



# **Investor-state dispute settlement**

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**Rupert Schlegelmilch  
Director – Services and Investment  
Directorate General for Trade**



# Overview

1. What is ISDS?
2. Why protect investment?
3. Facts on ISDS
4. Main arguments in ISDS debate
5. Why is reformed ISDS better option?
6. Can we improve further?
7. Annex showing existing EU approach

# 1. What is ISDS?

- **Enforces** international agreements
- **Only very limited** and specific obligations
  - discrimination
  - expropriation without effective compensation
  - unfair or inequitable treatment
  - limits on transfer of funds
- **IMPORTANT: No ISDS for market access, No ISDS for other parts** of FTAs (e.g. regulatory).



## 2. Why do we protect investment?

- **Economic reasons**

- Special nature of investment transaction: long term perspective, cannot move assets
- Attract/promote investment
- Ensure certain basic protections



- **EU interest**

- EU + MS : collectively the largest investors worldwide
- EU investors biggest users historically (NL, DE, UK)
- In 2013: account for 52 % of new cases (30 out of 57 new ISDS cases)

### 3. Facts on ISDS

- 90 % ISDS cases are **administrative measures**
- **Not only multinationals**: SMEs 22 %;  
Medium/big companies: 45 % (rest unknown)

## **4. Arguments in ISDS debate**

4.1 Make investment protection provisions apply at domestic courts

4.2 Use of domestic courts

4.3 Use state to state as Dispute settlement instead of ISDS



## 4.1 Make provisions apply in front of national courts?

- Inherent risk that investor could seek **annulment of a law** (in addition to compensation) whereas under ISDS only compensation
- Direct effect not allowed in many judicial systems (e.g. US, Canada) – and unlikely to change
- Consequently, not in EU's interest.





## 4.2 Use of domestic courts?

- **Different system of law applied** (domestic courts can only apply domestic law, not international law)
- **Other judicial systems:** discrimination not always prohibited by law – risk of national allegiances by domestic courts;
- ISDS is more of an offensive interest for EU



## 4.3 State to state as alternative to ISDS?

- 90 % of cases : **administrative** measures and mostly smaller or medium sized companies
- In WTO, EU only takes cases that are of significant **commercial and systemic importance**
- State to state: risk of **politicisation**
- Makes investors **dependent on political goodwill** to raise company-specific issues
- Challenge for **smaller companies** to get their "case" heard



## 5. Reformed ISDS as the better option?

- ISDS needs reform – not just for future EU agreements. **Entire system needs overhaul**
- Reform EU is delivering **most far reaching** in the world: full transparency (also for existing treaties), choice and ethics of arbitrators, oversight by States etc

## 6. Can we improve further?

### **Ongoing work after consultation, notably on legitimacy and institutionalisation:**

- protection of the right to regulate
- establishment and functioning of arbitral tribunals;
- the relationship between domestic judicial systems and ISDS;
- the review of ISDS decisions through an appellate mechanism.



## Comparison existing agreements – EU approach for EU agreements

Investment protection provisions	Existing agreements	EU approach
Right to regulate	Not mentioned	Made explicit
Non discrimination (NT, MFN)	Post establishment	Post establishment No importation of other clauses
Fair and Equitable Treatment	Not clarified	Closed list - denial of justice, Breach of due process Manifest arbitrariness Abusive treatment + No guarantee of stability of legal system
Expropriation	Not specified	Substantial deprivation Increase in cost/loss of profits not expro / Non-discriminatory public policy measures not expro



## Comparison existing agreements – EU approach

ISDS provisions on:	Existing agreements	EU Approach
Transparency	Proceedings confidential	Full transparency ( <b>EU aim also in existing treaties</b> )
Choice of arbitrators	Disputing parties – if no agreement other arbitrators/institution	Disputing parties – if no agreement, then pre-established roster (EU + X)
Qualification of arbitrators	Silent	Expertise international law
Ethics of arbitrators	General reference – policed by other arbitrators	Detailed + binding Code of Conduct – policed by independent actor
Parallel claims domestic courts	Silent	-Prohibited
Unfounded claims	Silent	-Quick dismissal possible
Mailbox companies	Silent	-Prohibited
Party control	Silent	Binding interpretations+ submissions by government
Costs	Not mentioned	Loser pays
Appellate mechanism	Silent	Foreseen