Investor-State Dispute Settlement in TTIP

Factsheet

Introduction

Investor-State Dispute Settlement (ISDS) is an arbitration mechanism usually included in investment and (more recently) trade agreements. It empowers foreign investors to initiate proceedings against a state to obtain compensation for alleged violations of their investment rights as granted by the treaty.

- ISDS originated in the 1950s to allow investors to pursue third party arbitration when they believed a host nation, usually a developing country, had violated their investment rights and its national courts lacked satisfactory judicial remedies.
- The number of ISDS cases is growing exponentially; fewer than 50 cases were litigated between the 1950s and 2000, while 568 are known to have occurred as of the end of 2013 (Source: UNCTAD).

ISDS in TTIP. What is on the table?

The negotiation mandate for the Transatlantic Trade and Investment Partnership (TTIP) given to the Commission by EU Member States includes ISDS. Yet, no formal proposal for an ISDS chapter exists.

Negotiations on ISDS were postponed while the European Commission carried out a public consultation on this issue, organised following huge public pressure. The results were published in early 2015 and revealed an overwhelming 97% of respondents had said 'no' to ISDS. In May 2015, the Commission presented its preliminary ideas on reforming ISDS.

While we welcome the efforts of the Commission to propose a long-term solution, we maintain that ISDS is too flawed to be fixed. The Commission's initial proposal fails to address the core issues: ISDS is not needed in TTIP, the mechanism is discriminatory, and ISDS arbitrators are not publicly appointed judges. The Commission will present its final proposal for reform after the summer (2015), and this plan must include a real short term alternative to ISDS.

What does it mean for EU consumers?

- Including ISDS in TTIP risks consumer, health, labour and environmental regulations being challenged as violations of 'investor rights' by foreign investors.
- ISDS can be a major deterrent to passing legislation to protect consumers, public health and the environment, especially for smaller countries, for fear of being challenged by large companies (known as the 'chilling effect').
- EU taxpayers could see their governments using public money to cover costly legal fees and other expenses related to arbitration trials, burdensome settlement agreements or compensation (the average legal and arbitration costs per ISDS case – whether won or lost – are estimated at around US$8 million [Source: OECD]).
- The legal certainty and predictability of our advanced European judicial systems, would be jeopardised by the superposition of this separate system of justice. Key concerns include:

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a. ISDS claims are handled behind closed doors and decisions are kept secret in most cases. Attempts to improve the transparency of the proceedings by means of the UNICITRAL Rules of Transparency, as included in the EU-Canada trade deal (CETA), are inadequate[1];

b. ISDS arbitrators are not accountable to any democratic body and are free to disregard or interpret jurisprudence and national consumer rights-related laws as they wish because the treaty provisions limiting their powers are usually very lax;

c. ISDS arbitrators' impartiality and independence is not guaranteed, even under updated proposals (as included in CETA), which do not address their conduct and activity prior to their assignment to the arbitration panel. This means they are free to rotate between being 'judges' and bringing cases for corporations against governments;

d. ISDS does not foresee an appeal system, as featured in all modern national and international judicial systems, nor does it require full exhaustion of national remedies (the CETA text delegates the possible creation of an appeal mechanisms to a committee, and considers that it is sufficient to have 'initiated' a legal proceeding before a national authority in order to resort to an ISDS panel). Even the Commission has recognised that the ISDS provisions in CETA are far from being ideal, yet doesn't plan to reopen this chapter.

Our recommendations

- BEUC calls for the exclusion of ISDS from CETA and TTIP. The arguments put forward by its proponents (a systematic violation of foreign investor rights in the US and the EU and the need for such system to increase investment flows) have been proved to be inconsistent by researchers[2,3]. Any alleged benefit is largely offset by the concrete risks for consumers and the society as a whole.
- If a measure is considered necessary for strengthening investor rights, BEUC suggests exploring viable alternatives as discussed by UNCTAD[4] and in academia such as the creation of an international arbitration court, a contractually-agreed forum, or the use of risk insurance and other non-adjudicative remedies.
- If ISDS is included in the TTIP or other trade agreements, BEUC urges EU member states and the European Parliament to reject such agreements.

1. The UNICITRAL Rules of Transparency contain very broad exceptions to transparency and publication of documents and leave to the arbitrators' panel itself the power of determining the circumstances under which exceptions can be applied.
2. Jan Kleinheisterkamp, 'Is there a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?' - LSE paper, 14 February 2014 – available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410188
3. Lauge N. Skovgaard, Jonathan Bonnitcha, Jason Wenn Jackee, 'Costs and benefits of an EU-USA investment protection treaty' – LSE Enterprise for the UK Department for Business, Innovation and Skills, April 2013 – available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf
4. UNCTAD, 'Investor-State Disputes: Prevention and Alternatives to Arbitration', 2010 – available at http://unctad.org/en/docs/diaeia200911_en.pdf
5. Gus Van Harten, 'A Case for an International Investment Court', July 2008 – available here http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424

NOTE: In this position statement and blog post we describe in more detail how TTIP could benefit consumers and what needs to happen to prevent detriment to consumer safeguards.

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