

Memorandum

European Commission

Brussels, 20 December 2013

“Investment protection does not give multinationals unlimited rights to challenge any legislation”

A statement by EU Trade Spokesman John Clancy about the investment protection provisions in Free Trade Agreements like TTIP (Transatlantic Trade and Investment Partnership)

“The EU welcomes the input from civil society and shares a number of their concerns over 'Investor-to-State Dispute Settlement'. There are currently 1,400 investment treaties in the EU Member States including, many with the US, which is exactly why TTIP offers an important opportunity to establish a revised, improved and fully transparent investment protection system with the right safeguards in place to prevent abuse by multinationals. In a future TTIP deal, we will aim at state-of-the-art investment provisions that fully enshrine democratic principles and guarantee the sovereign right of EU member states to regulate in their national and public interest.

The European Commission acknowledges that ISDS, if not properly designed, can raise a number of legitimate concerns about whether legislation can be undermined by investors. We want to find the right balance between preventing abuse and protecting investments – which is especially important for the thousands of SMEs to encourage them to invest in the transatlantic marketplace.

ISDS is not about giving unlimited rights to multinationals to challenge any legislative measure taken by sovereign states in any area of regulation. Under TTIP, investors will not be compensated with taxpayers' money just because of a fall in profits due to a change in the law. Nor will it be possible for investors to override bans of practices like fracking.

The protection given covers a limited number of specific actions which can concretely affect an investor's daily business operations in a foreign market, i.e. discrimination, denial of access to justice, expropriation without compensation and the inability to transfer capital to invest. Legitimate policy measures taken by public authorities to protect the environment or public health and which apply to all firms in the same way – foreign or national – cannot be successfully challenged under these provisions under the guise of investment protection.

The reason ISDS is needed in TTIP is that the US system does not allow companies to use international agreements like TTIP as a legal basis in national courts. So European companies – and especially SMEs - will only be able to enforce the agreement through an international arbitration system like ISDS. In short, yes we agree that ISDS needs to be improved and we would encourage the civil society to work with the European Commission to ensure that we create a system that satisfies the concerns of the civil society and the concerns of many businesses which seek a stable, legal and fair investment environment.”, stated John Clancy, EU Trade Spokesman.

For further information

So what is the EU aiming for in TTIP on investment protection?


(1) First, we will leave no room for doubt. TTIP should explicitly state that legitimate government public policy decisions cannot be over-ridden. It will be made crystal clear that this agreement will not limit the scope for governments to take decisions on, for example, the balance between public provision of healthcare and private services. A company will not receive compensation merely because its profits drop due to health or environmental regulation.

(2) Second, we will crack down on cases where companies have used legalistic technicalities to build frivolous cases against governments. We will define exactly what treatment investors can and cannot expect from host governments; they will get no more and no less. We will ban companies from simultaneously taking actions in domestic courts and under international investment agreements. We will follow the principle that the loser pays the costs, thereby deterring speculative challenges.

(3) Third, we will open up investment tribunals to scrutiny. Documents will be public. Hearings will be open and interested parties - including NGOs and civil society groups - will be able to make submissions. Transparency is the principle.

(4) Finally, we will eliminate any risk of conflict of interests. The arbitrators who decide on EU cases must be above suspicion. The defending party will have a right to veto two of the three arbitrators appointed in any case. All of them will be required to sign up to a strict, enforceable, code of conduct. We will also push for the inclusion of appeal mechanisms in future agreements.

[For more details on the EU's position on investment protection in Free Trade Agreements](#)  - Factsheet ([other languages](#))

[What the EU has agreed with Canada on investment provisions](#)  ([other languages](#))