

Contribution of Winand Quaadvlieg, Chair of the BIAC Investment Committee, to the Unctad World Investment Forum's session on reform of the IIA system and ISDS, Geneva, Thursday 16 October 2014.

Madam Chair,

Thank you for giving me the opportunity to present some views on ISDS from BIAC, the Business and Industry Advisory Committee to the OECD.

With the actual state of the world economy, we need every extra job and every extra point of economic growth that trade liberalization and an open international investment climate can provide. But the DDA and the implementation of the Trade Facilitation agreement are blocked, no alternative liberalization in the WTO is taking place, import substitution re-emerges as a policy in certain countries, other countries terminate Bilateral Investment Treaties, and investment protection and ISDS are widely criticized.

BIAC is very worried about the negative tone, and the lack of equilibrium, in the actual debate on investment protection and especially ISDS. And also about the picture of proliferation of national legislative initiatives in the field of investment protection that emerges from our discussions this morning.

In our view, investment protection is an indispensable element of any investment regime or agreement. And ISDS in its turn is a necessary element of investment protection. Not only in agreements with developing countries. In every agreement. It is part of the system.

ISDS was created fifty years ago as an element of the rule of law: to protect companies against the arbitrary behavior of states, to guarantee then a fair process in a relation of unequal power and serious risk of biased national courts. The creation of ISDS was based on a massive accumulated body of evidence of arbitrary state behavior.

But now the public debate turns the issue on its head. Investment protection is presented as a demonic instrument for evil companies to bar innocent good willing states from promoting the public good. This is a caricature.

We have the feeling that the public movement against ISDS is totally out of proportion. As if ISDS would be an existential threat to our societies.

Let us therefore have a look at the numbers. The total stock of FDI in the world is \$ 26 trillion. That is a giant sum. ISDS exists for 50 years. In those fifty years there have been 586 known cases of ISDS. Of those 586 cases, 274 have been decided upon: 43% were in favor of the government, 26% were settled, and 31% were decided upon in favor of the company. So this amounts to roughly 90 cases, in 50 years of ISDS related to \$ 26 trillion FDI. And of those 90 cases, only a few led to societal debate on their merits.

As another speaker said this morning in this forum: 'If you compare the advantages of the total stock of FDI in my country with the number of cases my country lost, it was a very good bargain'.

We should also remind that the cases which cause now much upheaval in the public debate, e.g. Philip Morris in Australia and Vattenfall, are as yet undecided upon.

Seen in the perspective of these numbers, this matter does not justify the well coordinated, emotional, internationally widespread debate that is actually taking place. Does that mean that the existing system of ISDS is fine as it is, that there is no issue, no need for changes? No.

BIAC thinks that in the debate that has taken place, a number of issues have been raised that demand further examination. But it is the responsibility, of governments and of international organisations, to de-escalate the discussion and make it rational.

That is the first step towards a solution. And Unctad does an excellent job in that respect.

The next step towards a solution is indeed examining the issues. Business has already taken a number of initiatives in that respect, on the national as well as on the international level.

BIAC does not see much perspective in limiting investor access to ISDS, e.g. in the form of sectoral exclusions. Every legal business should be able to use the system that has been created.

But a number of issues merit further examination, without at this stage prejudicing the outcome. I can mention in this respect:

- Transparency of procedures
- Make investment protection compatible with policy freedom of host states
- Introducing an appeal mechanism
- A new code of conduct for arbitrators
- Early discharge of frivolous claims
- Improvement of timing and enforcement
- Alternative dispute resolution.

BIAC is looking forward to participating in the further debate.

Thank you.