

## Statement BDI at TTIP Stakeholder Forum, 16 July 2014 “Investment Protection in TTIP – The Road Ahead”

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Thank you very much for the invitation to this stakeholder session. I represent BDI, the Federation of German Industries, which speaks on behalf of 37 sector associations and over 100,000 large, medium-sized and small enterprises with more than eight million employees.

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German Industry has always been a strong supporter of international investment agreements: Foreign Direct Investment is an essential foundation for the success of the German and the European economy. An effective investment protection regime is instrumental to facilitate FDI. And in our view, investment protection can be best enforced through an investor-state-dispute- settlement.

We have welcomed the opportunity to submit our ideas and priorities during the consultation process that the EU Commission has just concluded.

Today, I want to briefly explain

- why we believe that an investor-state-dispute-mechanism should be part of TTIP?
- what our recommendations are regarding the negotiations.
- what should happen now?

### **Why should TTIP include a chapter on investment protection?**

We believe that TTIP provides a unique opportunity to negotiate a state-of-the-art investment protection regime that could serve as a gold standard for investment treaties around the world. Today, there are over 3.000 investment treaties. However, many of these treaties as well as the practice of investment tribunals raise very legitimate concerns. This is true regarding issues like transparency, predictability, legal precision, or the lack of an appeal mechanism.

TTIP is a very good platform to address these concerns. If we do not negotiate ISDS and investment protection in TTIP, we will forego the opportunity to reform the system and to set a new, high standard. We would leave things as they are, which will also put us in a worse position to negotiate ISDS with other countries.

This is more important than ever: Already, some countries have withdrawn from international investment treaties, or they consider doing so. And what we do in TTIP will also influence our ongoing negotiations with China.

## **What are our specific recommendations?**

BDI has provided detailed recommendations on a strong and balanced investment protection chapter via the online consultation of the European Commission.

What does “strong and balanced” mean? It means addressing the concerns that I mentioned while at the same time providing a robust level of protection for investors. Let me illustrate this with some examples:

- 1) We call on the negotiators to increase transparency in ISDS tribunals. This could be done by providing public access to key documents, by conducting public hearings and by allowing non-parties to file submissions to the tribunal. But at the same time, we need to guarantee that confidential business information is protected.
- 2) We call on the negotiators to make sure that governments and parliaments retain the “right to regulate” at any time, and that an adequate policy space is preserved, including for social, health and environmental purposes. But the right to regulate must be executed proportionally, legally, and in a non-discriminatory and transparent way. For example, we could include a “proportionality test” in the investment chapter. This would give investors the ability to succeed in expropriation claims if a less burdensome measure could have been adopted.
- 3) We call on the negotiators to strengthen mechanisms against unjustified or frivolous claims, including a preliminary review process. But we caution against a general “loser pays” approach because it would deter small and medium-sized companies to bring their case to a tribunal.

These are some examples for a “strong and balanced” approach to investment protection. In addition, a “gold standard agreement” should also include an “umbrella clause” and strong language on “fair and equitable treatment”. These clauses should be precisely defined in order to improve the predictability of the system.

## **What should happen now?**

We encourage the EU Commission to continue the negotiations with the United States on investment protection.

But we strongly believe that only a balanced agreement that enacts reforms, that guarantees the right to regulate and that simultaneously establishes a high level of investment protection will win broad support among politicians, in the broader public and within the business community.

If these conditions cannot be met, the level of acceptance for TTIP would decrease.

In addition, the Commission, Member States and the business community must further engage in the public debate surrounding ISDS.

We must convey some basic facts, for example that investment tribunals can never declare a law null and void, but that it can only decide about compensations

We must explain why we do not see the threat of a “regulatory chill” in the transatlantic market: There is no empirical evidence that ISDS precludes governments from enacting strong regulations. To the contrary: When Poland, the Czech Republic and other East European countries joined the European Union, they adopted the EU *Aquis Communautaire*. However, no US investor sued them based on existing investment treaties, even though they accepted much tougher regulation within the EU.

To conclude, only a balanced negotiation approach can lead to a state-of-the-art TTIP agreement. And only a continued, fact-based public dialogue can win public support for this project.

The BDI as the Voice of German Industry is willing to do its part on the way ahead.

Thank you very much.