

ISDS in numbers

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How transparent are proceedings under ISDS?

There are different ISDS arbitral mechanisms and rules specified in different treaties, the most common of which are set by bodies of the World Bank and the United Nations. In the past many treaties have not included instructions on transparency meaning provisions are decided on a case-by-case basis.

Recently the United Nations body (UNCITRAL) agreed a new set of rules on transparency that ensure there is public access to hearings and that key documents are made publicly available, with the only exception being for confidential information.

It will soon be possible to apply these rules to existing treaties and the EU has stated its intention to include the UNCITRAL transparency rules in all future treaties.

Cross-Government work on TTIP is led by the Department for Business, Innovation and Skills (BIS). To find out more, work with us or get involved in any other way, contact us on:

TTIP.team@bis.gsi.gov.uk



Department
for Business
Innovation & Skills

Investor-State Dispute Settlement

FAQ

Part of a series of leaflets on the Transatlantic Trade and Investment Partnership (TTIP)

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What is ISDS?

ISDS gives international investors the right to bring a damages claim against the government of the 'host' state where the investment is located. Claims are heard by independent international tribunals. They must be based on an alleged breach by the host state of an investment protection commitment agreed in a treaty between the host state and the investor's home state. Such treaty commitments usually include not discriminating against foreign investors, protecting investments from expropriation by the host state, guaranteeing certain minimum standards of treatment and allowing free transfer of capital. The tribunal may award damages to the investor if the host state has breached a commitment. ISDS thus provides additional protection for investors, over and above any protection provided by the host state's domestic laws and courts.

Is it a threat to UK sovereignty?

No. On the right terms, ISDS does not prevent the government from changing its policies or regulating in the public interest, provided that is done in a fair and non-discriminatory way. Nor does ISDS allow tribunals to overturn a host state's laws. Tribunals can order a host state to pay compensation, but only if it has breached its treaty obligations.

Investment Protection plays a vital role in safeguarding the gains of international investments and the trade that depends on them, benefiting producers and consumers alike. It has been included in every British investment deal, without doing the slightest damage to consumer protection or undermining our sovereignty or our legal system.

Rt Hon Kenneth Clarke QC MP, 2014

What's the Government's position on ISDS in current FTA negotiations?

The UK Government will consider ISDS provisions in FTAs on a case-by-case basis and bearing in mind the terms of the wider agreement. The UK Government is aware of the risks of agreeing ISDS provisions on the wrong terms, particularly in agreements with countries which are a major source of investment into the UK. The UK will not support ISDS provisions in EU Treaties that restrict the Government's capacity to govern fairly and in the public interest in any policy area, including public health, labour standards or the environment. Safeguards protecting these policy areas are regularly incorporated into FTAs and BITs.

What about in TTIP?

The UK Government welcomes the European Commission's forthcoming public consultation on the merits of ISDS in the Transatlantic Trade and Investment Partnership (TTIP). The US has supported ISDS clauses in other trade agreements including the Trans-Pacific Partnership, and already has BITs with nine EU Member States, but not the UK. At this early stage in negotiations it is not possible to provide more specific detail. If ISDS were to be included then we would press for provisions that strike the right balance between investment protection and the rights of government to regulate.

Why's it needed?

Investments overseas by UK companies benefit both the company and the UK economy. Investing in a foreign country carries legal and political risk, particularly if the investor's legal rights in relation to actions by the host state are unclear or hard to enforce in local courts.

Where investment protection is provided in a treaty a mechanism is needed to resolve disputes between the investor and host state. ISDS gives UK investors access to independent tribunals and to possible compensation when they are treated unfairly by host states. It also deters the host state from acting unfairly in the first place.

How is ISDS different to other dispute settlement mechanisms in FTAs?

ISDS claims are brought directly by investors and can result in damages awards that are enforceable internationally against the host state's foreign assets. ISDS does not extend to the other non-investment provisions of an FTA such as tariff rates.

These provisions are usually enforceable by state-to-state claims. State-to-state claims do not provide a right to damages. Instead, they can lead to authorised trade sanctions if a state fails to comply with the ruling in a dispute, similar to claims made through the World Trade Organisation under the WTO treaties.