the world's largest source and destination of FDI measured by both stocks and flows. European services businesses have invested nearly €3 trillion outside the EU, which must be strongly legally protected.
- ESF welcomes the inclusion of investment protection chapters in recent and forthcoming EU FTAs, provided that this protection is not traded against market-opening.
- ESF calls on EU negotiators to ensure that new EU agreements will as far as possible follow the model of European Member States' existing BITs to provide the broadest possible substantive protections for investors.
- EU Member States have concluded more than 1400 bilateral investment treaties (BITs) providing high level protection, all of which include investor-state dispute settlement (ISDS). It is essential that all future EU investment agreements replacing existing member state BITs retain the right for investors to bring proceedings against states which violate agreed investment rights
- All EU agreements must provide the same level of protection, with a similar state-of-the-art ISDS. Adoption of different levels of protection depending on the trading partner must be resisted and such precedent avoided.
- ESF rejects the suggestion that most investment arbitration proceedings lack transparency but recognises that there is a need for the ISDS system to evolve. The solution to the various concerns expressed about the present ISDS system is not to abandon a well-tried and largely effective system.

One of the main objectives of the European Services Forum[1] (ESF) is to secure the removal of barriers that prevent European services businesses from investing in foreign markets and to support the provision of strong protection for these investments once established.

Foreign Direct Investment (FDI) plays a crucial role in establishing businesses, creating jobs in the EU and abroad, as well as in setting up global supply chains. Around half of world trade takes place between affiliates of multinational enterprises that exchange intermediate goods and services. The opportunities for foreign investors to invest into the EU and the decisions of EU investors to expand their activities in foreign markets have a direct impact on trade, jobs and global economic growth. Such investments are encouraged by the provision of reciprocal investment guarantees and also by a dispute settlement mechanism through neutral arbitration that allows investors to bring proceedings (outside the state's courts) against a state that violates these guarantees.

[1] The European Services Forum (ESF) is a private sector trade association that represent the interests of the European services industry in International Trade Negotiations in Services & Investments. It comprises major European service companies and European service sector federations covering service sectors such as financial services, tourism, telecommunications, maritime transport, business and professional services, distribution, postal and express delivery, IT service (see full list of members on the web-site: www.esf.be). It is estimated that ESF membership covers approximately 70% of Extra EU services exports and investments. ESF members employ more than 90 million workers, are present in more than 200 countries and provide services to hundreds of millions of consumers in Europe and around the world. The European Union is by far the largest exporter of international trade in services (26% of world share) and European services companies are the world largest investors (€ 3 Trillions Extra-EU 2011).

1. Facts and figures: EU Services businesses are by far the world biggest investors

It is well established that the European Union is the largest source and destination of FDI in the world measured by stocks and flows. According to Eurostat, the EU27 FDI flows to the rest of the world (outflows) reached €370 billion in 2011, while FDI into the EU27 from the rest of the world (inflows) were €225 billion. As to stocks, in 2011 European businesses held €4 983 billion outside the EU, while non EU companies held €3 806 billion into the EU[2]. This places the EU in first position on both counts. On their own, these figures illustrate why protection of investments is crucial for European businesses needing an effective remedy against treaty violations such as expropriation or inequitable treatment, which undermine investment.

What is less known is the services sectors' share in total EU FDI. Services made by far the largest contribution to both outward (59 %) and inward (57 %) stocks. **This means that European services firms hold nearly €3 trillion of investments outside the EU.** The EU's economic stability requires an effective system to protect these assets against unfair treatment. Almost two thirds of services investments are held in financial and insurance activities, with, in the recent years, high growth in information and communication. By contrast, EU27 stocks in manufacturing represent 20% of outward and 31% of inward investment. The scale of FDI by European services companies explains why the ESF particularly favours strong protection of investment including investors' ability to bring legal proceedings against a state before a neutral arbitral tribunal.

2. Investment protection through commitments in trade agreements

The undertakings by the WTO members in their GATS[3] Schedules of Commitments in the Uruguay Round or in their commitments under bilateral or regional trade agreements can be considered as already providing market access and a first layer of protection for investments, since they allow European businesses to establish abroad (mode 3 of the GATS). Any denial of market access, or a requirement to disinvest afterwards, can be challenged through the WTO or specific FTA dispute settlement mechanisms. Such commitments are therefore welcomed, since they provide an initial level of legal security to investors. The ESF will continue to support trade negotiations that provide better market access to services businesses.

The dispute resolution mechanisms in WTO, FTAs or other trade agreements are however only state-to-state systems, which require European businesses whose market access has been denied to convince the European institutions to pursue a case. There is always a degree of uncertainty as to whether a complaint will be pursued in the WTO (political considerations, for instance, might impede the initiation of a case).

3. Investment protection through Bilateral Investment Treaties

For these reasons, European services firms have always supported their respective EU Member States in negotiating and signing bilateral investment treaties (BITs). These treaties complement EU trade policy by providing a strong post-establishment protection to investors who might otherwise be unable to bring proceedings against states which breach agreed investment guarantees. Since the 1950's EU Member States (other than Ireland) have concluded more than 1400 BITs, or 40% of all 3,400 existing BITs worldwide. These BITs are perceived as an insurance policy for investors. Investment is about trust, and BITs contribute to that essential trust.

All BITs include an investor-state dispute settlement (ISDS) process which allows for legal proceedings before an impartial and neutral arbitral tribunal, in addition to the state-to-state dispute settlement mechanism. It must be emphasised that a BIT without an ISDS mechanism does not exist, principally because the main purpose of a BIT is to protect investors by the widest range of means. Some BITs require the investor first to "exhaust all domestic remedies", i.e. first to seek redress through the judicial system of the country where the investment is made. But when that

[2] Source: Eurostat (Foreign Direct Investment Statistics). If we include intra-EU, the total of outward stocks for the EU in 2011 was $ 9.46 Trio, while the second biggest country investing abroad was the USA ($ 4.68 Trio) (source: OECD – FDI in figures – 2013).

[3] GATS : WTO General Agreement on Trade in Services

process is ineffective or resort to it is unsuccessful, then the availability of neutral arbitration is necessary to provide confidence to investors. Use of ISDS by EU firms has increased in the recent years[4], largely due to the fact that more countries have taken protectionist measures in the context of the global economic crisis and that FDI flows to developing countries now account for more than half of global FDI flows. All this means that the ISDS approach is not new, although the fact that investment protection has now become an EU competence has focussed fresh attention on it.

All EU member states except Ireland have for a long time considered it very important to negotiate investment treaties that would allow their companies, when need be, to have access to a specific dispute settlement mechanism that will ensure impartial and neutral arbitration.

Two features of EU members' experience of ISDS should be emphasised. First, the initiation of a dispute between an investor and a state must be – and can only be - triggered by a measure by the host state, if the host state takes a amounting to direct or indirect expropriation (as defined in the treaty) which would hamper or nullify the reason why the company invested in that country. Therefore, contrary to what is sometimes asserted, an investor will never be the unprovoked "aggressor" party in an ISDS case.

Secondly, businesses do not like conflicts with the authorities of the host countries in which they invest. Disputes can be lengthy and costly. It must be emphasised that recourse to ISDS often only comes after a lengthy period of difficulty for a business that has had assets expropriated or is suffering from what it considers to be a breach of the investment agreement. Many months can pass before getting an ISDS process activated, and often many months will go by before a decision of the arbitration tribunal is given. In the meantime, the firm is losing business and goodwill in the country where it has invested. Initiating arbitration is often seen as a last resort for companies, and on many occasions, companies prefer to settle arbitration proceedings through mediation or other mechanisms often enshrined in or encouraged by the BITs themselves[5]. In addition, companies investing abroad may find that the problems in questions cannot be solved through the host state's domestic legal system, because in many countries, investment agreements are not directly enforceable in local courts. This means that international arbitration is often the only means to obtain redress when an alleged breach of an investment agreement occurs.

4. EU Competence for investment protection

Under the European Union's Lisbon Treaty, in force since December 2009, FDI falls under the exclusive competence of the European Union (EU). This is set out in article 207 of the Treaty on the European Union, and is the legal basis for the European Commission to seek authority from Member States to start negotiations on new investment agreements.

The EU is close to concluding a comprehensive economic and trade agreement (CETA) with Canada, which includes an investment chapter. A free trade agreement (FTA) with Singapore will also soon be concluded. In addition, the European Commission has obtained an extension of its negotiating mandate to include investment protection chapters in agreements with India, Vietnam, Malaysia and Thailand. The Commission also has been granted a negotiating mandate to conclude an FTA with Japan as well as the Transatlantic Trade & Investment Partnership (TTIP) with the United States. Furthermore, the Member States have given a mandate to the Commission to negotiate a Bilateral Investment Agreement with China and with Myanmar. Others might follow.

[4] *Of the 214 ISDS cases registered worldwide for the period 2008-2012, EU investors accounted for 53 % of the cases (113 cases) with investors from the Netherlands, Germany and the United Kingdom the main users. Of the 58 cases initiated in 2012, EU investors were behind 60 % of all claims, while US investors accounted only for 7.7%.*

[5] *244 cases were concluded in 2012 – of which: 42% were decided in favour of the State, 31% in favour of the investor and 27% were settled before Arbitration Tribunal decision. (Source: UNCTAD – Recent development in ISDS – May 2013). These disputes that are settled before an award (compensation) is rendered prove that arbitral proceeding provide an effective forum for finding acceptable solutions, before necessarily arriving at the final stage of the allocation of awards.*

Investment protection is the logical counterpart to market access secured in trade negotiations. The ESF has therefore welcomed the inclusion of an investment protection chapter in the recent EU trade agreement with Canada and Singapore. Investment protection must however be negotiated on its own terms, clearly separated from the traditional trade-offs forming part of the dealings between the negotiating partners in other chapters covering trade issues: levels of investment protection should not be a matter of negotiation in return for concessions in other areas. This principle need to be very clear and well respected, to ensure a uniformly high standard of investment protection, whatever the trading partner and whatever the quality of the market access commitments negotiated in the other chapters and annexes of the agreements.

On the other hand, when the Union does not want to open trade negotiations with a trading partner, but is willing to open negotiations with that partner for a bilateral investment agreement (as with China), the ESF strongly encourages EU negotiators to seek certain new market access provisions as well. The reasons are simple: many trading partners still have investment barriers, particularly in services sectors and, where such market access barriers exist, the value of investment protection is correspondingly reduced. Where is the added value of a BIT if investment cannot take place? But again, these new market access commitments should not be traded against lower investment protection.

5. How to achieve good investment protection?

Experts in the field of investment protection generally regard European BITs as offering strong investment protection based on solid standard model BITs. It has taken a long time, helped by national negotiators' expertise plus well-established jurisprudence from arbitration cases, to achieve this degree of protection. There is no doubt that the very large amount of FDI invested by European firms around the world reflects the high level of protection now in place. Investment decisions require trust among private partners as well as between the private investor and the country where it decides to invest, and good BIT protection contributes to this trust. Investment protection is also a mean for countries around the world to attract and retain FDI for the benefit of their economies.

Most existing EU Member States' BITs can be described as having the following characteristics[6]: short, simple treaties; broad-based definitions for investors and investment; unqualified Most Favourite Nation clause and National Treatment clause (to ensure protection against discrimination in favour of domestic competitors), unqualified "Fair and Equitable Treatment" clause; broad "umbrella clause[7]; no exceptions for certain sectors; no filter mechanisms; broad choice of ISDS mechanisms; free choice of arbitrators; full compensation for direct & indirect expropriation.

European services businesses would like to retain or improve all these features, including in future investment chapters of EU Free Trade Agreements or in Bilateral Investment Agreements (BIAs) at EU level. Given that the web of existing 1400 European BITs already provides good protection to many European investors, any new EU-level investment protection agreement must bring specific additional value. In addition, given that not all EU countries are covered by existing BITs, ESF strongly urges that the same high level of protection be provided to all EU investors whatever their EU country of origin, as well as to foreign investors whatever the EU country in which they invest. This will provide a level playing field among all investors and is therefore to be welcomed.

For all these reasons, ESF will closely monitor future negotiations to ensure that investment protection remains as strong as possible in the forthcoming EU-level investment chapters of FTAs and in BIAs. In the meantime, EU Regulation N° 1219/2012 of 12 December 2012 "establishing transitional arrangements for bilateral investment agreements between Member States and third countries" specifically provides (Article 3) that existing "bilateral investment agreements notified

[6] *Lavranos, Nikos," The New EU Investment Treaties: Convergence towards the NAFTA Model as the New Plurilateral Model BIT Text?" (March 29, 2013) at page 1. Available at SSRN*

[7] *I.e. covering not only the investment as describe in the BIT, but also the activities related to that investment, such as the public procurement contracts won by the investor. See: OECD Paper on "Interpretation of the Umbrella Clause in Investment Agreements" – Oct 2006*

pursuant to Article 2 of this Regulation may be maintained in force, or enter into force, in accordance with the TFEU and this Regulation, until a bilateral investment agreement between the Union and the same third country enters into force”. This makes clear that the 1400 BITs signed by the 28 EU Member States should continue with undiminished force until they can be replaced by EU protection.

ESF is open to any suggestions for improving Bilateral Investment Treaties, so as to make them even clearer and more transparent in the interest of avoiding any possible misuse of the protection system. It is not in investors’ interests for such protection to be held in poor regards among authorities or the public in host countries. In this regard, it is clear and indisputable – and indeed it should go without saying - that sovereign states will always have the right to regulate and to make changes in their rules in the public interest, for social, environmental, or any other public policy purpose they see fit. Against that background, the objective of a BIT is to ensure disciplines to:

i) Prevent discrimination against investors on grounds of nationality;
ii) Provide fair and equitable treatment to investment;
iii) Guarantee prompt, adequate and effective compensation in the event that the government has to expropriate for a public, non-discriminatory, purpose;
iv) Allow transfers of funds related to the investment.

A BIT never denies the right to regulate, but complements that right with a clear and mutually agreed statement of the international obligations to be observed.

ESF would like to recommend the following:

- Definitions: the text of investment protection chapters in agreements could include clearer definitions of key provisions, but exceptions to the rules should be kept to a minimum, since they often can be a source of diverging interpretation triggering more disputes.

- Legal concepts: the vast majority of European BITs refer to “fair and equitable treatment” of investment, and ESF would strongly recommend continuing the use of that concept. Other treaties refer to “customary international law”, but this notion is less well defined, subject to diverse interpretations, and provides in our views a lower level of protection. There has been criticism that, as currently drafted, the rule of “fair and equitable treatment” might impede host states seeking to introduce non-discriminatory regulation in the public interest. The solution is not to abandon a current concept that is well-tried but rather to negotiate carve-outs which ensure that states can continue to regulate (for example, to protect health and the environment), in a fair and impartial fashion.

- Scope: investment protection should cover not only the visible part of the investment, but also the activities related to that investment, such as the public procurement contracts won by the investor. Reducing the scope of the protection would seriously reduce the value of a BIT.

- Filter mechanisms, carve-outs and exceptions: where these are introduced for certain sectors or types of activity (e.g. financial services), they must be properly justified and limited to the maximum extent possible, because they make protection less efficient. One filter mechanism, for instance, could be to oblige an investor to seek the opinion of a body such as a “Committee of experts” before seeking redress through the national courts or via ISDS. Such a body will typically be composed of officials from the two signatory countries (state-to-state). Rather than providing an avenue for direct recourse by the investor, it could mean that the outcome is decided without an opportunity for the investor’s case to be heard.

- Investment Review: ESF recommends against pre-market access review provisions, such as pre-investment review powers (e.g. the Investment Canada Act or US CFIUS).

6. Investor-State Dispute Settlement for EU Agreements

Investor-State Dispute Settlement (ISDS) is a mechanism that constitutes an integral part of an investment protection agreement. Although ISDS is sometimes presented as an instrument that creates scope for abuse by foreign investors, it must be reiterated here that its original purpose is to limit arbitrary behaviour of governments towards foreign investors. Local courts could be perceived (rightly or wrongly) as potentially under the control of the state against which the claims are brought, or biased against foreign investors. It must also be emphasised that in some existing BITs, ISDS is the only instrument that businesses are entitled to use, since the contracting parties, when agreeing the BIT, took the view that international investment cases were not justiciable in local courts.

The European Services Forum calls upon the European Union to ensure that any EU investment protection chapter or BIA allow an investor to have access to an efficient state of the art "Investor-State Dispute Settlement" (as in all other BITs around the world). Any limitations or conditions to its access should be well justified and kept to a minimum. Allowing recourse only to a host state's national courts for breach of treaty obligations by the host state would diminish investor confidence, particularly given concerns about delays, domestic bias, lack of due process or political interference. ISDS jurisprudence over the last decades has clearly demonstrated that governments are not always impartial, and that a neutral arbitration system is needed. We understand that the investor-state arbitration system proposed by the Commission is based on the existing arbitration rules established by the International Centre for Settlement of Investment Disputes (ICSID - set up by the World Bank to handle investor-State disputes with 140 member states) and the United Nations Commission on International Trade Law (UNCITRAL), whose rules currently provide the basis for the ISDS system in existing BITs signed by the EU countries. The European Commission is not therefore proposing some entirely novel and untried system, and ESF welcomes this.

It is essential for the ISDS mechanism to be uniform across all agreements. It would be a huge mistake to introduce some kind of "ISDS à la carte", with access or activation dependent on where an investment takes place. A non-uniform approach would create a negative precedent with the potential to derail the whole system, as dispute settlement would be subject to bargaining, where the result would depend on the political negotiating strength of the trading partner. It would mean different levels of protection in different countries, plus possible loss of trust in BITs and a reduction in investment flows exacerbating weakness in the global economy.

The ESF understands that the Commission proposes to address some problems that have arisen in recent years in the investment-treaty arbitration context, and to address any gaps and concerns with additional rules in the following areas:

a) Additional rules for activating investor-state dispute settlement

There could be clarification of current ISDS practice. Some provisions are indeed already included in existing BITs concluded by the countries which use the NAFTA model as well as the European BIT model. There could be, for instance: i) clarification of the scope of dispute settlement; ii) new detailed rules on mediation; iii) the exclusion of 'class actions'; iv) "fork-in-the-road" clauses to avoid multiple claims on the same issue; v) a special framework on the constitution of the tribunal and conditions for tribunal members;, vi) the allocation and setting of costs; vii) the consolidation of claims; viii) the setting up of a Committee for the Settlement of Investor-State Disputes in charge of implementation and interpretation issues; and (ix) examination of the possibility of an appellate mechanism. Many of these proposals are interesting and ESF will examine them closely, including a possible appellate mechanism (which should however be subject to tight timescales, so as not to further delay final settlement of the dispute.

As a preliminary remark on the fact that the cost of the proceedings should be paid by the losing party: Since the cost of international arbitration can be significant and an overwhelming burden, ESF would like to recommend a more equal represented approach which is also considered fair. We would suggest that as a starting point, each contracting party should bear its own expenses from the arbitral tribunal. Additionally, the costs of the chairman should be divided equally between the parties. However, in exceptional well explained cases, the tribunal can decide to assign all costs to one part. It should be noted that the tribunal is appointed by the parties.

b) Transparency in investor-state dispute settlement

Similarly, the Commission is considering stronger transparency provisions to ensure access to documents and hearings in the dispute-settlement system. This builds on developments at ICSID and UNICTRAL which have recently adopted more robust transparency rules. It would be a mistake however to infer that current ICSID procedures are not already transparent: hearings are often held in public and third parties can participate in proceedings and submit briefs to the tribunal. ESF would have no difficulty with the concept of holding all investment arbitration proceedings in public.

c) Constitution of tribunals

On the constitution of tribunals, we understand that the Commission intends to follow an approach in which the disputing parties each appoint one arbitrator and the chairperson is appointed by agreement. The Commission however would add to this traditional approach the creation of a “roster” (list) of “at least 15 individuals” to serve as arbitrators in investment disputes involving the EU or EU member states under an EU treaty. Each Party to the treaty would propose at least five individuals to serve as arbitrators and also select at least five individuals “who are not nationals of either Party to act as chairperson of the tribunals.” Where disputing parties have not appointed their arbitrator or cannot agree on a chairperson, the Secretary General of ICSID would appoint arbitrators from this list. The text of future treaties would also contain unequivocal language requiring arbitrators to be impartial, independent and free of any conflict of interest. These proposals seem largely to follow existing ICSID practice and would be welcomed by ESF.

Although it is too soon to take a position on all these proposals before being able to analyse the final wording, the ESF recognises that the political and economic climate in relation to ISDS has significantly changed since the first investment treaties, and that there is a need for the ISDS system to evolve. We understand that the European Commission’s aim is precisely to address governance and legitimacy concerns by requiring transparency in dispute settlement. This is unobjectionable, provided that investors can still rely on a valued remedy for enforcing their rights under current and future investment treaties.

See Below the list of ESF Members supporting this Position Paper

See also Below a One Page “Fact & Figures about Investment Protection” which highlights some keys issues that are also explained in this Position Paper

LIST OF ESF MEMBERS

SUPPORTING THE ABOVE POSITION

- Architects' Council of Europe –ACE
- BDO
- British Telecom Plc
- Bundesverband der Freien Berufe - BFB
- Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
- BUSINESSEUROPE
- BUSINESSEUROPE WTO Working Group
- Deutsche Bank AG
- Deutsche Telekom AG
- DHL Worldwide Network SA
- DI – Confederation of Danish Industries
- Ecommerce Europe
- EK - Confederation of Finnish Industries
- Ernst & Young
- EuroCommerce
- EuroCiett
- European Association of Cooperative Banks – EACB
- European Banking Federation – FBE
- European Community Shipowners' Associations – ECSA
- European Express Association – EEA
- European Federation of Engineering and Consultancy Associations – EFCA
- European International Contractors – EIC
- European Public Telecom Network – ETNO
- European Savings Banks Group – ESBG
- European Satellite Operators Association - ESOA
- Fédération des Experts Comptables Européens – FEE
- Fédération de l'Industrie Européenne de la Construction – FIEC
- Foreign Trade Association - FTA
- HSBC
- IBM Europe, Middle East & Africa
- Inmarsat
- Irish Business and Employers' Confederation
- KPMG
- Law Society of England & Wales
- Oracle Europe, Middle East & Africa
- Orange
- Siemens AG.
- Standard Chartered Bank
- Svenskt Näringsliv (Confederation of Swedish Enterprise)
- Tata Consulting Services
- Telefónica SA
- Telenor Group
- The CityUK
- Thomson-Reuters
- Zurich Financial Services

European Services Forum

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FACTS AND FIGURES ABOUT THE INVESTMENT PROTECTION

- The EU is by far the world's largest source and destination of FDI measured by both stocks and flows. The European services sectors are the biggest investors in the world. Services made by far the largest contribution to both EU outward (59 %) and inward (57 %) stocks. This means that European services companies hold nearly €3 trillion of investments outside the EU[8].

- Investment is about trust. Investment protection, including the right to defend it through a neutral dispute settlement, provides that trust. Hence, the EU Member States have concluded more than 1400 BITs of high level protection, all of which include investor-state dispute settlement (ISDS).

- WTO and other bilateral market access commitments provide a certain form of indirect protection of the investment, but can be defended only through state-to-state dispute.

- Use of ISDS by EU companies has increased in the recent years[9], but that is largely due to the fact that more countries have taken protectionist measures in the context of the global economic crisis and that FDI flows to developing countries now account for more than half of global FDI flows.

- The initiation of a dispute between an investor and a state must be – and can only be - triggered by a measure by the host state. Therefore, contrary to what is sometimes asserted, an investor will never be the unprovoked "aggressor" party in an ISDS case, but on the contrary is the claimant who is asking for fair compensation.

- In many countries, investment agreements are not directly be enforceable in local courts. Issues that are of international private or public law are not admissible in front domestic judiciary system. For example, a clause of non-discrimination or the obligation for a country to respect a national treatment obligation is only enshrined into a Bilateral Investment Treaty or a Free Trade Agreement, which is part of the international law, and hence can only be implemented by an ISDS case. This means that international arbitration is often the only means to obtain redress when an alleged breach of an investment agreement occurs.

- ISDS jurisprudence over the last decades has clearly demonstrated that governments are not always impartial (e.g. unjustifiable delays, domestic bias, lack of due process or political interference) and that a neutral arbitration system is needed

- Businesses do not like conflicts with the authorities of the host countries in which they invest. Disputes can be lengthy and costly. Many months can pass before getting an ISDS process activated, and often many months will go by before a decision of the arbitration tribunal is given. In the meantime, the firm is losing business and goodwill in the country where it has invested.

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