Investment Protection and Investor-to-State Dispute Settlement (ISDS) in EU agreements

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Investment is a vital part of any economy: it is key to creating and maintaining businesses and jobs. In today's modern international economy – including in the EU – investments often come from abroad. Companies invest to build global value chains that not only create new opportunities for trade but also add value, jobs and income. Trade agreements promote investment and create new opportunities for companies to invest around the world.

Investors need to be sure that they will be treated fairly when they invest abroad. Investment protection provisions aim to do just that and to ensure foreign firms' investments are treated in the same way as domestic ones.

Problems firms encounter when investing abroad cannot always be solved through the domestic courts. Problems can be rare but dramatic. For example, they can include direct expropriation (e.g. seizure of assets) by the host country by force and without proper compensation, discrimination, lack of due process in the domestic court system, or restrictions to international transfers of capital.

If things go wrong, ISDS provides a forum for solving disputes. It also helps give investors confidence to invest. In ISDS the dispute is judged by one or more arbitrators chosen by the parties. If an investor can prove a measure taken by the host state breaches investment protection provisions and causes him significant damage, he is entitled to compensation. But investment protection does not exempt foreign firms from the host country's laws.

Investment protection and ISDS are not new. Since the late 1960s, EU countries have signed 1400 investment protection agreements, including many with developed countries. Although these agreements have generally worked well, the system needs some improvement: sometimes results have been controversial. To address such concerns, the European Commission wants to:

1. Clarify and improve the rules on investment protection by:

- Making sure EU agreements confirm governments' **right to regulate** in the public interest; some current agreements could be seen as limiting this right.
- Making sure future EU agreements clearly define **indirect expropriation** (where discrimination effectively prevents a firm from carrying out all or part

of its business). Under EU agreements, a government would not have to pay compensation if it took a non-discriminatory measure in the public interest.

- Making sure EU agreements are clear about the term **fair and equitable treatment**. At the moment, tribunals have a wide margin of discretion in interpreting it, sometimes giving investors too many or too few rights.

2. Improve how the dispute settlement system works by:

- **Preventing abuse of the system** by allowing early dismissal of unfounded claims, preventing investors from bringing multiple claims in various jurisdictions, and discouraging frivolous or tactical claims by making an investor who loses a case pay all the costs, including those of the state.

- **Making the system more transparent** by making documents publicly available, providing access to hearings, and allowing interested parties like NGOs to make submissions.

- **Preventing conflicts of interest in arbitrators** by having a code of conduct.

- **Introducing safeguards** so governments keep control over how investment provisions are interpreted.

- **Preventing tribunals from ordering the repeal** of a government measure.

- **Setting up an appeals system** to get more consistent results.

The EU wants to introduce these features in its trade agreements. It has already introduced them in its trade agreement with Canada and is negotiating similar improvements in its agreements with other countries.

The EU is also pushing for higher international standards in the United Nations where it has succeeded in getting new rules on transparency in dispute settlement that will apply to all investment agreements, not just the EU's.

The Lisbon Treaty put the European Commission in charge of negotiating investment agreements on behalf of the EU. It does so in close cooperation with all EU governments and keeps the European Parliament informed. Over time, all 28 EU countries will benefit from a single set of investment protection rules in EU trade and investment agreements. These rules will reflect best practice and will be an improvement on the bilateral agreements they will replace. The Transatlantic Trade and Investment Partnership (TTIP) would replace EU countries' bilateral investment agreements with the US with up-to-date rules.