

APRODEV Response to European Commission's Public Online Consultation on Modalities for Investment Protection and Investor-to-State Dispute Settlement (ISDS) in Transatlantic Trade and Investment Partnership (TTIP)

Brussels, 4 July 2014

See http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

C General Assessment

- ***What is your overall assessment of the proposed approach on substantive standards of protection and ISDS as a basis for investment negotiations between the EU and US?***
- ***Do you see other ways for the EU to improve the investment system?***
- ***Are there any other issues related to the topics covered by the questionnaire that you would like to address?***
If you do not want to reply to these questions, please type "No comment"?

APRODEV position

APRODEV argues that it is not acceptable that ISDS mechanisms give investors exclusive rights to sue states when democratic decisions – made by public institutions in the public interest – are considered to have negative impacts on their anticipated profits. These mechanisms rely on rulings outside the national courts and thereby undermine our national and EU legal systems, our democratic structures for formulating laws and policies in the public interest.

Any EU investment agreement should safeguard and improve the right and duty of governments to regulate economic activities and actors in the broader public interest and longer term interest of future generations. It should promote inclusive economic development and the attainment of MDGs. It should not undermine the sovereign rights of governments and legislatures to revise and implement domestic policies and laws to regulate consumer safety, protect health and the environment, address climate change, implement the precautionary principle and positive discrimination in favour of disadvantaged groups and regions, empower women, and specify local content rules.

An ISDS in TTIP will consolidate the ISDS as an instrument for foreign investors to sue government policies and will make it more difficult to develop and adopt alternative dispute settlement models. This is an increasing concern to developing countries. For this reason in 2012, Bolivia, Ecuador and Venezuela withdrew from the investor-state dispute settlement tribunals (ICSID), followed by

Argentine. In 2013 South Africa announced that it was ending all of its BITs (bilateral investment treaties). In 2014, Indonesia announced it wants to cancel its BIT with The Netherlands and all of its other 67 bilateral investment treaties. In February 2014, the Indian government announced that it was reviewing all its BITs and rewriting its model BIT.

APRODEV proposal

APRODEV recommends looking at alternative dispute settlement models, for example, at a Standing International (European/US) Appeals Court that investors can access for arbitration once domestic court systems have been exhausted and the investor upholds its request for litigation or fair remedy. Such an Appeals Court would be based on international legislation governing investment protection as well as existing international legislation governing the protection of social, cultural and economic human rights. Any such appeals court would have to be a standing court with standing judges subject to and protected under full democratic control. (See work done by UNCTAD - Investment Policy Framework for Sustainable Development and by International Institute for Sustainable Development - Reply to European Commission's Public Consultation on investment Protection and ISDS in the TTIP, June 2014)

Justification

Government policies and regulations are a very important driver of economic and social development. Given that development is a dynamic process, and given the relative size and potential risks of large foreign investment projects, governments and legislatures require democratic space to be able to introduce new, or revisit existing policies if new evidence or experience with existing investment show that change is required, without being sanctioned by an external court.

Current BITs allow TNCs to claim a dispute if a change in policy or law will cause the loss of future earnings, however it does not permit governments to take actions against TNCs. This leads to social upheaval and environmental damage. This situation allows TNCs to externalise the environmental and social impacts of their activities and leaves citizens affected by their activities without a voice.

APRODEV believes that the EU should use an investment chapter to promote and improve regulation of the conduct of European firms in their overseas markets, and vice versa, foreign firms in European markets in the social dimension, for example, with regard to taxation, financial reporting, anti-corruption, compliance with the OECD guidelines for Multi-National Enterprises and adherence to the UN Guiding Principles on Business and Human Rights. Only companies that adhere to these guidelines and principles including the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security or the forthcoming UN Committee on Food Security Responsible Agricultural Investment should be able to use any dispute settlement mechanism provided for in future EU investment treaties. Ultimately, these guidelines need to become enforceable.

APRODEV believes that the EU should support the UN Proposal for an international legal framework that regulates TNC behaviour as adopted by the Human Rights Council on 25 June 2014 (A/HRC/26/L.22/Rev.1). In essence, the ISDS should be excluded from the current TTIP negotiations given the controversies around this mechanism, and as pointed out above more and more countries start to reject the investor-state dispute settlement as the benchmark.