

Statement Reform of Investor-State Dispute Settlement and IIAs

UNCTAD Multi-year Expert Meeting "Taking Stock of IIA Reform"

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Relevance of IIAs for German Industry

Germany benefits from globalization. One expression of the interconnectedness of the German economy is its foreign direct investment, which has grown roughly five-fold since 1990 to about € 0.9 trillion (2013). The foreign turnover generated by German businesses (2013: € 2.4 trillion) is more than double the value of German exports (2013: € 1.1 trillion). International Investment Agreements (*IIAs*) offer protection for these investments. Germany has more IIAs than any other country: 129 in total.

BDI's efforts to promote investment through modern IIAs

In the last years, a debate has flared up on the topic of IIAs. In fact, many of the existing IIAs and current practices within ISDS do have weak points.

BDI has been involved in the reform debate on several political levels.

- On the *national* level, BDI is an important conversational partner for questions of IIAs and ISDS. We publish articles and position papers about facts and developments in this field. We stay in contact with the relevant interest groups in Germany and with the German Government on the one hand and with the different industrial sectors on the other hand. Together, we try to find ways to modernize the IIAs system so that it could stimulate investments and find acceptance in society.
- On the *regional* level, we address mainly the European Union. Moreover, we are in discussion with other European business organizations and with our umbrella association BUSINESSEUROPE. Until now, no EU agreement has yet come into force. However, with CETA and the proposal for a TTIP investment chapter, the European Commission has presented many ideas for a reformed investment protection. We have published our opinion on the proposals.

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- The global development of the IIA system largely depends on the *multilateral* level. Currently, the international law of investment protection looks like a spaghetti bowl. International organizations should promote modern protection standards to enhance consistency of investment protection. BDI is engaged not only in the context of UNCTAD, but also at the WTO, G8/B8 and in the G20/B20 process to promote better investment conditions. Institutions such as UNCTAD, UNCITRAL, ICSID or ICC, which deal with ISDS and IAAs, should focus their attention on developing new investment protection standards. Since 2012, at least 110 countries have renewed their investment policies. About 100 of them used the UNCTAD Policy Framework.¹ This work contributes in creating global standards. Comparable standards can boost confidence and encourage investment.

BDI recommendations and goals

The discussion on the evolution of IIAs have accelerated at all levels. The objectives of the reform proposals are aimed to improvements in several areas. For German industry, each of UNCTAD's five reform areas is important². This can be shown on the basis of the EU's proposal of a TTIP investment chapter, which is perhaps the most discussed IIA:

- *Promoting and facilitating investment*

The purpose of IIAs is and has to be the facilitation of investment. Their main aim is to guarantee investor's legal certainty. In principle, the TTIP proposal aims to this goal. For example, the definition of "investment" corresponds largely with investor needs. On the other hand, the condition that a state measure to protect public interests must be "manifestly excessive" to be deemed an indirect expropriation is restrictive and could become problematic for investors.

- *Safeguarding the right to regulate*

States must be able to legislate and regulate in the public interest. The state's "right to regulate" is expressly protected in the TTIP investment proposal in both the preamble and the main body of the text. The detailed list of measures that violate "fair and equitable treatment" provides for a lower level of protection than current BITs. However, the new rules could make the legal situation for states and investors clearer.

- *Improving investment dispute settlement*

BDI also welcomes a number of the European Commission's proposed provisions on dispute settlement. The Commission proposes establishing a public "investment court system". BDI is open to this proposal. However, we reject the concept of a rotation system for the appointment of judges to the tribunal divisions, which rule on individual cases.

¹ UNCTAD, *IIA Issue Note No. 1 March 2016*, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d1_en.pdf> (accessed 11 March 2016), p. 5.

² UNCTAD, *IIA Issue Note No. 1 March 2016*, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d1_en.pdf> (accessed 11 March 2016), p. 2.

Such a procedure could result in a one-sided composition of these bodies. In light of the diversity and complexity of the cases, the permanent tribunal should consist of significantly more judges.

- *Ensuring responsible investment.*

Foreign investment can make positive contributions for responsible development. Especially for internationally oriented companies, responsible business became an important success factor. There are a number of internationally recognized reference texts which formulate expectations for multinational companies such as the OECD Guidelines for Multinational Enterprises or the UN Guiding Principles. IIAs can provide incentives for sustainable management. One way is to highlight the importance of CSR in IIAs. The TTIP proposal (in contrast to TPP) makes no use of this possibility.

- *Enhancing systemic consistency*

From the company's view, it is important that the investment protection is consistent. Therefore, BDI welcomes the proposal of the European Commission that the tribunals of the Investment Court System should use existing international structures like ICSID to support its activities. BDI also supports the Commission's proposal for ensuring procedural transparency in accordance with the standards established by the UNCITRAL. The Commission has also announced that it wants to use the structure implemented for TTIP as a model for other EU investment treaties. The long-term objective is to replace bilateral solutions with a multilateral dispute settlement mechanism.

Way forward (UNCTAD activity)

The aim of the joint efforts must be to encourage international investment. Investments are important for the global development. IIAs have proven to be a good instrument to increase the confidence of investors. In recent years, a need for improvement in the IAA system became apparent. In a partially public debate critics have outlined criticisms. Business community and investment policy have responded. In recent years, many IAAs have been revised or renegotiated. In most cases, it has responded to the criticisms. In modern IIAs, the right to regulate of States is protected. The dispute resolution procedures have been professionalized. The aim of these efforts must be to increase the quality of justice and to facilitate investment. From the standpoint of German industry, many reform proposals go in the right direction. However, some go in the wrong direction or are harmful to investment. The best solution can only be found if a serious discussion continues. This discussion needs to take place between investors, governments, lawyers, and civil society. Today's conference is a good opportunity to make progress on the way towards a reformed international investment protection.

- BDI Foreign Economic Report 1|2016
www.bdi.eu
http://www.ifg-online.com/rd-ext/agenda/FER_1_2016_small.pdf
- BDI Position Paper "ISDS in TTIP. Negotiation Proposal by the EU-Commission on a Reformed Investment Chapter in TTIP"
http://english.bdi.eu/media/topics/global_issues/publications/201601_Assessment_Investment_Protection_in_TTIP.pdf
- BDI Position Paper "Investor-State Dispute Settlement: Fears, Facts, Faultlines"
http://bdi.eu/english/TTIP_1566.htm
- BDI Position Paper "Protecting European Investment Abroad: A Roadmap for Improved International Investment Agreements"
http://bdi.eu/english/download_content/2014_BDI_Position_paper_EN_Protecting_European_Investment_Abroad.pdf
- BDI Position Paper "The 'I' in TTIP. Why the Transatlantic Trade and Investment Partnership Needs an Investment Chapter"
http://bdi.eu/media/presse/publikationen/globalisierung-maerkte-und-handel/BDI_The_I_in_TTIP_140930.pdf
- BDI Background Information "Facts and Figures. International Investment Agreements and Investor-State Dispute Settlement"
<http://wahrheituebertip.at/wp-content/uploads/2015/07/bundesverband-der-deutschen-industrie-facts-and-figures-international-investment-agreements.pdf>