

Mr Bernd Lange
Member
Chairman of INTA Committee
European Parliament
Bât. Altiero Spinelli - 12G205
60, rue Wiertz
B - 1047 - Brussels

Brussels, 5 May 2015

Subject: **ESF views on Investor State Dispute Settlement**

Dear Chairman,
Dear INTA Rapporteur for TTIP,

I am writing to you with regards to the issue of Investment protection and **Investor-State Dispute Settlement (ISDS)** mechanism.

The **European Services Forum (ESF)** represents the European services companies that are doing business outside the EU via trade and investment.

The **European Union** 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 EU¹.

Taking this into consideration, **we would like to express our great concerns raised by the recent position of the S&D Group against the inclusion of ISDS in TTIP.**

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 (Bilateral Investment Treaties) of high level protection, nearly all of which include investor-state dispute settlement (ISDS). There is a clear relation between the volume investment and the ISDS system², since investors take a decision knowing that, should there be a problem with their investment, there is a mean to look for redress. ISDS is an integral part of the trust that the investor will have to take its investment decision. ISDS is like an insurance policy that a holder is taking, hoping that he/she will never need to use it. **ESF is strongly in favour of having a state of the art ISDS mechanism in TTIP and in any other agreement which will include investment protection rules.**

Investment creates jobs and growth in the EU. For instance, aggregate US investment in Europe totalled €2 trillion in 2014 and directly supports more than 4.3 million jobs in Europe.

We welcome the debate around this important issue and believe that it will be useful to reform the system to make it more transparent and more efficient. And we hope that this contribution, like the ESF response to the European Commission consultation in July 2014, will bring some constructive input.

¹ Source: Eurostat ([Foreign Direct Investment Statistics](#)). If we include intra-EU, the total of outward stocks for the EU in 2011 was \$ 9.46 Trilo, while the second biggest country investing abroad was the USA (\$ 4.68 Trilo) (source: [OECD – FDI in figures – 2013](#)).

² See [ECIPE Occasional Paper N° 4/2014, page 16 to 18](#), with many references to a vast body of economic researches providing evidence of a positive effect of BITs on investment flows.

We would like to express the **regret that the mindset of the investment protection negotiators has shifted**. Previously, the negotiators purpose was to sign an agreement that would protect the investors of their countries against the discriminatory measures adopted by the authorities of the other party. Today, it seems that the main purpose of the negotiators is to protect the EU and its member states against the possible abuses of the foreign investors. **It is not anymore about investment protection, but about government protection.**

We also refute the message that **arbitration courts for ISDS** were a kind of private justice. They **are mechanisms established through international conventions signed by the governments of the signatory countries**, including the EU member states.

- Indeed, the International Centre for Settlement of Investment Disputes (ICSID) is an international arbitration institution which facilitates legal dispute resolution and conciliation between international investors. The ICSID is a member of the World Bank Group.
- The UNCITRAL Model Law on International Commercial Arbitration was prepared by UNCITRAL, and adopted by the United Nations Commission on International Trade Law on 21 June 1985. Investors are only using a tool that has been put at their disposal.
- We welcome the new transparency rules adopted recently by UNICITRAL and hope that the European Union and its Member States will be able to sign this revised convention soon. **We trust that the European Parliament, through your Committee, will support the Commission in this endeavour.**

It must also be emphasized that **the initiation of a dispute between an investor and a state can only be triggered by a measure taken by the host state**. Therefore an investor will never be the unprovoked “aggressor” party in an ISDS case, but on the contrary, is the claimant asking for fair compensation.

- We would like to repeat here that **our companies**, small, medium or large, **neither like nor want conflicts with the authorities of the host countries in which they invest**. Such a decision can only deteriorate the relationship with the local authorities, and therefore the board of the company will take such action only as a last resort. Disputes can be lengthy and costly: many months can pass before getting an ISDS process activated and many months will go 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.

Another important element in this debate is **the right of the EU and the governments to regulate**. This has never been put into question. But it came through the false allegation that ISDS tribunals could prevent countries from regulating. As you well know, this is untrue.

- BITs are not instruments to oblige countries to change regulation, or to prevent them from expropriating. **BITs are treaties to prevent discrimination against investors on grounds of nationality. ISDS arbitrators can only decide to attribute fair and equitable compensation, not to revoke a regulation.** On the contrary, administrative national courts can do that. ESF welcomes the proposal by the Commission to clearly state in the investment protection chapter that the parties keep the right to regulate.

So far, the ISDS system has worked well. This, in turn, explains why this issue has not dragged public opposition by the more than 3400 exiting treaties worldwide. We believe that many opponents to the TTIP are raising the profile of this matter, which is now of the competence of the European Union, as controversial as a tool against the TTIP itself.

- You have organised many hearings in your Committee and in your political group, and much **data** have been provided:

- UNCTAD reported only less than 600 cases in 50 years, where **the governments lost only 31% of the 274 known cases**, i.e. in 85 cases. And the vast majority of these lost cases were clear arbitrariness decisions by countries well known for protectionist behaviour and poor judiciary system like Argentina and Venezuela.
- It is also important to note that **70% of all new claims concern investments in the services sectors**, which explain why ESF is so much supportive of the mechanism. Furthermore, the largest number of the cases was brought by European investors, which fell victim of unfair measures (299 cases - 53% of all cases). Only a minority of cases (if we exclude the intra-EU BIT cases) were brought against EU governments.

We agree with the fact that the first BITs were signed with developing countries where the investors could have some concerns about the independence of the judiciary systems. Hence the legitimate question about the necessity to have an ISDS mechanism in trade and investment agreements with developed countries, like the United States, that are members of the OECD and which respect the rule of law, with developed and trustworthy judiciary system. ESF believes that

- **The EU is the perfect powerful player in international trade**, with its new competence on investment, **to initiate a new framework in investment protection agreements**, and
- **TTIP is the perfect platform to set new international standard in investment treaties** while preserving the interests of the investors.

When we look at possible alternatives to ISDS, we believe that **any other dispute settlement method would be incomplete and could lead to denial of justice or unfair treatment**.

A state-to-state dispute settlement in the FTA or at multilateral level

- is established to settle **disputes that cover a whole sector** that is victim of a breach or non-application of a treaty provision or commitment.
- **is not meant to deal with individual investment disputes**.

Should such a mechanism be used for individual investors' disputes, it would inevitably be subject to "politisation" of the case. Depending on the foreign affairs headlines of the day, on the sector where the dispute would occur, as well as possibly on the size of the company, a company would or not be defended by its own country, or by the European Union. This would not be acceptable, since it would result in denial of justice.

The use of national courts could be an option, but not always. Indeed, to ensure that the obligations undertaken by a party in the investment protection chapter of a trade or investment agreement, these obligations need to be enshrined into the core of the national law. This means that in this occurrence the TTIP should be transformed into American law applicable to the whole US territory. But the US practice is that the international trade agreements are simply adopted by the US congress and implemented as such, but the **obligations are not introduced in the US legal domestic system**. So, if in the course of an investment dispute a foreign company would ask a local judge to implement a provision from the TTIP where there are some non-discrimination obligations that it considers as not respected, the judge will have to deny the admissibility of the request by his/her domestic court. **Should there be no ISDS option in TTIP, this would also result in a denial of justice**.

There are also concerns that, in some cases, domestic courts – including of developed countries - may favour the local government over the foreign investor e.g. when assessing

a claim for compensation for expropriation, or may deny due process rights. It must be recognised that the local courts are not always neutral, in particular in countries where the judges are elected. **It was specifically to ensure a neutral system of redress that ISDS was established.**

Therefore, not having an ISDS system in TTIP is not an option. **If the EU does not want to recognise the ISDS mechanism, the only option is to renounce at its new competence on investment protection.** Indeed, no investment protection chapter, no ISDS needed.

Nevertheless, ESF agrees that there are **legitimate concerns** about the ISDS mechanism and therefore **we welcome the initiatives recently made by the EU to improve the system and we strongly encourage further improvements.**

- ESF supports the recent move by the Commission to introduce a **“fork in the road” provision**, requiring that the investor chooses between domestic courts and ISDS tribunals, and preventing multi-claims at the same time on the same matter given that when the investor chooses the domestic court route and it becomes manifest that the judge(s) or local court are not neutral, the investor has still the right to opt for an ISDS case.
- ESF applauds the EU's willingness to ensure **transparency and openness** in the ISDS system under TTIP by including provisions to guarantee that hearings are open and that all documents are available to the public. In ISDS cases brought under TTIP for instance, all documents would be publicly available (subject only to the protection of confidential information and business secrets) and hearings would be open to the public. Interested parties from civil society would be able to file submissions to make their views and arguments known to the ISDS tribunal.
- ESF is also in favour of the introduction by the EU of specific requirements in the TTIP on the ethical conduct of arbitrators, including a **code of conduct**. This code of conduct will be binding on arbitrators in ISDS tribunals.
- Finally, ESF welcomes the recent proposals by the EU Trade Commissioner to work on an **Appeal mechanism** in the ISDS procedures, with a long term perspective of possible establishing with other countries a permanent court of investment arbitration.

We believe that with all the changes the Commission is considering will make the new ISDS system even more efficient and respond to the concerns raised by the S&D group and other stakeholders. We therefore ask you to give this process an opportunity instead of calling for an outright exclusion of ISDS from TTIP and other trade agreements.

I would like to ensure you and your Committee that we remain deeply committed to an open dialogue and I remain at your disposal for any further information on this very important issue.

Yours sincerely,



Sir Thomas Harris
ESF Chairman

Cc: - *Members of the International Trade Committee of the European Parliament*
- *EU Trade Commissioner Cecilia Malmström, European Commission*
- *EU Trade Ministers and Members of the EU Council Trade Policy Committee*

LIST OF ESF MEMBERS

SUPPORTING THIS POSITION ON ISDS

- Ageas Insurance
- Architects' Council of Europe –ACE
- British Telecom Plc
- BDO
- 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
- Deutsche Post DHL
- DI – Confederation of Danish Industries
- Digital Europe
- 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 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 Group
- IBM Europe, Middle East & Africa
- Inmarsat
- Insurance Europe
- Irish Business and Employers' Confederation - IBEC
- KPMG
- Law Society of England & Wales
- Le Groupe La Poste
- Microsoft Corporation Europe
- Mouvement des entreprises de France – MEDEF
- Oracle Europe, Middle East & Africa
- Prudential Plc.
- SELDIA – European Direct Selling Association
- Standard Chartered Bank
- Svenskt Näringsliv (Confederation of Swedish Enterprise)
- Tata Consulting Services - TCS
- Telenor Group
- TheCityUK
- Thomson-Reuters
- Zurich Financial Services