European Commission

Incorrect claims about investor-state dispute settlement

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Claim: Investor-state dispute settlement subverts democracy by allowing companies to go outside national legal systems.

Response: Untrue! To get a sense of perspective on this question it is important to remember that the EU itself, as well as all but one of our Member States, Switzerland, the United States, Canada, Japan, South Korea and India - to name just a few - are all party to many agreements which provide for investor-state dispute settlement. These countries, and many more that also allow investor state dispute settlement, have healthy, vibrant democracies.

More specifically, relying on the national courts of the host country to enforce obligations in an investment agreement is not always easy.

Firstly, the investor may not want to bring an action against the host country in that country's courts because they might be biased or lack independence.

Secondly, investors might not be able to access the local courts in the host country. There are examples of cases where countries have expropriated foreign investors, not paid compensation and denied them access to local courts. In such situations, investors have nowhere to bring a claim, unless there is an investor-state dispute settlement provision in the investment agreement.

Thirdly, countries do not always incorporate the rules they sign up to in an investment agreement into their national laws. When this happens, even if investors have access to local courts, they may not be able to rely on the obligations the government has committed itself to in the agreement.

Claim: Investor-state dispute settlement gives too many rights to companies.

Response: Wrong! In fact the rights which can be enforced under investor-state dispute settlement are limited. The most common are protection against discrimination, protection against unlawful expropriation and a requirement to treat investors fairly and equitably. These are generally accepted principles of international law, which stipulate

that countries are required to protect foreigners, including investors. States can enforce this. Investor-state dispute settlement allows the investor, whether an individual or a multinational corporate entity, to rely on such international law principles for the purpose of protecting its own investment.

Claim: Investor-state allows companies to sue just because they might lose profits.

Response: Wrong! Companies cannot sue successfully just because their profits might be affected. They need to have a case. That means they need to prove that one or more of the investment protection standards, such as non-discrimination or protection against unlawful expropriation have not been respected. The fact that a government changes a law, which increases the costs for a given company, is not on its own, sufficient to bring a successful case in investor-state dispute settlement.

Claim: Investor-state dispute settlement cases take place behind closed doors

Response: Many existing agreements do indeed provide, by default, that investment disputes are heard behind closed doors. The EU does not believe that is appropriate. We have championed transparency in international dispute settlement in general and in investor-state dispute settlement in particular (click here for more information). In future EU agreements, all submissions will be public, all hearings will be open, all decisions of the tribunal shall be public and interested parties will be able to make their views known.

Claim: Investor-state dispute settlement undermines public choices (e.g. Vattenfall challenging the German moratorium on nuclear power, Philip Morris challenging Australia's plain packaging regime for cigarettes)

Response: It is important to note that only well-founded cases have a chance of being successful. The fact that a policy has been challenged does not mean that the challenge will be successful. The EU will negotiate in such a way so as to ensure that legislation reflecting legitimate public choices e.g. on the environment, cannot be undermined through investor-state dispute settlement. Experience with investor-state dispute settlement up until now confirms that tribunals do not consider it appropriate to undermine public choices.

The Vattenfall and Philip Morris cases are on-going so it is not possible to know the outcome. It is interesting to note, however, that Australia's legislation is also being challenged through the World Trade Organisation – though this time by other WTO members. Should Australia lose that case at the WTO it would indeed be under an obligation to change its legislation. This could not happen as a result of the investor-state dispute settlement. Whatever the outcome of the Philip Morris investor-state dispute settlement case, we can be sure that Australia will remain free to maintain its legislation. The same goes for the Vattenfall case and Germany's ban on nuclear energy.

Claim: Investor-state dispute settlement is biased in favour of investors – they can threaten to bring expensive cases against governments and so scare them away from policies that the investors do not like.

Response: There is little real world evidence that this is the case. UN statistics on investor state dispute settlement cases show that a majority of cases are decided in favour of the government (Of all the cases concluded by 2012[1], 42% found in favour of the State, 31% in favour of the investor and 27% were settled).

Nonetheless, the EU believes that countries should be protected from this kind of tactic. One idea which the EU is advocating is to provide that costs must always be borne by the losing party, which would act as a deterrent for investors to bringing tactical or spurious claims. Further, the EU will include provisions allowing for the swift dismissal of frivolous, unsubstantiated claims, in order to avoid unnecessary, protracted litigation.

Claim: Investor-state dispute settlement cases are decided by a small clique of lawyers, with considerable conflicts of interest, who seek to cream off public money.

Response: Like in any area of national or international law the number of true specialist lawyers in the field is not large. Some of these lawyers do combine roles as arbitrators in some disputes and advocates in others. This crossing over may create the risk of conflicts of interest.

The EU believes it is essential to make sure that there are no conflicts of interest in any future cases based on our agreements.

We will do this in two ways:

First, the presiding arbitrators in future cases will be appointed by agreement of both disputing parties. If one side suspects a conflict of interest they are free to block the appointment. If the parties cannot agree, then the arbitrators will be appointed from lists established by the Parties to the agreement.

Second, the EU seeks to include in its agreements a far-reaching code of conduct designed precisely to prevent conflicts of interest arising. No one will be able to arbitrate an EU dispute without respecting these codes, which require arbitrators to proactively disclose possible conflicts and give the parties to the dispute the chance to

[1] http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf, on page 5

challenge their continued role. The EU-Korea Free Trade Agreement provides and an example of the kind of rules the EU proposes.[2]

On the question of public money, under EU treaties, costs will be borne by the losing party. That means that there will be little incentive for investors to take frivolous cases against governments, regardless of what any enterprising lawyer may advise them. But it is important to remember that investor-state dispute settlement is often a necessary response to situations in which investors are subjected to unfair or discriminatory treatment. This is comparable to the possibility to obtain compensation under domestic law, when for example, land is expropriated for a public good (e.g .to build a road or railway).

Claim: Investors should not be allowed to challenge governments directly in international law. Only governments should be able to act against each other, via state-to-state dispute settlement.

Response: It is investors who actually suffer the financial losses. Governments (including the EU) need to pursue the general interest, and that means that they have neither the time nor the resources to follow-up each individual alleged breach of the agreement. Moreover, state-to-state dispute settlement does not provide for recovery of property or compensation, only repeal or reversal of measures. It is not, therefore, the appropriate mechanism.

[2] See Annex 14-C on page 1341. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:0006:1343:en:PDF