

PROTECTING DIGITAL FREEDOM

Answering guide

Tell the European Commission your views on
Investor-State Dispute Settlement (ISDS)

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Tell the European Commission your views on Investor-State Dispute Settlement (ISDS)

In March 2014, the European Union launched a public consultation on Investor-State Dispute Settlement (ISDS).

ISDS is probably the most controversial aspect of upcoming EU trade agreements (with Canada, the US, Singapore, and others). Investor-State Dispute Settlement gives multinational companies the right to sue states and challenge legislation before special tribunals if they believe their investments are being jeopardised or their expected profits undermined. It can also be used to threaten lawmakers with expensive legal cases, during legislative procedures. Multinationals could challenge reform of copyright and patent law, privacy protection, environmental or health policies.

As the EU seeks to include this dispute resolution mechanism in the Transatlantic Trade and Investment Partnership (TTIP), currently being negotiated with the United States, this is a unique opportunity to tell the European Commission what you think about ISDS.

The questions asked in this consultation are quite technical, but can easily be answered.

Please note that, in the interest of brevity and clarity, we have only reproduced the questions and not the full text of the consultation from the Commission. To view the full text of the consultation, please click [here](#).

HOW TO USE THIS ANSWERING GUIDE:

1. Go to the Commission online consultation form: <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=ISDS>
2. You only have 90 minutes to answer the 13 questions! Before you start entering your answers on the Commission website, make sure to read this guide once.
3. Each answer is limited to 4,000 characters! Prepare drafts of your answers before filling in the answering guide, you can count the characters on <http://www.lettercount.com/>
4. Submit your answers before **6 July 2014**.

Question 1

Scope of the substantive investment protection provisions

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the objectives and approach taken in relation to the scope of the substantive investment protection provisions in TTIP?

WHAT DOES THE QUESTION MEAN?

The question seeks to get your views on the definitions on investment and investor in the proposed text.

WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

- The European Commission's proposal contains an excessively broad definition of investment, including intellectual property rights and even expectations of gain or profit.
- The proposed approach allows "forum shopping". For example, Australia does not have an ISDS agreement with the US, following its experience of how such agreements work in practice. US tobacco company Philip Morris sued Australia under a Hong Kong - Australia ISDS agreement, after setting up a subsidiary in Hong Kong.
- To stop forum shopping the EU wants to exclude so called "shell" or "mailbox" companies. According to the text on ISDS proposed in the EU-Canada trade agreement (CETA) - i.e. the first ISDS agreement the EU wants to conclude - a foreign company would first have to establish substantial business activities in Canada before this company can make use of the CETA agreement to sue the EU. This is a far smaller safeguard than it appears, as it will not stop multinationals since they are big enough to do this.
- ISDS systems are unbalanced: they give broad actionable rights to foreign investors but without any corresponding responsibilities.
- ISDS places obligations on states but not on foreign investors.
- ISDS systems give foreign investors greater rights than local investors. It gives them a bargaining power in relation to legislators, governments and courts. For example, a government that is planning environmental or consumer protection measures could be threatened with expensive and time-consuming ISDS cases if they do not respect the wishes of the foreign investors.

Question 2

Non-discriminatory treatment for investors

Taking into account the above explanations and the text provided in annex as a reference, what is your opinion of the EU approach to non-discrimination in relation to the TTIP? Please explain.

WHAT DOES THE QUESTION MEAN?

The EU will promise to treat investors from the other party at least the same way as European investors.

Furthermore, with a most favoured nation (MFN) clause, the EU will promise to treat US companies no less favourably than investors from any third country.

Old ISDS agreements have very broad protection. If the TTIP was to bring any improvements in the ISDS mechanism, those could be lost if old protection standards are imported through the MFN clause.

WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

- Contrary to what it says in its consultation document, the Commission did not close a major well known loophole, known as the most favoured nation clause. It only closes it for procedural provisions, not for substantive provisions.
- Companies will not only be able to use the substantive investment protection provisions in TTIP, but they can cherry-pick protection from any other investment agreement the EU or EU Member States signed or will be signing. [for more details see: FFII, section “A known major loophole”, <http://acta.ffii.org/?p=2118>]

Question 3

Fair and equitable treatment

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the approach to fair and equitable treatment of investors and their investments in relation to the TTIP?

WHAT DOES THE QUESTION MEAN?

The EU will promise to treat investors from the other party in accordance with a “fair and equitable treatment” clause (FET).

This standard has often been abused in ISDS arbitration. It is the weakest point in investment agreements. In its explanation with regard to question 3 the Commission indeed observes that the interpretations adopted by arbitral tribunals have varied from very narrow to very broad, leading to much controversy about the precise meaning of the standard, and that this lack of clarity has fueled a large number of ISDS claims by investors, some of which have raised concern with regard to the states’ right to regulate.

WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

- The Commission claims to have solved the issues with FET by introducing a closed list of rights. However, the list is not explicitly closed (does not mention “limited to” or similar).
- The elements of the FET list are open to interpretation, leaving it at the discretion of arbitrators. Experience of arbitration shows that the widest possible interpretation is often used.
- The FET standard contains a provision on the unpredictable “legitimate expectations” of investors. This protection goes beyond customary international law.
- The Commission claims that it intends to ensure that the fair and equitable standard (“legitimate expectations”) is not understood to be a “stabilisation clause”. If this is the intention of the Commission, it should be explicit in the text.

Question 4

Expropriation

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the approach to dealing with expropriation in relation to the TTIP? Please explain.

WHAT DOES THE QUESTION MEAN?

The EU will promise to not expropriate investors from the other party. This protection includes the problematic provision on “indirect expropriation”, which allow investors to sue government when their profits are lower than expected.

WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

- The scope of the substantive provision is very broad. Claims can be initiated after direct or indirect expropriation. Indirect expropriation is opening opportunities for an indefinite amount of claims - any investor could challenge any measure at any time based on any belief that profits were reduced by government actions. Creating open-ended rights to be sued by companies from a country as litigious as the United States is clearly a major risk.
- This protection has an exception which is limited to measures protecting “legitimate public welfare objectives”. The problem is that ISDS arbitrators, whose expertise is generally investment and not public welfare, will decide on what legitimate public welfare objectives are and whether or not measures are manifestly excessive.
- The Commission proposal gives investors much stronger protection than Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR). Under Article 1 of Protocol 1 to the ECHR every natural or legal person is entitled to the peaceful enjoyment of his possessions. This “shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” In these circumstances it is up to the states to decide what is “deem[ed] necessary”. However, under ISDS, the arbitrators will do the assessment.

Question 5

Right to regulate

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion with regard to the way the right to regulate is dealt with in the EU's approach to TTIP?

WHAT DOES THE QUESTION MEAN?

The “right to regulate” refers to the competency of a sovereign state to legislate. The right to regulate is specifically designed to promote public interest ahead of other interests.

ISDS procedures are complex and expensive, even if a state wins a case. Whenever any proposal is made in the future, multinational companies will be able to threaten (with no important financial burden on themselves) to make a complaint under ISDS. The mere existence of this possibility risks creating a chilling effect that will prevent measures from being proposed and will generate a strong lobbying tool for multinationals to bully democratically-elected lawmakers to legislate in the interests of companies instead of citizens.

WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

A) A general perspective

The definitions entail vagueness and legal uncertainty

- A very broad definition of “investment” is being proposed by the Commission.
- The right to regulate is only an exception to investment protection.
- The preamble mentions the right to regulate but as it is not binding, arbitrators have the right to disregard the preamble.
- The preamble limits the right to regulate to “legitimate” objectives: What are legitimate objectives? There is legal uncertainty. Ultimately, “legitimate” is a constraint on the arbitrators, but the arbitrators will decide on how narrowly this will be understood.
- The proposed safeguards to protect the right to regulate are not efficient and do not reduce the risk of chilling effect, as arbitrators will have the power of final interpretation.

- Companies will have the ability to use ISDS to prevent or lobby more effectively to change new legislations, influencing the state willingness to legislate.
- If, in practice, the interpretation made by the arbitrators is unbalanced, there seems to be no realistic possibility for the parties of the agreement to amend the agreement to create the balance that they currently claim to want.

B) Focus on human rights

There is no safeguard to ensure respect of human rights and possible chilling effect.

- The Commission's proposal does not provide proper protection for human rights. There is no mention of human rights in the proposed text, except possibly in the still secret non binding preamble.
- The text refers to article 14 GATS, which mentions privacy but not as a human right and only as a exception limited to investment and trade rules.
- ISDS tribunals will be able to review decisions taken by national courts, but also the European Court of Human Rights and the European Court of Justice. This ensures compliance with investors' rights, but almost certainly to the detriment of human rights.
- People whose rights may be affected by the outcome of cases have no standing before the tribunals. For example, a Human Rights' advocate cannot intervene in the ISDS system.
- Due to the lack of basic institutional safeguards ensuring the independence and impartiality of the ISDS mechanism, the respect for human rights is far from being ensured by the proposed text.
- EU should avoid signing an agreement that would create a risk of nullifying or impairing the enjoyment of human rights.

C) Focus on copyright and patent law

There is no protection against the innovation of legislation.

- Experience shows that there are risks, highlighted for example the Eli Lilly case against Canada. Following a minor adjustment to Canadian patent law, to facilitate better access to medicine, the US pharmaceutical company Eli Lilly claims 500 million dollars of damages in ISDS arbitration. Eli Lilly lambasts the Canadian patent policy framework as "discriminatory, arbitrary, unpredictable and remarkably subjective", and accuses Canada of expropriation.
- If a minor adjustment already leads to such accusations, bigger reforms will for sure be attacked. Threats will have a strong chilling effect, preventing democratically elected decision-makers for acting in the best interests of citizens.
- In this context, you may wish to mention the dangers for a possible future reform of the copyright

legislation to adapt to the digital age.

- Innovation is at stake - if legislation cannot be changed (in fear of high damages being imposed by ISDS tribunals), this will prevent new models to evolve, we get a lockdown of existing and outdated legislation.
- Companies can challenge reforms using the MFN clause. They may claim the treatment is not fair and equitable (manifestly arbitrary or abusive) or that the EU expropriates (manifestly excessive, the measure does not serve legitimate public welfare objectives) or discriminates against them. Leaving the decision in the hands of arbitrators who decide on investment rules and potential profit loss, raises serious concerns regarding the state's ability to regulate.

Question 6

Transparency in ISDS

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on whether this approach contributes to the objective of the EU to increase transparency and openness in the ISDS system for TTIP. Please indicate any additional suggestions you may have.

WHAT DOES THE QUESTION MEAN?

The European Commission is asking you if the measures it aims to put in place to develop transparency and openness in the ISDS system are efficient.

WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

- The Commission proposes the adoption of the 2014 UNCITRAL rules on transparency. However these rules include a chapter on exceptions empowering an arbitration court to block the publication of documents related to a large variety of measures.
- Arbitrators will still be able to block access to documents or close the hearings in order to protect “the integrity of the arbitral process”.
- While the Commission’s proposals do indeed make a very bad situation less bad, we are still faced with a situation where the proposed rules will not solve the problem of opacity of the ISDS mechanism.

Question 7

Relationship to domestic courts

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on the effectiveness of this approach for balancing access to ISDS with possible recourse to domestic courts and for avoiding conflicts between domestic remedies and ISDS in relation to the TTIP. Please indicate any further steps that can be taken. Please provide comments on the usefulness of mediation as a means to settle disputes.

WHAT DOES THE QUESTION MEAN?

With ISDS foreign companies are offered the possibility to circumvent national court systems and use international tribunals instead.

The question the European Commission is asking you is whether or not you agree to give foreign companies the ability to circumvent the existing judicial system and to permit tribunals to overrule independent national court decisions.

WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

A) National courts are independent, the ISDS tribunals are not

- National courts are designed to be independent and impartial (principle of separation of powers).
- National courts have rules concerning procedural fairness such as legal standing of others whose rights or interests are affected by the outcome of a case.
- National legal systems have to balance actionable rights for investors but also actionable responsibilities for investors.
- ISDS systems lack conventional institutional safeguards for independence: tenure, prohibitions on outside remuneration by the arbitrator and neutral appointment of arbitrators.

B) The European Commission is promoting ISDS, to the detriment of national courts

- ISDS would allow companies to circumvent national courts.

- The Commission states it favours national courts, however, investors can start ISDS cases without any requirement to go through national courts.
- Once an investor chooses the ISDS system, it cannot go to a national court. However, investors are still allowed to opt for the ISDS system after seeking damages in national courts. ISDS takes precedence over a national court as investors are always able to use it as a final option.
- Under ISDS, arbitrators can review all national court decisions, including decisions of supreme courts and human rights courts.

C) ISDS is not a solution for a fair protection

- In commercial arbitration, a party can appeal to a court if he/she considers that the legal interpretation done by the arbitrator(s) is wrong. This is not possible with the ISDS system, as arbitrators are the final interpreters of the investment protection rules. Arbitrators tend to interpret the rules very broadly, as this gives them the maximum amount of power under the existing rules.
- National courts should be able to protect investors of the other party to the agreement. This should be clearly stated in the international agreement.
- If a state does not implement investor protection, this can then be solved by state-to-state dispute settlement.
- In the EU, companies can use national courts where appeal mechanisms exist.
- Foreign investors are favoured over domestic investors: if foreign investors are being expropriated, they can use ISDS. However, domestic investors will not have this opportunity.
- ISDS arbitrators can award unlimited damages.

Question 8

Arbitrator ethics

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on these procedures and in particular on the Code of Conduct and the requirements for the qualifications for arbitrators in relation to the TTIP agreement. Do they improve the existing system and can further improvements be envisaged?

WHAT DOES THE QUESTION MEAN?

The European Commission is asking you whether or not you agree that a not yet existing code of conduct will solve the existing lack of independence and accountability of the arbitrators.

WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

Adjudicative processes need institutional safeguards for independence and a credible and enforceable code of conduct.

A) Uncertainty about the code of conduct

- The Commission states that the EU aims to set down a code of conduct for the arbitrators, to be negotiated with USA.
- In the reference text, the Commission only mentions a possible future code of conduct. The Commission says that the planned code of conduct will be binding but how will we know for sure that it will be binding? How will they make sure that it is applied/implemented? Why is the Commission so certain that a credible, complete, enforceable code can be agreed with the USA?
- Not only the text does not provide a sample code of conduct to comment on but it also does not clearly state what will be addressed in this possible future code.
- The text allows a delay of two years after the implementation of the treaty to put a code of conduct in place. What will happen in the meantime? Will there ever be a code of conduct? There will be neither institutional safeguards for independence nor a code of conduct.
- How will conflict of interests be solved?

B) Why we need institutional safeguards and a binding code of conduct?

- As previously stated, ISDS arbitrators have great power. They can review all decisions of the state, can award unlimited damages.
- Furthermore, ISDS systems lack conventional institutional safeguards for independence.
- The appointment of arbitrators is not neutral:
 - Each party chooses one arbitrator and the third one is appointed by the Secretary General of ICSID if the parties do not agree. The Secretary-General of ICSID also decides on conflicts of interest.
 - The ICSID Secretary-General is appointed by the President of the World Bank who is himself appointed by the President of the United States. Under ICSID rules the President of the World Bank appoints all three the arbitrators in appeal cases. ISDS therefore gives the US an unfair advantage.
- Arbitrators are often investment lawyers who are lacking independence and impartiality.
- The large sums awarded to arbitrators create incentives to accept frivolous cases, let cases drag on, let the investor (the only party that can initiate cases) win to generate more cases.

Question 9

Reducing the risk of frivolous and unfounded cases

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on these mechanisms for the avoidance of frivolous or unfounded claims and the removal of incentives in relation to the TTIP agreement. Please also indicate any other means to limit frivolous or unfounded claims.

WHAT DOES THE QUESTION MEAN?

The European Commission is asking if the measures it aims to put in place in order to avoid “frivolous” or unfounded cases is efficient.

Frivolous cases cost defending states a lot of money and can have a chilling effect on the ability of the states to legislate.

WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

- There is no definition of what “frivolous” means, creating legal uncertainty about what will be considered as “frivolous”.
- Arbitrators will decide whether claims are frivolous and have a personal financial incentive not to dismiss claims on this basis.
- The number of ISDS cases is rising sharply. The number of disputes have grown from fewer than 50 cases between 1950s and 2000 to 514 known cases between 2000 and 2012.
- The real problem is that under broad protection rules many cases might not be frivolous or unfounded but the legal merit is still dubious.

Question 10

Allowing claims to proceed (filter)

Some investment agreements include filter mechanisms whereby the Parties to the agreement (here the EU and the US) may intervene in ISDS cases where an investor seeks to challenge measures adopted pursuant to prudential rules for financial stability. In such cases the Parties may decide jointly that a claim should not proceed any further. Taking into account the above explanation and the text provided in annex as a reference, what are your views on the use and scope of such filter mechanisms in the TTIP agreement?

WHAT DOES THE QUESTION MEAN?

The European Commission is asking if the proposed filter mechanism is efficient.

WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

- The filter mechanism proposed by the Commission has a very limited scope as it solely focuses on financial issues.
- It is dependent on other parties and does not help against the chilling effect of anticipated cases or threats to sue the state.
- In order to filter out an undeserving claim, states will have to demonstrate that the public measure challenged by the investors was taken for “prudential reasons”, establishing legal hurdles.

Question 11

Guidance by the Parties (the EU and the US) on the interpretation of the agreement

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on this approach to ensure uniformity and predictability in the interpretation of the agreement to correct the balance? Are these elements desirable, and if so, do you consider them to be sufficient?

WHAT DOES THE QUESTION MEAN?

The parties to the ISDS agreement (i.e. the EU and the US) may jointly adopt an interpretation of the investor protection included in the treaty.

WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

- The parties (i.e. the EU and the US) would be able to adopt interpretations of the investment provisions. These are meant to be binding on ISDS tribunals. Under the North American Free Trade Agreement this possibility has hardly been used, and the arbitrators took minimal account of the interpretations.
- There is no enforcement procedure for the “binding interpretations”.
- Moreover, the EU will be dependent on the other party. This is not comparable with the legislative feedback loop in a democratic society. It depends on the cooperation of the other party, moreover the executive will be in charge of the interpretation not the legislator.
- National supreme courts are embedded in a constitutional and legal culture, they tend to respect the legislator’s intentions. ISDS tribunals are mostly constituted by foreign arbitrators and have multiple motivations to use a broad interpretation of the texts.

Question 12

Appellate Mechanism and consistency of rulings

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on the creation of an appellate mechanism in TTIP as a means to ensure uniformity and predictability in the interpretation of the agreement.

WHAT DOES THE QUESTION MEAN?

ISDS has very limited appeal possibilities. The EU aims to add an appeal mechanism in TTIP, and is asking you what you think about their proposal.

WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

- The ICSID rules have limited appeal possibilities. In appeal cases, all three arbitrators are appointed by the president of the World Bank. The president of the World Bank is appointed by the President of the United States.
- These ICSID rules will apply under the trade and investment agreements with Canada and other countries, unless the EU and Canada (or other country) agree otherwise later on. There is no certainty whether this will happen and the outcome is dependent on both parties.
- The EU aims to establish an appellate mechanism in TTIP. The outcome of such a new appeal mechanism is very uncertain as with the current system the US have a strong advantage that it has no reason to give up.
- There is uncertainty regarding the outcome of this objective.
- In this appellate mechanism, other arbitrators will decide on the basis of the same broken rules of the ISDS system.

Question 13

The 'open' question

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?

WHAT DOES THE QUESTION MEAN?

The European Commission is asking you to share your views/opinion on ISDS.

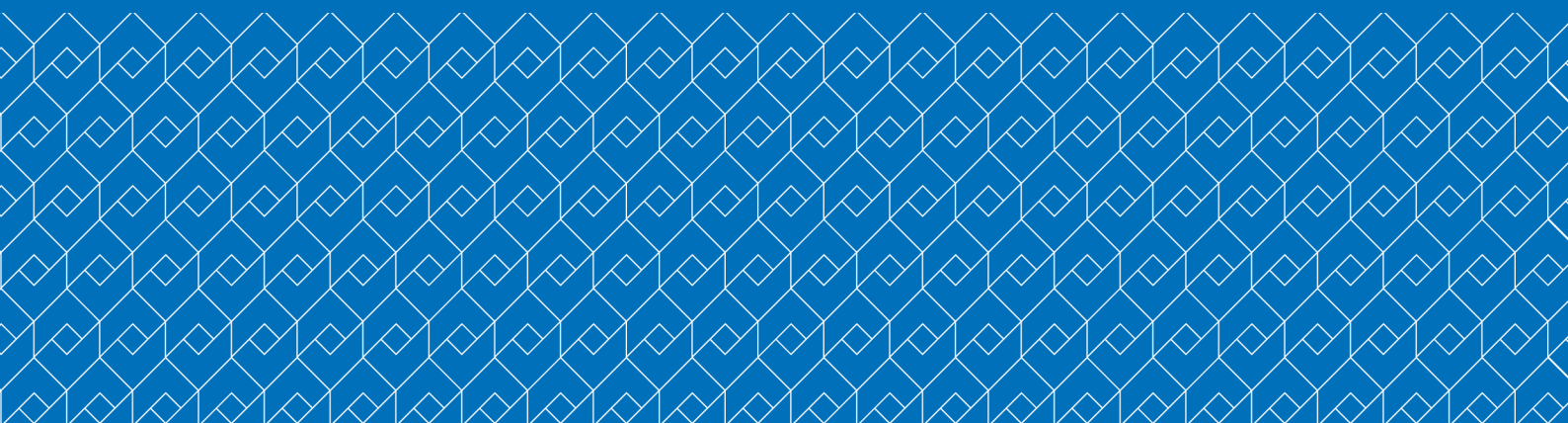
WHAT CAN YOU TALK ABOUT IN YOUR ANSWER?

- ISDS is a flawed mechanism and the measures proposed by the European Commission do not address the systemic risks of ISDS.
- The proposed text does not solve the problem of lack of conventional institutional safeguards for independence and impartiality of arbitrators, harmful incentives and risk for the right to regulate. (See questions 5,7 and 8)
- The ISDS system gives the US a clear and unjustifiable advantage. (See question 12)
- ISDS agreements concluded by EU member states are stand-alone investment agreements from which it is possible to withdraw. The EU considers adding ISDS to its trade agreements. This would create a lock-in, as it is almost impossible to withdraw from trade agreements.
- To avoid this lock-in, the EU should not deviate from standing European practice of stand-alone investment agreements, the EU should not add ISDS to trade agreements.
- So far ISDS has been more favourable to US companies, it is therefore to be expected that it is not in the EU best interests. Indeed, the US never lost an ISDS case so far.
- In the Commission's proposal, the rights of investors trump human rights. This is fundamentally incompatible with Europe's human rights system. (See question 5)
- The Commission's proposals threaten our privacy and reform of copyright and patent law. (See Question 5)

- The EU aims to create a global standard. Presently a minority of foreign investments is covered by ISDS, after ISDS agreements between the major capital exporting countries a majority of global foreign investments would be covered by ISDS. This seems unrealistic and dangerous.
- ISDS systems put the rule of law principle at risk.
- There are imperative reasons for the EU to exclude ISDS from its trade and investment agreements. In doing so, the EU would give direction to the debate and create room to strengthen alternatives.
- The EC has never provided a convincing answer to the question: why do we need ISDS?

To honour its values, to comply with the Treaties, the EU has to acknowledge the ISDS's fundamental flaws and act accordingly. The EU should endeavour to abolish and not strengthen this system. In doing so, the EU would give global leadership in the debate and create room to strengthen alternatives.

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