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INVESTOR-STATE DISPUTE SETTLEMENT: AN INFORMATION NOTE ON THE UNITED STATES AND THE EUROPEAN UNION

Key Findings

Investors' use of and countries' exposure to investor-state dispute settlement (ISDS) cases vary. Understanding patterns of ISDS activity can help achieve best possible solutions when designing investment dispute settlement mechanisms in negotiations of international investment agreements (IIAs).

The IIA networks of the US and of EU Member States are large, but patchy.

- The US has bilateral IIA relationship with 57 countries, that cover 21 per cent of US outward FDI stock. The majority of EU Member States as well as large emerging economies are currently not covered by US IIAs.
- EU Member States have 1,228 IIA relationships with non-EU countries. The number of treaties varies significantly by Member State, with Germany having 114 extra-EU BITs in force while Ireland does not have a single one.
- BITs are in place between the US and nine "new" EU Member States; they cover one per cent of US FDI stock in the EU and 0.1 per cent of the EU FDI stock in the US.

US and EU investors are active users of the ISDS mechanism.

- Together they account for 75 per cent of the global number of known ISDS claims.
- In the EU, investors from the "old" EU Member States, including the Netherlands, the UK, Germany, France, Italy and Spain, are claimants in three quarters of all EU claims.

On the defensive side, exposure to ISDS cases varies.

- 16 cases have been initiated against the US to date, among those not a single one originated from an investor from a EU Member State.
- EU Member States have been respondents in 117 known cases, of which almost a quarter faced by one country (the Czech Republic). Several EU countries (e.g. Austria, Denmark or Finland) have faced no known ISDS claim to date. 88 of the 117 cases are intra-EU disputes.

- To date, there are few (nine) known claims in the EU-US relationship. All of them were filed by US investors, constituting about seven per cent of all ISDS claims filed by US investors.
- The nine cases also represent close to eight per cent of all cases faced by EU Member States (or close to one third, if intra-EU disputes are disregarded).
- All nine cases were brought against "new" EU Member States.

Known disputes relate to all sectors of the economy.

- They include, among others, oil and gas, mining, forestry, agriculture, construction and management of infrastructure, telecommunications, generation and distribution of energy, financial services, tourism, the provision of water, waste management, and media.

Governmental measures that have been challenged most frequently.

- They include, among others, the revocation of licences, direct and indirect expropriations, alleged breaches or unilateral terminations of investment contracts, economic measures taken to combat financial crisis, environmental and public health measures, taxation measures, privatisation-related measures, sectoral economic reforms and conduct of national courts.

The patterns of won and lost cases differ among countries.

- Of the nine concluded cases where the US was the respondent, the Government has not lost a single case.
- EU Member States won half of the concluded cases brought against them and settled another quarter.
- On the offensive side, investors from the US and EU Member States won about a third of the concluded cases and settled another third.

The awards rendered in US and EU ISDS cases vary highly.

- The lowest known amount awarded by an arbitral tribunal was 0.46 million USD and the highest 1.8 billion USD.

I. Introduction

With the continuing use of the investor-State dispute settlement (ISDS) mechanism (2012 and 2013 saw the largest numbers of known investment arbitrations filed in a single year, 58 and 56 respectively), and its discussion in numerous negotiations for international investment agreements (IIAs), investment arbitration is at the centre of public attention.

Investors' use and countries' exposure to ISDS cases vary. Understanding patterns of ISDS activity can help achieve best possible solutions when designing dispute settlement mechanisms in IIA negotiations.

This information note gives a brief overview of ISDS activity involving the United States (US) and the Member States of the European Union (EU).[1] This includes:

- ISDS claims brought by investors against the US and against EU Member States ("defensive" perspective); and

[1] The analysis is based on UNCTAD's database of ISDS cases as of 31 December 2013. For an analysis of global ISDS data, see UNCTAD, "Recent Developments in Investor-State Dispute Settlement", IIA Issues Note, No. 1, April 2014, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf.

- ISDS cases initiated by investors from the US and EU Member States ("offensive" perspective).

The review focuses on cases brought pursuant to IIAs, including bilateral investment treaties (BITs), free trade agreements (FTAs) such as the North-American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT). Cases based only on investment contracts or national laws of a respondent State are not included in the analysis. Only claims whose existence has become public knowledge are accounted for; the actual number of cases is likely to be higher due to confidentiality reasons.

This analysis is preceded by an overview of the IIA networks of the US and the EU and its Member States, as well as the existing IIA links between them.

II. Respective Treaty Networks - an Overview[2]

United States. The US is signatory to 46 BITs, of which 40 are in force. It has also concluded 14 FTAs with BIT-like provisions, all of which are in force.[3] As a result, the US currently has active[4] bilateral IIA relationships with a total of 57 countries.[5]

Existing US investment treaties cover 21 per cent of US foreign direct investment (FDI) stock abroad. Important recipients of FDI that are not covered by existing US IIAs, aside from the majority of EU Member States, include Brazil, China, Japan, India, the Russian Federation and South Africa.

European Union. Analysis of the EU's IIA network is less straightforward. The EU itself is party only to IIAs that contain limited investment provisions and do not include BIT-like provisions or an ISDS mechanism.[6] Over the past 50 years, EU Member States have demonstrated varying levels of activity in concluding BITs, with Germany currently being signatory to 129 BITs, and Ireland being party to none.[7]

In total, the 28 EU Member States are currently parties to 1,356 extra-EU BITs, of which 1,160 are in force. There are also 199 intra-EU BITs, of which 198 are in force.[8] Thus, EU Member States currently have 1,228 active extra-EU BIT relationships (i.e. about 44 relationships on average per Member State) and 211 active intra-EU BIT relationships, which comes to 1,426 if extra-EU and intra-EU BIT relationships are combined.[9]

Aside from BITs, the EU and its Member States are parties to the ECT, a multilateral agreement with 53 signatories, which protects investments in the energy sector and includes an ISDS mechanism.

The United States – European Union relationship. There are currently nine BITs in place between the US and the following EU Member States: Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and Slovakia. FDI stock held by US investors in these nine countries equals one per cent of the total US FDI stock in the EU. In terms of outward FDI from these nine EU Member States to the US, the figure is even more modest: collectively, they hold only 0.1 per cent of the total EU FDI stock in the US.

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2 Based on UNCTAD's IIA database, available at http://investmentpolicyhub.unctad.org/IIA.
3 One of the US FTAs (between Australia and the US) does not include an ISDS mechanism.
4 "Active" means that the relevant treaty is in force.
5 This takes into account the fact that some US FTAs involve more than two parties and that there is an overlap between BITs and FTAs with respect to three countries (Bahrain, Morocco and Panama).
6 Except for the Energy Charter Treaty (ECT), see below.
7 Ireland had concluded a BIT with the Czech Republic in 1996, but it was terminated in 2011 by consent of the Contracting Parties.
8 The Cyprus-Italy BIT (2004) is not in force.
9 This takes into account the fact that Belgium and Luxembourg conclude BITs jointly, as Belgium-Luxembourg Economic Union (BLEU), i.e. every BIT concluded by BLEU creates two IIA relationship.

The US-EU relationship is the largest in terms of the amount of FDI stock held by investors from these countries in each other's territories.[10] Investors from EU Member States hold a total of 1.6 trillion USD of FDI stock in the US, which represents 62 per cent of the total inward US FDI stock.[11] Investors from the US hold a total of 1.9 trillion USD of FDI stock in EU Member States which represents around 38 per cent of the total inward FDI stock in the EU (figures 1a and 1b).[12]

Figure 1a. US FDI stock - outward and inward (2012)

(Billions of dollars)

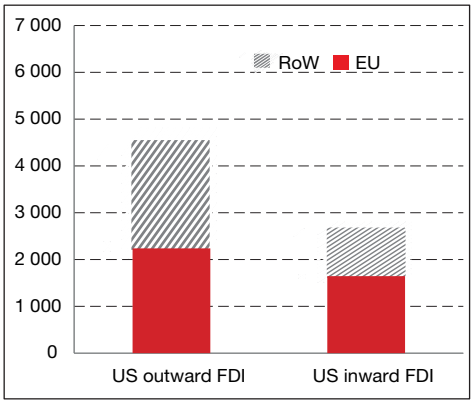
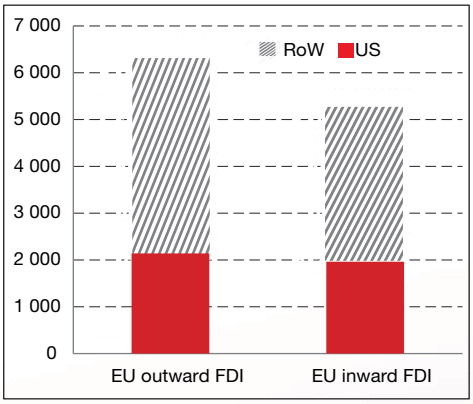


Figure 1b. EU Member States FDI stock - outward and inward (2012)

(Billions of dollars)



Source: UNCTAD bilateral FDI statistics.

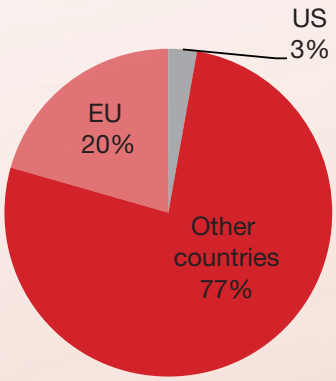
Note: Figures for US outward and inward FDI are based on reporting by the US; figures for EU outward and inward FDI are based on reporting by individual EU Member States.

III. The US and EU Member States as Respondents

1. Number of cases brought

By end of 2013, the global number of ISDS cases reached 568. EU Member States were respondents in 117 of them (20 per cent).[13] The US has faced 16 arbitrations (three per cent) (figure 2).

Figure 2. Cases brought against the US and EU Member States



Source: UNCTAD.

[10] For a comprehensive discussion of global and regional FDI flows and stocks as well as projections for the future, see UNCTAD, "Investing in the SDGs: An Action Plan", World Investment Report (WIR) 2014, forthcoming.

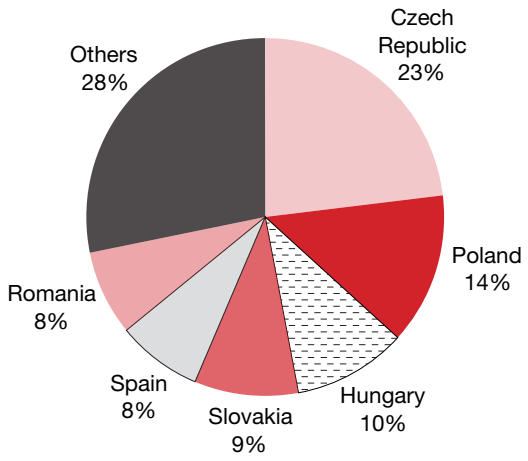
[11] Data based on US reporting. Figures provided by end of 2012. Source: UNCTAD Bilateral FDI Statistics, http://unctad.org/en/Pages/DIAE/FDI%20Statistics/FDI-Statistics-Bilateral.aspx.

[12] Data based on reporting by individual EU Member States. Ibid.

[13] Under existing IIAs, an ISDS claim may be brought against a specific EU Member State but not against the EU as a single entity.

Of the 28 EU Member States, “new” Member States (those which acceded to the EU in 2004 or later) have faced the majority of cases (figure 3).

Figure 3. Distribution of cases brought against EU Member States



Source: UNCTAD.

Two EU Member States (the Czech Republic and Poland) as well as the US appear in the global list of most frequent respondents (figure 4).

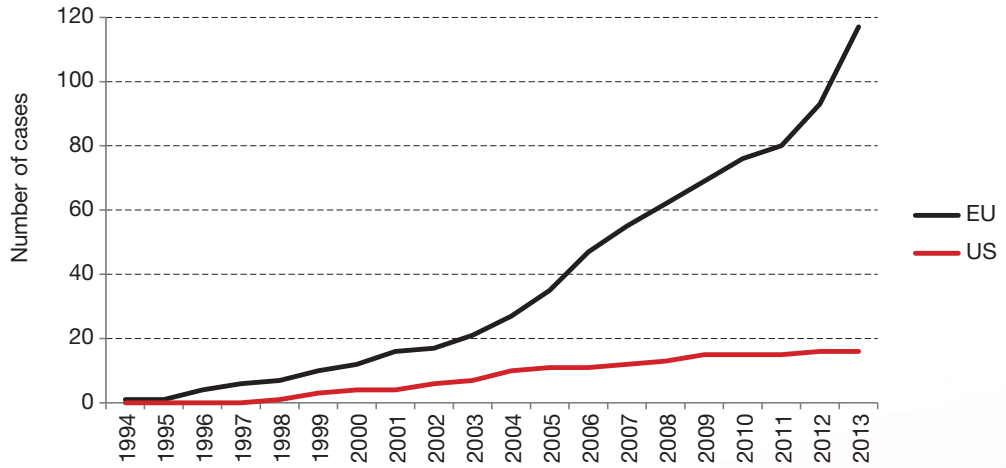
Figure 4. Most frequent respondent States (global data)

Source: UNCTAD.

2. Trends over time

Cases against the US and EU Member States have evolved differently over time (figure 5).

Figure 5. ISDS cases against the US and EU Member States, cumulative



Source: UNCTAD.

3. Home countries of claimant investors

United States. All cases but one against the US were initiated by Canadian investors. The only remaining case was brought by a Mexican investor. NAFTA's Chapter 11 served as a legal basis for all of these claims.

European Union. Of the 117 cases against EU Member States, three quarters (88 cases) are "intra-EU" disputes, i.e. brought by investors from other EU Member States under intra-EU BITs and the ECT. The remaining 29 cases include claimants from a variety of countries such as the US (nine cases), Switzerland and the Russian Federation (three each), Canada, India and Turkey (two each) and others.

4. Economic sectors involved, measures challenged and amounts claimed

United States. Cases against the US are divided rather evenly between the primary sector, the manufacturing sector and the services sector. Specific industries involved include forestry, mining of precious metals, pharmaceuticals, real estate development, the manufacture and sale of tobacco products, transportation, death-care industry and others. Some of the measures challenged in these disputes are (illustrative list, in no particular order):

- conduct of litigation and alleged errors in the application of law by US domestic courts
- ban on the sale, or border closure for movement of certain goods or chemical substances on environmental or public health grounds
- alleged discriminatory treatment in construction and transportation services
- certain antidumping, countervailing duty and material injury determinations
- certain regulations concerning open-pit mining operations.

The amounts of damages claimed by investors in cases where information is available range from 8 million to 970 million USD.

European Union. Cases against EU Member States also relate to a variety of industries, including agriculture, energy generation and distribution, construction and management of infrastructure, chemical industry, provision of water, waste management, banking, insurance, telecommunications, media and others. In these disputes, investors' claims arise out of (illustrative list, in no particular order):

- revocation of licences
- privatization
- environmental legislation
- energy market transformation
- health sector reform
- public tenders
- termination of investment contracts or concessions
- bankruptcy.

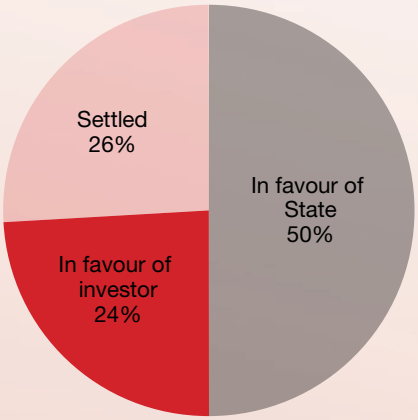
The amounts of damages claimed, in cases where the information is available, range from 0.13 million to 1.4 billion USD.

5. Outcomes of disputes

United States. Of the 16 cases brought against the US, nine are concluded. All nine cases ended in favour of the respondent, with the investor claims dismissed.

European Union. In 54 of the 117 cases brought against EU Member States, the proceedings have been concluded. Half of the concluded cases were won by the respondent State; in the remaining cases tribunals either awarded damages to the claimant or the case was settled (figure 6). The highest amount awarded is 270 million USD (plus interest). In settled cases, amounts of settlements almost invariably are kept confidential.

Figure 6. Outcomes of cases against EU Member States



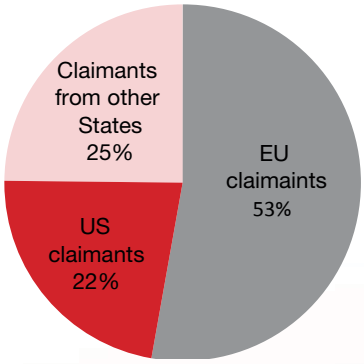
Source: UNCTAD.

IV. The US and EU Member States as Home States of Claimant Investors

1. Number of cases brought

Claimants from the US and EU Member States account for three quarters of the 568 known investment treaty arbitrations.[14] Claimants from EU Member States have initiated 300 cases, while claimants from the US have filed 127 disputes (figure 7).

Figure 7. Claimants' home States



Source: UNCTAD.

Within the EU, investors from the Netherlands, the UK and Germany are the most active in terms of bringing ISDS cases (figure 8).

Figure 8. EU Member States: most frequent home States of claimants