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Countering Anti-ISDS Propaganda with Facts: An Uphill Battle

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Ever since the EU started to develop its investment policy, anti-ISDS groups started an unprecedented campaign. Indeed, on the very same day (7 July 2010) the European Commission published its first Communication on the EU's investment policy, the anti-ISDS groups had a 100 page publication ready calling for the dismantling of international investment arbitration.

Since then the campaign of the anti-ISDS groups has become ever louder. EFILA and its members have been repeatedly personally attacked by "reports" of the anti-ISDS groups, and the campaign recently culminated in the following remark by Yannick Jadot (Green Party and member of the INTA Committee) at a parliamentary meeting:

Mr. Jadot said [emphasis added]:

"The Commission is continuing to wriggle around the ISDS issue in the TTIP-negotiations. The proposal to be presented by trade commissioner Malmström today shows the Commission is trying to test the water of what form of ISDS might be acceptable to Socialist MEPs in a similar vein to the proposals by German deputy chancellor Gabriel at the weekend. Instead of heeding the clear and consistent opposition to enabling multinational corporations to take democratic laws and governments to court, the Commission is ***trying to put lipstick on the ISDS pig***. In short, the Commission needs to consign ISDS and any derivatives of this approach to the history of EU trade policy and start by excluding it from the EU-US TTIP negotiations."

Subsequently, the following Twitter message was distributed on the internet:

No objection or challenge was brought by the Chair of the INTA Committee, Bernd Lange, or any other MEP against this kind of offensive remark. Fortunately, the vote on 28 May in the INTA Committee regarding the question whether or not to include ISDS in TTIP was won by the more moderate and reasonable parties. Accordingly, the majority of the INTA Committee accepted that a modernized form of ISDS, preferably by the establishment of a permanent investment court, should be included in TTIP. This has been an important victory for the supporters of ISDS, but it remains to be seen whether the plenary vote of the EP scheduled for 10 June will follow suit.

Whatever the outcome of the vote, EFILA has from the beginning chosen to counter this anti-ISDS

campaign by providing fact-based contributions to the discussion.

This has been the case with its submission for the Commission's TTIP consultation and its evidence provided for the parliamentary inquiry by the UK's BIS Committee.

In light of the massive anti-ISDS campaign, EFILA decided to make an effort to seriously look at the main criticisms against ISDS and to analyze them in a comprehensive way.

The recently published EFILA paper examined 11 main criticisms, which can be summarized as follows:

- Criticism 1 concerns the claim that the substantive treaty provisions are interpreted in favour of investors, whereas the statistical evidence shows that respondent States in arbitral proceedings consistently win more cases than the investors who bring claims against States;
- Criticism 2 addresses the argument that perceived inconsistency and unpredictability of arbitral decisions, but the reality is that by their very nature investment disputes are fact- and case specific and so is their resolution;
- Criticism 3 deals with the claim of a lack of transparency, but the truth is that the majority of arbitral proceedings take place under ICSID rules and the ICSID awards have been published on the ICSID website for several years and the new UNCITRAL Transparency Rules introduce the same level of transparency for UNCITRAL proceedings;
- Criticism 4 concerns the perceived lack of independence and impartiality of arbitrators. However, the current system of investment arbitration already includes effective control mechanisms to ensure that any lack of independence or impartiality can be tackled by both States and investors;
- Criticism 5 relates to the claim that a small elite group handles most arbitrations, but the truth is that arbitrators are appointed by States and investors and thus States are entirely free to appoint other individuals thereby widening the pool of arbitrators;
- Criticism 6 addresses the claim that investment disputes lead to a diversion of public money from public goods and services, whereas there is no evidence that the domestic judicial system is cheaper;
- Criticism 7 deals with the argument that ISDS leads to so-called "regulatory chill" but there is no evidence which would support such a claim;
- Criticism 8 concerns the claim that ISDS allows international companies to bypass national judicial systems, whereas the truth is that international arbitration is the most efficient way to handle investment disputes;
- Criticism 9 deals with the argument that since both the US and the EU have highly evolved, efficient legal systems, ISDS is not necessary in TTIP, however since TTIP will serve as model for other investment treaties a modern ISDS chapter must be included;
- Criticism 10 concerns the argument that when governments concede to demands for ISDS provisions, they may be less willing to agree to other reforms such as greater market access. However, the CETA shows that creative solutions can be found;
- Criticism 11 addresses the claim that despite the absence of investment treaties, flows of FDI go into Brazil and other emerging economies, apparently showing that there is no positive

correlation between FDI flows and investment treaties, however, the truth is that investment treaties are one instrument of many which States use to attract FDI;

The conclusions are hardly surprising for those who have been looking at ISDS from a rational, unbiased, perspective. However and more importantly, this comprehensive 40 page study exposes that most, if not all, anti-ISDS criticisms are neither supported by facts nor experience from investment arbitration law and practice.

So, what are the consequences of this anti-ISDS propaganda?

Firstly, it remains to be seen whether the plenary vote of the EP will follow the vote of the INTA Committee or whether the anti-ISDS groups will eventually succeed in convincing the EP to vote against ISDS on the basis of the myths, which they have been disseminating .

Secondly, the European Commission has been pressured by the anti-ISDS groups. The public consultation on TTIP, which was hijacked by those very same groups, is a clear example of this problem. But the recently published concept paper for a permanent investment court is the result of this pressure too. Rather than taking into account the positions of all stakeholders and take decisions after careful analysis, the European Commission seems to have become hostage of the anti-ISDS groups in alliance with their allies in the European Parliament. Too little time is spent by the European Commission to discuss with ISDS-advocates who are open for reforms.

Thirdly, the results of the EU's investment policy after almost 6 years could be better. No investment treaty has been formally signed and ratified. CETA is still in limbo, its faith apparently dependent on the progress of TTIP. The EU-Singapore trade and investment treaty is in limbo because it has been put by the European Commission before the European Court of Justice requesting it to decide on the question whether the EU is exclusively competent to sign and ratify it or whether it is a mixed agreement, which requires the ratification by all Member States. Nothing is heard anymore about the FTA negotiations between the EU and India. In light of this state of affairs, one can only guess how the negotiations between the EU and China are going to progress in the near future.

Despite this poor record so far, with the competence that the European Commission received through the Lisbon Treaty and with the United States being a pro-active negotiation partner on ISDS, there is potentially a great opportunity to do better during this term, 2014-19.

Finally, the hostility of the debate and the Commission being trapped by the anti-ISDS groups has had a huge negative impact on the investment climate in Europe. Investors are scared and wonder what has happened to investment protection within the EU? The recent interventions of the European Commission in the *Micula* case prohibiting Romania to execute an ICSID award is a clear warning signal that EU law apparently supersedes binding international investment law. All this is not helpful for implementing the ambitiously laudable €315 billion Investment Plan, which has been launched by Commission President Juncker.

In sum, the discussion on ISDS has been abused by anti-ISDS propaganda, which has dominated the public debate – both in the media and in national and European parliaments. The comprehensive EFILA study is an important, fact-based, contribution to counter this. In fact, the EFILA study complements previous publications of several others respected institutions and individuals, which have pointed out convincingly that too many myths are spread against ISDS. Indeed, even US President Obama has on several occasions debunked the unfounded anti-ISDS

critique.

Nonetheless, in view of the persisting ant-ISDS propaganda, it remains an uphill battle to convince policy makers that ISDS is a beneficial tool for resolving disputes for both – States and investors alike.

However, EFILA remains committed to continue to re-balance the debate by offering a platform for fact-based, balanced discussions and analysis.

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