Investor - State Dispute Settlement (ISDS)

What is ISDS?

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

- ISDS schemes 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.
- According to the UNCTAD, the United Nations Conference on Trade and Development, 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.

What are the problems with ISDS?

- Claims are handled behind closed doors and **decisions are kept secret** in most cases. This allows unaccountable private tribunals to bypass well-functioning national court systems.
- The chances of dismissal of **frivolous** or **unlawful cases** are very limited.
- **The impartiality and independence of arbitrators is a major problem**. They often rotate between being 'judges' and bringing cases for corporations against governments, thereby creating inherent conflicts of interest.
- **Consistency and predictability of decisions are not guaranteed** due to the wide margin of interpretation left to arbitrators. Consequences can be particularly serious due to the absence of the possibility of appeal (European Parliament Research Service).
- **Proceedings are hugely expensive** and place a high burden on what are often cash-strapped governments and, by extension, the tax payer. The average legal and arbitration costs per ISDS case – whether won or lost - are estimated at around $8 million USD (figures from the OECD).
- Investors have become increasingly able to use ISDS provisions to challenge and **undermine legitimate public policy objectives** such as controls on the sale of tobacco (See *Philip Morris Asia vs. Australia* case).

What are the potential risks of ISDS for consumers?

- Consumer, health, labour and environmental regulations are regularly challenged as violations of 'investor rights'.
- Arbitrators are unaccountable and free to disregard or interpret jurisprudence and national consumer rights-related laws as they wish as the treaty provisions limiting their powers are **very lax**.
- ISDS can be a **huge deterrent**, especially for smaller countries, to pass legislation to protect consumers, public health and the environment for fear of being challenged by large companies (the so-called 'chilling effect').
- It allows foreign companies to demand financial compensation which represents significant burdens on states' public finances and ultimately means a waste of hundreds of millions of taxpayers´ euro. In other words, the ISDS mechanism is **discriminatory** against national companies and consumers.

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BEUC and ISDS

- BEUC recognises the right of access to justice of foreign investors in cases of unlawful behaviour by the host State. Nevertheless we believe both the US and EU court systems are sufficiently equipped to address such cases in the most effective and efficient way.
- BEUC calls for the exclusion of ISDS from any of the EU's future trade deals.
- Asks the Commission to refrain from closing a trade deal between the EU and Canada (CETA) including an ISDS mechanism, while the public consultation on ISDS in TTIP - based on the CETA ISDS provisions - is ongoing.
- Urges EU member states and the European Parliament to reject any final TTIP or CETA deal including ISDS provisions.

Other sources: www. tacd.org, www.beuc.eu/blog

Did you know that...

Several countries like India, South Africa and Australia have recently put ISDS mechanisms under scrutiny due to the significant negative impact on state sovereignty.

The highest award in the history of ISDS amounted to **$1.77 billion USD** in the *Occidental vs. Ecuador*. The case involved Ecuador's termination of an oil concession contract after Occidental's sale to another firm of 40% of its production rights without government approval, despite a provision stating that any preceding sale unapproved by Ecuador would lead to the termination of the contract.

Of all concluded cases (274), investors won outright in **31%** of the cases and states in **43%**. However, the remainder were 'settled', meaning the parties found an extra-judicial agreement entailing some sort of (taxpayer funded) compensation (UNCTAD).

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