TRANSPORT & ENVIRONMENT

1. RESPONDENT DETAILS

2. VIEWS ON THE PROPOSED TEXT TO BE USED AS THE BASIS FOR INVESTMENT NEGOTIATIONS WITH THE US

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?

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

The Commission intends to agree on the inclusion of investor-state dispute settlement (ISDS) mechanisms in EU investment treaties, conferring jurisdiction over EU investment treaties to privately appointed arbitrators. The Commission cannot ensure that, in the context of ISDS proceedings, even the proposed improved definitions will not be stretched significantly and beyond the intention of the parties.

The definition of "investor" encompasses not only natural and legal persons actually making investments in the territory of the EU, but also those that "seek to make" an investment, allowing for pre-establishment rights. The proposed wording of the provisions would unduly extend protection to potential investors, leaving the subjective scope of investment protection agreements undefined. This definition of "investor" also omits any requirement that potential investor claimants are in ultimate beneficial ownership and control of the investment. The chosen definition of "investment" opts for the most open-ended concept, so as to include non-FDI (foreign direct investment) forms of investment, such as portfolio investments.[1] These broad definitions, alongside the inherent vagueness of other proposed terms - "substantial business activities" and "substantial resources" - means that EU member states are likely to be vulnerable to ISDS litigation from a much wider range of actors than is foreseeable.

The definitions of terms in international investment agreements have been subject to the interpretative trends chosen by arbitrators. These definitions have often moved beyond the will of the states that initially signed the agreements under which the claims were brought.[2] ISDS tribunals have proven

[1] Rainer Geiger, 'The Transatlantic Trade and Investment Partnership: A critical perspective', *Columbia FDI Perspectives: Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment.* No. 119 April 14, 2014

[2] See generally UNCTAD, *Investor–State Dispute Settlement And Impact On Investment Rulemaking* (2007) UNCTAD/ITE/IIA/2007/3, available at: <http://unctad.org/en/docs/iteiia20073_en.pdf>; N. Bernasconi-Osterwalder and L.

unreliable and often unwilling to interpret definitions in accordance with the intentions of the treaty parties.

The Commission's commitment to rule out claims made by companies that have routed their investments through a third party state simply in order to gain the protection of the TTIP treaty provisions, also identifies a key problem in current ISDS practice. But the proposed approach is weak. The Commission position is to "rely on past treaty practice". ISDS case law shows that arbitrators have widely accepted the principle of investors "treaty shopping" in this way. Indeed, this practice is promoted by arbitrators in case awards[3] and advertised by international law firms fishing for clients.[4] Investors have proven adept at creating corporate structures which maximize their recourse to investment protection agreements and arbitrators themselves have a vested interest in ensuring a steady flow of claims. The EU's approach is therefore unlikely to create any effective deterrent.

ISDS as a system is characterised by structural imbalances and lack of democratic oversight, and invests a high degree of power - to interpret treaties and adjudicate disputes - in a restricted number of private individuals. Simply tinkering with certain provision will not alter this.

In light of this, abuse of the system can only be truly assured by excluding any ISDS mechanism in the agreement.

Johnson, 'International Investment Law and Sustainable Development, Key Cases from 2000-2010'. *International Institute for Sustainable Development,* (2010) available at: <http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf>; on dissatisfaction of states with ISDS, see *UNCTAD World Investment Report 2012*, p.86, available at: <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>; also, L. Johnson, 'Case Note: How Chevron v. Ecuador is Pushing the Boundaries of Arbitral Authority' (2012) available at: <http://www.iisd.org/itn/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/#_ftn1>; G. Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion', 2 *Trade Law & Development* 1 (2010) 35. See also further detail under questions 3, 5 and 11 below.

[3] *Aguas Del Tunari, S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3), Decision on Jurisdiction, 21 October 2005, para. 332.; see also, Inna Uchkunova, 'Drawing a Line: Corporate Restructuring and Treaty Shopping in ICSID Arbitration', available at: <http://kluwerarbitrationblog.com/blog/2013/03/06/drawing-a-line-corporate-restructuring-and-treaty-shopping-in-icsid-arbitration>

[4] P. Eberhardt and C. Olivet, *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, Corporate Europe Observatory / Transnational Institute, (2012) (in particular Chapter 3, available at: <http://corporateeurope.org/trade/2012/11/chapter-3-legal-vultures-law-firms-driving-demand-investment-arbitration#footnote74_3burxzi>); for examples of firms fishing for business, see: Baker & McKenzie, 'How The Netherlands Bilateral Investment Treaty With China Offers Protection Of Your Chinese Investments', (2011) available at: <http://www.sccc.ch/download/publications/2011/201101-201103_Baker.McKenzie_China.Legal.Developments.Bulletin.pdf>; Niels Geuze and Mark Rebergen, of De Brauw Blackstone Westbroek, 'Benefits of structuring foreign energy investments through the Netherlands', Oil&Gas Financial Journal (2012) available at: < http://www.ogfj.com/articles/print/volume-9/issue-2/department/capital-perspective/benefits-of-structuring.html>

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.

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

It is important to highlight that Article 207(3), paragraph 2, TFEU "*the Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules*." Thus EU institutions should under no circumstances negotiate and conclude commercial agreements that may limit the EU's competence to define its policies, or conflict with existing or future internal rules. It is consistent with this premise that the EU should retain the power, under the TTIP, to adopt discriminatory measures "where necessary to achieve public policy objectives": any limitation of this power would lack justification under the TFEU and therefore be invalid.

The Commission's proposed approach, whilst stating the objective of protecting the policy-making and regulatory authority of the EU, is bound to be ineffective in this regard and puts such authority at risk. If the TTIP includes an ISDS mechanism, which it should not, privately appointed arbitrators instead of ultimately the European Court of Justice, would be entrusted with deciding whether EU measures comply with standards of non-discriminatory treatment laid down in the TTIP agreement and whether derogations from the non-discrimination principle are justified in the light of EU public policy objectives.

Such risk is greatly increased by the Commission's deficient approach to the most-favoured nation (MFN) treatment provision, included in the reference text. The effect of this clause in ISDS claims has enabled investors to simply select more favourable provisions from other investment treaties to which the state is a party. The proposed language appears only to exclude the application of MFN to procedural standards (and therefore may be effective in preventing investors using MFN to skirt the TTIP rules on transparency), but does nothing to prevent the application of MFN to material standards, as is the Commission's professed intention. In practice, this would have the effect of negating the supposed improvements the Commission purports to make, such as its attempt to limit the scope of the "fair and equitable treatment" (FET) standard. In effect, an investor may potentially use the proposed MFN provision to simply invoke the much broader and more favourable FET standard under the Energy Charter Treaty, of which the EU is a member.[5]

The "general exceptions" clause is flawed in two further respects. The closed list of exceptions

[5] Prof. Dr. Markus Krajewski, 'Zu Investitionsschutz Und Investor-Staat-Streitbeilegung Im Transatlantischen Handels Und Investitionspartnerschaftsabkommen (TTIP)', der Bundestagsfraktion Bündnis 90/Die Grünen (2014), available at: < www.gruene-bundestag.de%2Ffileadmin%2Fmedia%2Fgruenebundestag_de%2FVeranstaltungen%2F140505-TTIP%2FKurzgutachten_Investitionsschutz_TTIP_Endfassung_layout.pdf&ei=dYyJU9mIFcLZPMLbgcAJ&usg=AFQjCNGKultdmsCFS2RcOcAeP2ycF8OsYQ&sig2=bQRqtxAP2zOzyDO05DYuLw&bvm=bv.67720277,d.ZWU>

incorporated from WTO law would allow exceptions on the grounds of protection of public morals, public order, human, animal or plant life or health, or national security, but would appear to preclude any exception on the basis of labour standards, or a number of other legitimate social or welfare policy objectives. It is unclear why the Commission's approach aspires to apply such exceptions only to the non-discrimination standard and not to other material standards such as the FET standard or the provision on expropriations.

These limitations in scope and application of the "general exceptions", which allow the EU and its member states to take measures necessary to achieve public policy objectives, is of particular concern in light of ISDS case law. To date, arbitration tribunals do not recognise the states' right to define what their own legitimate, public policy objectives actually are.[6] A number of arbitration tribunals have rejected the argument raised by states that they and they alone, should be able to define what a legitimate public interest objective is.[7] This is even more concerning, when one considers that ISDS cases are primarily presided over by arbitrators from corporate legal practice, with no background in public policy, government or even public international law.

In order to ensure that the EU and its member states maintain the regulatory space that is necessary to achieve public policy objectives, in all spheres, ISDS provisions should be excluded from the TTIP.

The Commission approach to non-discrimination is flawed and will allow for continued excessive use of the ISDS mechanism. The only way to close the loopholes is to drop ISDS as a whole from TTIP and all other free trade agreements including CETA.

[6] For general discussion see Andreas von Staden, 'Deference or No Deference, That is the Question: Legitimacy and Standards of Review in Investor-State Arbitration' (2012), available at: <http://www.iisd.org/itn/2012/07/19/deference-or-no-deference-that-is-the-question-legitimacy-and-standards-of-review-in-investor-state-arbitration/>; also W. Burke-White and A. Von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations' in Schill, S. (ed.) *International Investment Law and Comparative Public Law*. Oxford University Press (2010) pp. 689-720

[7] See in particular: *Tecmed v. Mexico* (ICSID Case No. ARB(AF)/00/2); *Vivendi v. Argentina* (ICSID Case No. ARB/97/3); *Biwater v. Tanzania* (ICSID Case No. ARB/05/22); *Siemens v. Argentina* (ICSID Case No. ARB/02/8)

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?

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

The fair and equitable treatment (FET) standard, common to a large number of existing international investment agreements, is characterized by its inherent vagueness. The Commission claims[8] to be fully aware of the undetermined scope of FET clauses, its suggested approach is merely to edit the FET standard, leaving uncertainty as to how the standard will function in practice.

According to the reference text proposed, "a state could be held responsible for a breach of the fair and equitable treatment obligation only for breaches of a limited set of basic rights, namely: the denial of justice, the disregard of the fundamental principles of due process; manifest arbitrariness; targeted discrimination based on gender, race or religious belief; and abusive treatment such as coercion, duress or harassment".

The imposition of an FET standard on treaty parties (the EU and its member states), without any concrete obligation on investors to also abide by standards of conduct, illustrates the underlying imbalance in the ISDS mechanism. While it is generally accepted that an investor cannot claim a breach of the FET standard where they have committed fraud or engaged in illegal conduct, the proposed FET clause does not expressly require that the investor's conduct - for example, with regard to the environment or social impact of their investments – be a determining factor in the assessment of whether the FET provision has been breached (as is alternatively recommended by UNCTAD). This omission means that corporations which have conducted their investment operations without any regard for standards of corporate social responsibility may still be able to claim the right of FET, and to sue for breach of the standard through ISDS. The only reference to standards for investors is included in the preamble of the reference text. The lack of any substantive provisions, detailing the precise extent and meaning of such standards, renders this inclusion largely ineffective and meaningless.

The Commission's approach to the issue of investors' legitimate expectations also simplifies a complex and problematic area. Previous ISDS cases have demonstrated that where investors' legitimate expectations are protected by an investment agreement, states may find themselves bound by the statements of individual officials who engage with investors, or by "commitments" inferred

[8] DG Trade Commissioner Karel De Gucht '"Improving ISDS to prevent abuse" - Statement by EU Trade Commissioner Karel De Gucht on the launch of a public consultation on investment protection in TTIP', press conference – Brussels, Belgium. 27 March 2014. http://europa.eu/rapid/press-release_STATEMENT-14-85_en.htm

from general laws and regulations.[9]

The Commission's proposed text requires only that there be a "specific representation" which gives rise to the legitimate expectation, leaving a very wide scope for interpretation. As such, a host of potential "representations" which do not reflect the intended, democratically-based policy decisions of states, or that originate from remote corners of public administration, may nonetheless be relied upon as enduring and binding commitments on the future policy space of states.

The Commission's proposal does not make clear how this wholly undemocratic guarantee to investors can be reconciled with the right of states to regulate, unfettered, in the public interest. Like the issue of investor conduct, the right of states to regulate – which should be central to any TTIP agreement – is referred to only in the preamble of the reference text and in the limited provision on Prudential Carve-Out/Exceptions (see question 10).

The lessons learned to date from the practical application of the FET standard, and the potential scope of investors' "legitimate expectations", provide good reasons for the exclusion of any ISDS provisions from the EU's international trade and investment agreements.

Moreover, the suggested "limited set of basic rights" which investors would enjoy under the proposed FET standard does not contain any rights, specifically relevant to the investment context, that foreign investors would not already enjoy under the law on fundamental and constitutional rights of the EU and its member states. This prompts the question: why is this provision (or indeed, an ISDS mechanism with which to enforce it) necessary at all?

The Commission further proposes that this list of basic rights may be extended (where the US and the EU specifically agree to additions). In light of this, it is necessary to ask what basic rights does the EU anticipate that it might be desirable to grant to US investors in Europe, which EU citizens should not be entitled to enjoy?

It is overwhelmingly clear that since EU law fully acknowledges the principles of equality before the law and access to justice, these provisions are, at best, wholly unnecessary and, at worst, discriminatory against EU citizens.

The European Commission approach to fair and equitable treatment is wholly unsatisfactory and the proposed reforms by the Commission will not alleviate the current concerns about the misuse of the clause. FET is one of the most dangerous features of ISDS, and is one of the keys reasons for excluding ISDS in all free trade agreements including CETA.

[9] See discussion in Lise Johnson and Oleksandr Volkov, 'State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law', *International Institute for Sustainable Development: Investment Treaty News*, Vol. 5, Issue 1 (2014), available at: <http://www.iisd.org/sites/default/files/pdf/2014/iisd_itn_jan_2014_en.pdf>; case examples include: *EDFI v. Argentina* (ICSID Case No. ARB/03/23) Award, June 11, 2012; *Enron v. Argentina* (ICSID Case No. ARB/01/3), Award, May 22, 2007; *LG&E v. Argentina* (ICSID Case No. ARB/02/1), Decision on Liability, Oct. 3, 2006; *Occidental Exploration and Production Company v. Ecuador*, (LCIA Case No. UN 3467), Final Award, July 1, 2004; *Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Award, March 3, 2010

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.

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

As highlighted in the answer to question 2, above, Article 207(3) TFEU requires that EU commercial agreements are compatible with internal Union policies and rules. This means that the TTIP provisions on the protection against expropriation, as well as the criteria applying to compensation, should adhere to the principles enshrined in the European Convention on Human Rights (ECHR, Article 1) and in the EU Charter of Fundamental Rights (Article 17(1)).

Investment treaties should not put foreign investors in a more favourable position, vis-à-vis public authorities, than natural and legal persons of the EU. EU public authorities should therefore be entitled to enjoy a wide margin of appreciation in their exercise of powers of expropriation, "*subject to fair compensation being paid in good time*". In exceptional circumstances, EU law recognises justifications for expropriation without payment of compensation. The principle that the use of property may be regulated by law - in so far as is necessary in the public interest - should also apply to foreign investments as it does to domestic situations of the EU, without discrimination.

The Commission's proposed approach replaces the standards defined by ECHR and EU law with those of international investment law, thereby treating investors' property rights more favourably than those of EU citizens and EU businesses.

The Commission's reference text assumes that compensation must always be paid and must always be "prompt, adequate and effective". This approach to expropriation simplifies a complex debate - within investment law - on expropriations undertaken for a public purpose, largely ignoring the alternative approaches to levels of compensation that should be paid to foreign investors.

The option to require compensation to be "appropriate, just and equitable" – an approach which would be closer to EU law standards – would grant states a wider margin of discretion and allow them to assess investors' own conduct, as well as the circumstances around the investment and its expropriation, and to compensate accordingly. This would make it possible to reduce the level of compensation payable where the expropriation serves a public interest. This policy option for treaty-makers is outlined in UNCTAD's IPFSD Report.[10]

In the Commission's approach, it is further stated that the EU wants to limit indirect expropriation claims which arise from the mere fact that a measure has had an impact on the economic value of an

[10] *UNCTAD Investment Policy Framework for Sustainable Development* (2013), available at: <http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf>

investment. However, the suggested approach would not appear to effectively limit the number of potential claims. The draft clause in the reference text provides a *non-exhaustive* list of factors which, in addition to an economic impact, would amount to expropriation (including the extent, duration and character of the challenged measures). This would leave to the discretion of arbitrators the finding of practically *any* other factor, additional to an economic impact, on which to base a claim of indirect expropriation. Terms such as "substantial deprivation" of certain property rights and the implementation of "manifestly excessive" measures which are designed to protect "legitimate public welfare objectives" also leave a very wide area of interpretation for arbitrators in any potential dispute brought under ISDS mechanisms.

The breadth of claims brought under "indirect expropriation" provisions is, as the Commission itself acknowledges, a "source of concern". What these proposals fail to address is that the expansive interpretative trends seen in ISDS to date, which have opened up the possibility of legal challenges to legitimate public policy measures taken by host states, are principally driven by the adjudicative preferences of the arbitrators themselves.

The only way to effectively address this concern is to wholly exclude the ISDS mechanism from all TTIP and all other free trade agreements including CETA.

Question 5: Ensuring the right to regulate and investment protection

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?

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

The right of the EU and of its member states to regulate is only referred to in the preamble of the reference text and in relation to the "Prudential Carve-Out" provision (see question 10). There are no further substantive provisions on which states might rely. Protection of this right requires a clear and broadly formulated provision affirming the right of the EU to maintain and develop domestic regulatory measures in pursuit of its public policy objectives, in accordance with the EU treaties.

It must be reiterated that pursuant to Article 207(3) TFEU, the Commission and the Council cannot negotiate and conclude commercial agreements that would conflict with internal EU policies and regulations.

The text provided by the European Commission as a reference only mentions the right to regulate in the preamble, not anywhere else in the actual agreement, or in the articles provided by the European Commission for consultation. As such, having the right to regulate mentioned in the preamble of the agreement is not binding on the parties. This was confirmed by a Commission representative at a debate organised by Friends of the Earth on March 13, 2014[11].

The proposed approach is manifestly ineffective, as the articulation of a specific substantive "Prudential Carve-Out" exception to the protections established under the agreement necessarily implies that other substantive exceptions are precluded. This limits the right to regulate to a narrow list of reservations and exceptions, rather than affirming it as a general principle, encompassing all the policies and public interests referred to in the EU treaties and subject to which all investment protection standards should be interpreted.

The further, unpersuasive reference in the preamble of the reference text, to enterprises having respect for internationally recognized standards and principles of corporate social responsibility (CSR) is equally wholly inadequate to the purported aim of the Commission. Without precise and comprehensive provisions detailing the responsibilities of investors to conduct their business in the investment environment with respect to the laws of the host state (including environmental, consumer protection and labour laws), and the effect of investors' breach of these responsibilities, then such aspirations are effectively meaningless. The weakness of these approaches - to CSR standards and the right to regulate - is particularly important, as it significantly diminishes the capacity of the EU and its member states to regulate the activities of corporations in the public interest.

[11] http://www.tni.org/multimedia/untangling-trade-talks

Major international developments recognising the necessity of states to regulate corporate activities – such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises – demonstrate clearly that the EU and its member states must retain a wide scope for regulatory action in order to confront and remedy the often negative impacts of multinational enterprises on the environment, public health, labour and human rights. An ISDS mechanism would inevitably limit this scope, to the detriment of the EU and its citizens, and should therefore be wholly excluded from the agreement.

The EU's approach to addressing the right to regulate in TTIP is unacceptable. As long as ISDS is included in the agreement, the right to regulate will be endangered and there will be potential for the mechanism to create a chilling effect on regulation. ISDS as a whole must be excluded from TTIP and all other free trade agreements including CETA.

B. Investor-to-State dispute settlement (ISDS)

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.

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

ISDS is unnecessary, since the judicial systems of the EU and of its member states, already provide foreign investors with an adequate and complete set of remedies. The EU judicial systems fully comply with the fundamental legal principles which this treaty chapter purportedly intends to extend to investors through ISDS. Recourse to ISDS provisions for EU investors in the US are similarly unnecessary; the judicial system of the US (as well as that of Canada in the case of CETA) provides adequate existing protection to investors from the EU.[12]

Furthermore, ISDS mechanisms are incompatible with the principle of the autonomy of EU law and the exclusive jurisdiction of the EU Court of Justice (ECJ), to the extent that they:

- allow arbitrators to review EU measures and decide on their compatibility with international agreements which are binding upon the EU (and which are, therefore, fully integrated into EU law); and
- offer foreign investors an additional avenue with which to establish the liability of the EU and its member states and their obligations to pay compensation.

In relation to the first aspect, the Commission should bear in mind that it is for ECJ to ensure the correct interpretation and application of EU law and the coherence of the EU legal system, as mandated by Article 19 of the EU Treaty. ISDS mechanisms would give arbitrators the task of deciding whether measures adopted by the EU institutions (or by member states, in execution of their EU law obligations) are compatible with the provisions of investment treaties. Such a task necessarily implies that arbitrators would have to interpret EU law (in order to decide, for instance, on its discriminatory effect or on its justification in the light of a particular public policy objective), without having the right or the duty to refer preliminary questions to the ECJ. This violates the ECJ's exclusive jurisdiction and impinges on the autonomy and uniform interpretation of EU law.

[12] Jan Kleinheisterkamp, 'Is there a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?', London School of Economics (2014), available at: <http://ssrn.com/abstract=2410188>

The TFEU already provides that the Union shall "make good any damage caused by its institutions" (Article 340(2)). The treaty confers exclusive jurisdiction on the ECJ over the non-contractual liability of the EU and over all claims for the reparation of damages, including those brought by individual investors (Articles 268 and 274 TFEU). This judicial protection is available to everyone, including companies based in third countries.

The introduction of ISDS mechanisms would therefore open a loophole in the judicial architecture of the EU. Indeed, under ISDS mechanisms, arbitrators would be called upon to decide whether EU laws and the national laws of EU member states violate foreign investors' rights. Based on this review, arbitrators would issue rulings on the liability of the EU or its member states towards foreign investors, and could order the payment of compensation. This is clearly incompatible with the exclusive jurisdiction of the ECJ over non-contractual liability claims when the EU acts as a respondent.

In the light of the foregoing, and the concerns related to ISDS practice that Greenpeace highlights elsewhere in response to this consultation, the measures proposed by the Commission to ensure transparency and openness in ISDS proceedings appear to be totally inadequate to offset the numerous risks of the ISDS system as a whole.

Over the past ten years, minor steps have been taken to increase transparency and public participation in ISDS proceedings, including such measures as proposed by the Commission for allowing civil society submissions in individual cases. Overwhelmingly, these processes have only been exploited to provide a thin veneer of democratic legitimacy to the ISDS system, while the substantive arguments raised by non-disputing parties (on issues of jurisdiction, environmental standards, and international human rights law among others) have been, for the most part, cursorily ignored by tribunals.[13]

The Commission's approach to openness and transparency within the ISDS is unsatisfactory and should be excluded from TTIP and all other free trade agreements including CETA.

[13] N. Blackaby, and C. Richard, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?' in M. Waibel *et al* (eds.) *The Backlash against Investment Arbitration: Perceptions and Reality* (2010) The Netherlands, Kluwer Law International. pp. 253-274; Sarah Schadendorf, 'Human Rights Argu- ments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations', 10 *Transnational Dispute Management* 1 (2010); C. Cross and C. Schliemann Radbruch, 'When Investment Arbitration Curbs Domestic Regulatory Space: Consistent Solutions through Amicus Curiae Submissions by Regional Organisations'. *The Law and Development Review*, Vol. 6 Issue 2 (2013)

Question 7: Multiple claims and 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.

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

The Commission's proposed clause is not an innovation in international investment agreements. The 'fork in the road' clause does not require investors to exhaust domestic remedies before bringing ISDS claims, as is required of practically every other international judicial mechanism, including cases brought by individuals under human rights treaties such as the European Convention on Human Rights.

This comparison betrays the preferential treatment for foreign corporate actors that is created by ISDS mechanisms. It prompts the question, why the Commission feels it necessary to provide these investors with recourse to leapfrog domestic courts, which are deemed adequate for the purposes of the human rights protection under their jurisdiction.

The European Commission has repeated on several occasions that ISDS is necessary because EU companies would not have access to US courts in case of dispute. But a recent London School of Economics study concludes that the Commission concerns about the US judicial system are not substantiated enough to justify the inclusion of ISDS in TTIP[14].

The use of such a clause is welcome only insofar as it would avoid farcical situations such as that created by the simultaneous cases brought against Germany by energy company Vattenfall in ICSID proceedings and in the German Federal Constitutional Court. It does not however resolve the issue of ensuring that a state's right to regulate for domestic public interest purposes is free from the interference of international investors and arbitrators.

While in normal circumstances routes to mediation might be welcomed, there can be no meaningful place for mediation between parties to an investment dispute, where one of the parties has the special right to invoke a legal process which will result in a hearing before a quasi-judicial body, which is not fit for purpose and inherently structurally imbalanced. The imbalance this creates between states and foreign investors inevitably alters the balance of power in any negotiations, to the extent that such negotiations are rendered effectively meaningless.

[14] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410188

We recommend that ISDS be excluded from TTIP and all other free trade agreements including CETA.

Question 8: Arbitrator ethics, conduct and qualifications

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?

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

The Commission's proposal acknowledges, but fails to address, one of the structural flaws affecting ISDS mechanisms: arbitrators' lack of neutrality, and the fact that they enjoy significant financial benefit from the existence and continued growth of the ISDS litigation.[15]

Only investors can initiate ISDS claims; there is no market for claims brought by states, because states cannot initiate arbitration against investors (routes for state-state arbitration are limited and rarely used). Therefore, the viability of the ISDS system is defined by its capacity to appeal to investors as a lucrative avenue for litigation against states – hence ultimately taxpayers.

In this context, arbitrators have a direct interest in the existence and development of a market for ISDS claims, which is likely the primary cause for the unprecedented growth in ISDS claims in recent years. There is no evidence to suggest that government behaviour towards foreign investors has changed significantly in this period. The current composition of ISDS arbitration tribunals is structurally biased towards investors; this in itself should be sufficient to warn the Commission against the inclusion of any ISDS mechanism in EU commercial and investment agreements.

The fact that arbitrators often act as legal counsel for parties in ISDS cases has produced a number of critical conflict of interest issues which have been raised in case proceedings and in case analyses.[16] Such structural issues make it practically impossible to guarantee the type of standards and safeguards against misconduct, as would be expected in domestic judicial systems. The principles of the rule of law and equality before the law are subordinated in ISDS to the commercial interests of investors and arbitrators.

Paradoxically, it is precisely the purported deficiencies of domestic judicial systems that ISDS is supposed to remedy. However, vital democratic and judicial standards cannot be guaranteed under the ISDS system and the Commission's reference texts do little to improve this. ISDS must therefore be

[15] P. Eberhardt and C. Olivet, *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, Corporate Europe Observatory / Transnational Institute, (2012) available at: <http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf>

[16] eg. *Siemens A.G. v. Republic of Argentina* (ICSID Case No. ARB/02/8); see also N. Bernasconi-Osterwalder and L. Johnson, *International Investment Law and Sustainable Development, Key Cases from 2000-2010*, International Institute for Sustainable Development (2010), available at: <http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf>

excluded from the TTIP agreement.

The implementation of a "roster" system, as proposed by the Commission, is unlikely to mitigate issues of impartiality and independence of arbitrators, as it is effectively only a "back-up" for cases in which the normal procedure for appointing arbitrators fails.[17]

The Commission's proposal to impose a Code of Conduct on arbitrators cannot be evaluated, since the text of this Code remains unknown. Given that the role of arbitrators is at the core of many criticisms of ISDS, there can be little confidence in such vague proposals to safeguard against arbitrator "misconduct". Civil society complaints and criticism[18] have raised serious problems of implementation of the Commission's own ethics rules and unchecked potential conflicts of interest[19]. It is additionally worth noting that the implementation of the EU Commission's own standards on conflicts of interest among staff has been subject to significant. Once ethics rules are agreed on, their effectiveness depends on strict implementation of the rules and close monitoring. The European Commission has not performed well in those areas. Furthermore, while it is true that investment treaties do not provide a roster of arbitrators, the ICSID system does use one. However this approach has not helped mitigate concern of impartiality and independence of arbitrators[20].

In particular, this proposal does not specify which body would have authority to initiate or adjudicate disciplinary proceedings against arbitrators for breaches of the Code of Conduct, or under what circumstances these proceedings would lead to the removal of an arbitrator from a panel. Similarly, the proposal fails to lay down the conditions for the circumstances under which the nullity of an award – as a consequence of an arbitrator's misconduct - could be established, including which body or institution would have authority to do this.

On the issue of the arbitrators' experience and expertise, while the Commission's explanatory note acknowledges that knowledge of "societal and public policy issues" is desirable, this is not reflected in the reference text. It is merely presumed that arbitrators who have expertise or experience in international law, in particular international investment and trade law, will have sufficient knowledge of such issues.

Experiences of ISDS litigation to date have demonstrated that arbitrators tend to adopt a narrow approach to disputes wherever possible, often privileging the commercial and private law aspects[21] and sidestepping other issues of public interest which may be relevant, by classing them as outside the

[17] Nathalie Bernasconi-Osterwalder and Howard Mann, 'A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"', International Institute for Sustainable Development (2014), available at: <http://www.iisd.org/pdf/2014/reponse_eu_ceta.pdf>

[18] Press release issued by Corporate Europe Observatory, Greenpeace, Lobbycontrol and Spinwatch, 'EU Ombudsman launches investigation into Commission's alleged failure to curb conflicts of interest via the revolving door', (14 February 2013) available at: <http://www.alter-eu.org/press-releases/2013/02/14/ombudsman-investigates-conflicts-of-interest-via-revolving-door>

[19] http://www.alter-eu.org/press-releases/2013/02/14/ombudsman-investigates-conflicts-of-interest-via-revolving-door
http://www.alter-eu.org/sites/default/files/AlterEU_revolving_doors_report_0.pdf
http://www.alter-eu.org/sites/default/files/revolving_door_provides_privileged_access.pdf
http://www.alter-eu.org/documents/2011/01/new-commission-code-not-enough-to-close-revolving-doors

[20] http://www.iisd.org/pdf/2014/reponse_eu_ceta.pdf

[21] W. Burke-White and A. Von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations' in Schill, S. (ed.) *International Investment Law and Comparative Public Law*. Oxford University Press (2010) pp.691, 694, citing cases of *CMS Gas Transmission Co v. Argentine Republic* (ICSID Case No ARB/01/8), Award, 12 May 2005, para. 324; *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v. Argentine Republic* (ICSID Case No ARB/02/1), Decision on Liability, 3 October 2006, paras. 201–266; *Continental Casualty Co v. Argentine Republic* (ICSID Case No ARB/03/9), Award, 5 September 2008, paras. 160–236; G. Van Harten and M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 17 *European Journal of International Law* 1 (2006), pp. 121-150.

scope of the dispute or outside the law applicable to the dispute.[22] In light of the curt treatment given by arbitrators to public policy issues previously arising in ISDS cases, the proposed improvements do not come near to providing any reassurance that future ISDS disputes will be decided by arbitrators with either knowledge or competence to adequately understand or assess the manifold public interest concerns that may be affected.

The European Commission approach to proposals in relation to arbitrators' conduct, impartiality and ethics is unacceptable, enabling loophole within the ISDS mechanism that are very dangerous; we recommend that ISDS be excluded from TTIP and all other free trade agreements including CETA.

[22] eg. *Bernhard von Pezold and others v. Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (Joint ICSID Cases No. ARB/10/15 and ARB/10/25), Procedural Order No. 2, 26.06.2012, para 60

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.

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

Many of the foreseeable ISDS claims which might arise from the TTIP agreement, whilst having an impact on the EU or its member states' right to regulate on environmental, labour or other public interest concerns, may not be easily dismissed as frivolous or "obviously without legal merit".[23] The Commission's approach is limited to proposing the sort of procedural efficiencies that are desirable in any judicial system. Ensuring that states do not incur costs for such claims is a reasonable aspiration in this respect.

However, this approach does not even begin to address the fundamental concern that it will ultimately be left to the discretion of private arbitrators whether claims that impact on areas of public interest or the regulatory space of states are allowed to proceed. These cases may well raise substantive legal issues that would not be dismissed as frivolous or unfounded. It is not so much with frivolous or unfounded cases that civil society is concerned with but rather with the claims that make it to the arbitration panels and allow some companies to abuse the system. Under the current Commission proposals, cases such as the ones filed by companies Philip Morris against Australia's attempts to introduce anti-tobacco legislation or Lone Pine Resources against Québec's precautionary moratorium on fracking would still be possible[24]. Claims that can easily be dismissed are only the ones without any legal merit according to the text.

The mere fact that states have to defend claims, in which public policy decisions are challenged by foreign investors, generates an unacceptable risk of damaging the democratic process and the capacity of states to regulate in the public interest. This risk can only be effectively mitigated by wholly excluding the ISDS clause from the TTIP agreement.

[23] To name but a few controversial cases, it is questionable whether any of the following were likely to have been found "frivolous" by the relevant tribunals: *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL, PCA Case No. 2012-12) *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, (ICSID Case No. ARB/10/7), *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* (ICSID Case No. ARB/09/6)*, Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12), *Biwater v. Tanzania* (ICSID Case No. ARB/05/22), *CMS Gas Transmission Co v. Argentine Republic* (ICSID Case No ARB/01/8), Vivendi v. Argentina (ICSID Case No. ARB/97/3), *Glamis Gold Ltd. V. United States of America* (UNCITRAL, Final Award 8 June 2009), *Metalclad v. Mexico* (ICSID Case No. ARB(AF)/97/1), *Methanex v. United States* (UNCITRAL, Final Award 3 August 2005), *Tecmed v. Mexico* (ICSID Case No. ARB(AF)/00/2), *Chemtura v. Canada* (UNCITRAL, Final Award 2 August 2010), *Pacific Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), *Piero Foresti v. South Africa* (ICSID Case No. ARB(AF)/07/1)…

[24] http://corporateeurope.org/sites/default/files/annex-2-still-not-loving-isds.pdf

The European Commission's reform proposal will only address the issue of costs (case terminated without expensive and long procedures), but in no way the scope of the decisions that would otherwise be made on jurisdiction or the merits. Imposing the burden of litigation costs on the losing party in ISDS cases is consistent with a generally accepted legal principle. However, the introduction of such a principle in the context of ISDS may be insufficient to dissuade investors from starting unmeritorious claims, given the significant imbalance in the levels of costs incurred by investors and by states.[25] States generally incur significantly lower legal costs and this may not therefore be a particularly effective deterrent to potential litigants. Investors on the other hand tend to incur vast legal costs, and the danger of the defending state having to pay these if they lose the case is likely to have a significant impact on their defense of proceedings, as well as on the decision to settle a claim and on any related negotiations or mediation processes.[26]

We recommend that ISDS be excluded from TTIP and all other free trade agreements including CETA.

[25] *Gemplus & Talsud v. United Mexican States* (ICSID Cases Nos. ARB (AF)/04/3 & ARB (AF)/04/4)) Award of June 16, 2010: "It is well-known that legal costs incurred by respondent-state parties are usually much lower than costs incurred by claimant-private parties, partly because a claimant bears a greater burden in presenting and proving its case, partly because a state's billing practices with its legal representatives are different and partly, as here, where there is more than one claimant bringing claims under more than one treaty." (para. 17-25)

[26] Many tribunals order that each party bears its own costs of legal representation without mentioning the sums, so much data is unavailable. For examples: *Siag v. Egypt* (ICSID Case No.ARB/05/15) Award of June 1, 2009, Egypt was ordered to pay the sum of USD 6,000,000 in legal costs; *Kardassopoulos & Fuchs v. Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15) Award of March 3, 2010, Georgia found liable to pay Claimant's costs of USD 7,942,297

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?

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

The potential to limit in any way the scope of ISDS cases is welcome, given the structural deficiencies we have described above. However, it is difficult to satisfactorily assess the efficacy of the "filter mechanism" proposed by the EU, until this has been tested in practice.

It is moreover unclear why "financial stability" is the only area of the proposed text in which the states' right to regulate is given any substantive detail. The Commission's proposals give no recognition to the necessity for governments to act quickly and unhindered, and free from the threat of costly international litigation, in other situations of crisis, such as for environmental and health protection, in labour relations, or other areas of public policy.

There is no justification for such a limit to be established *only* with regard to measures that are undertaken to maintain the stability and integrity of the financial system. Measures taken by states in other areas of policy should benefit from at least the same level of protection. Indeed, the ISDS system poses a threat to the *integrity of democratic systems of governance*, but the Commission's proposals make no such attempt to protect these. The Commission's proposal ignores the very fact that ISDS claims often challenge regulatory measures undertaken for public policy reasons - resulting in these policies being subject to a quasi-judicial review by privately appointed arbitrators. The threat this represents to the integrity of fundamental principles of democracy and the rule of law should be addressed by excluding the ISDS mechanism altogether.

The use and scope of the proposed filter mechanisms will not prevent abusive use of the ISDS mechanism and will not serve the announced purpose. The only way to ensure financial stability and other public interest objectives is not undermined is by excluding ISDS from TTIP and all other free trade agreements including CETA.

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?

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

The Commission itself acknowledges that ISDS mechanisms raise a number of fundamental concerns that should logically lead to their exclusion from trade and investment treaties. Nevertheless, the Commission appears to either underestimate or ignore such concerns, and merely endeavours to propose remedial measures that are manifestly insufficient to address them.

In contrast to the Commission's analysis, ISDS case law has shown that the scope for "undesirable interpretations" by ISDS tribunals is in fact very wide.[27] The purported "clarity and precision" of the provisions proposed by the Commission still leave significant scope for interpretation by tribunals. A mechanism allowing for the treaty parties to agree on binding interpretations is highly unlikely to be sufficient to remedy this problem. Past experiences of treaty parties adopting binding interpretations have demonstrated the limits of their value. For example, the Notes on Interpretation of the "fair and equitable treatment" (FET) standard, issued in 2001 under the aegis of the NAFTA Free Trade Commission, were subsequently subject to significant challenge in the decisions of ISDS tribunals, which simply "shifted the goalposts" in favour of a broader interpretation of the FET standard.[28]

The Commission acknowledges that the "balance" between "investment protection and the right to regulate" needs be "corrected". This is because ISDS arbitrators have, in their decisions, persistently undermined states' right to regulate. The claim that ISDS tribunals "would have to respect" the interpretations of the treaty parties is therefore based on a naive and high-risk assumption which ignores lessons learned from ISDS case law. The immense power that is invested in ISDS arbitrators has produced outcomes which have frequently frustrated the expectations of parties to investment agreements. It is certainly desirable that this trend be addressed, but the proposed "safety-valve" is unlikely to achieve this. In light of past experiences, the comprehensive exclusion of ISDS in the TTIP would clearly be the most prudent policy, and the only effective method to ensure that the EU's investment protection policy does not produce "undesirable outcomes".

[27] For commentary, see footnote 2, *supra*. For case examples, see footnote 20, *supra*.
[28] See generally, M. Ewing-Chow and J.J. Losari, 'Which is to be the Master?: Extra-Arbitral Interpretative Procedures for IIAs', *Transnational Dispute Management: Reform of ISDS: In Search of a Road Map.* Vol. 11, Issue 1 (2014); Patrick Dumberry, 'The Emergence of a Consistent Case Law: How NAFTA Tribunals have Interpreted the Fair and Equitable Treatment Standard' (2013), available at: <http://kluwerarbitrationblog.com/blog/2013/10/30/the-emergence-of-a-consistent-case-law-how-nafta-tribunals-have-interpreted-the-fair-and-equitable-treatment-standard/>; Lise Johnson and Merim Razbaeva, 'State Control over Interpretation of Investment Treaties', Vale Columbia Centre on Sustainable International Investment (2014) p.13, available at: <http://ccsi.columbia.edu/files/2014/04/State_control_over_treaty_interpretation_FINAL-April-5_2014.pdf>

According to the reference text, it is up to the committee on services and investment to make a recommendation to the CETA trade committee on the adoption of the interpretations of the agreement. It does not outline an automatic process for concerns to be raised. When it comes to the Commission proposals on how guidance by the parties would look like in CETA, the reference text mentions that "interpretation adopted by the CETA Trade Committee shall be binding on a Tribunal established under this chapter. The CETA Trade Committee may decide that an interpretation shall have binding effect from a specific date", while leaving it unclear what will be the exact process to ensure this interpretation becomes binding on the tribunal. It does not mention to whom arbitrators will be accountable to and what happens in cases when they do not follow the provided interpretation. To underscore the relevance of that point, **in the context of NAFTA, there are several examples of arbitrators ignoring the supposedly binding interpretations provided by either the US, Canada, or Mexico**[29].

The Commission's proposal on guidance by the Parties to interpret the agreement are neither sufficient nor satisfactory. We believe ISDS should be excluded from TTIP and all other free trade agreements including CETA.

[29] http://www.iisd.org/itn/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/

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.

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

The creation of an appellate mechanism might be, in principle, a welcome process of review of the rulings of ISDS tribunals, which are at present largely immune from any challenge. However, the stated aims of the Commission's in proposing this mechanism - to "increase legitimacy" and "ensure uniformity" – in other words, making it look more like the regular judicial system – exactly prove our point that the regular judicial system should rule unchallenged.

The proposal contains no further provisions on the functioning of the appellate body, its constitution, jurisdiction, or how leave to appeal would be granted. The lack of any comprehensive plan for the appeal mechanism suggests that its primary function is merely then to "increase legitimacy" – i.e. public confidence – in ISDS by constructing a facade of the sort of functions one would expect to find in a judicial system, albeit without any of the qualitative standards or substantive rules that might ensure that fundamental principles of law are respected or applied.

The CETA reference text provided mentions that "the committee on services and investment shall provide a forum for the parties to consult on issues relation to this section, including […] whether, and if so, under what conditions an appellate mechanism could be created…" This creates further uncertainty, partly by leaving it up to the committee on services and investment to take the issue forward, and partly by allowing this committee to bypass the right of scrutiny of parliaments and citizens.

The problem of lack of uniformity and consistency in ISDS rulings is complex and relates not only to the interpretation of single treaties but also to the interpretation of identical provisions in various different treaties. The ad-hoc nature of ISDS tribunals, as well as the variety of treaties under which claims are brought, has resulted in arbitrators simply cherry-picking precedents from ISDS case law in order to justify their decisions, without any systematic or comprehensive review which would ensure consistency or predictability of the law. It is unclear precisely how the decisions of the appellate body under the TTIP agreement would operate in the wider sphere of this case law. The mechanism may therefore - contrary to the Commission's stated intention - exacerbate this problem and create even greater inconsistency in ISDS rulings.

Even with the implementation of the Commission's proposals, the ISDS system would not to be fit to provide either consistency of rulings or an effective or meaningful recourse to appeal which would guarantee states' right to regulate. The ISDS mechanism should therefore be excluded from the TTIP agreement.

The Commission's proposals for an appellate mechanism do not ensure consistency, predictability or legal correctness of the agreement, unlike it is guaranteed in the normal court systems. The fundamental instability brought by the introduction of the ISDS mechanism remains, which is why ISDS should be excluded from TTIP and all other free trade agreements including CETA.

C. General assessment

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?

As an overarching comment, we want to express our strong disagreement with the European Commission objectives and approach in relation to the inclusion of investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the investor-state dispute settlement (ISDS) mechanism. We believe that the proposed reforms will not solve any fundamental flaws of ISDS, and in our view, they never can, since the whole concept of ISDS undermines the rule of law by bypassing regular courts. Hence, ISDS should be excluded from TTIP and the Comprehensive Economic and Trade Agreement (CETA).

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?

The proposals put forward by the EU Commission do not amount to a reform of the ISDS system, but a mere tinkering with the sorts of clauses typically found in existing investment agreements. The Commission's proposals may be characterized as an attempt to add gloss to the ISDS system, while failing to meaningfully address key criticisms of it.

It is noteworthy that the entire structure of this consultation is designed to suggest that the Commission's proposals are progressive in comparison to existing agreements. The description of approaches in "most investment agreements" largely ignores the many significant developments in investment treaty-making over the past fifteen years and the spread of new agreements and model agreements which attempt to balance investment protection with standards of investor conduct, and to reduce or wholly exclude the scope for ISDS claims.[30]

In the Commission's approach, meaningful attempts to address inherent imbalances in the system are overall lacking. The proposals hardly take into account the benefit of prior ISDS experience or the wealth of available legal literature and policy tools, such as those developed by UNCTAD. For example, the failure to require investors to exhaust domestic remedies means that the systematic privileging of foreign investors under ISDS is maintained. The lack of any extensive, substantive standards of corporate social responsibility for foreign investors is similarly lamentable. Moreover, the inclusion of a general right to regulate in the public interest only in the Preamble of the reference text

[30] *SADC Model Bilateral Investment Treaty Template and Commentary*, South African Development Community (2012) available at:
< http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf >; UNCTAD Investment Policy Framework for Sustainable Development (2013), available at:
<http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf>

effectively neither establishes nor enhances this right.[31]

The Commission's proposals do not in any way address the central concerns raised by critics of ISDS, which involve structural bias and a threat to democratic processes. Given the serious nature of these concerns, the proposals are wholly inadequate and present a weak safeguard against the well-documented risks that arise with ISDS litigation. It is entirely foreseeable that the proposed clauses will be easily navigable by the small clique of experienced arbitrators and lawyers who dominate the ISDS circuit, who will strive to ensure that the ISDS system continues to serve those who are currently its primary beneficiaries: namely, corporations and the lawyers themselves, over the back of those who pay the bill – taxpayers.

Finally the consultation is making reference to texts produced in the context of the EU-Canada trade agreement (CETA), while it remains unclear whether this agreement has been fully finalised. Civil society is also neither in a position to assess whether all of the propositions presented in this document will be re-used exactly in the same format in the TTIP negotiations, nor whether the US is supportive of such proposals. What comes out of the negotiations between the EU and the US on investment protection cannot be predicted at the time of writing.

Therefore, the only way to ensure predictability and consistency around investment protection is to exclude ISDS from TTIP and all other free trade agreements including CETA.

Do you see other ways for the EU to improve the investment system?

Many experts, academics, organizations and even EU member states regard the inclusion of ISDS in the context of transatlantic investments between Canada, the United States and the EU as unnecessary. Moreover, the inclusion of an ISDS mechanism in the TTIP agreement presents a significant financial and democratic risk. It is estimated that, proportionate to the level of investment between the US and the EU, up to twenty ISDS claims against EU states could be reasonably expected under the TTIP per year.[32]

In addition, as explained above (see question 6), there are fundamental doubts about the compatibility of ISDS mechanisms with the exclusive competence of the EU Court of Justice to interpret EU law and with that Court's exclusive jurisdiction over non-contractual liability claims against EU institutions.

In the light of the above, ISDS mechanisms should be excluded from the agreement. US investors should avail themselves of the complete set of remedies available within the domestic judicial systems of EU member states. These judicial systems already abide by the fundamental legal principles which this treaty chapter purportedly intends to extend to investors. ISDS is therefore unnecessary. Where EU states' judicial systems fall short of the standards which are purportedly aspired to in the EU's approach to TTIP negotiations, the EU should concern itself with rectifying these deficiencies and improving these judicial systems for the benefit of all under their jurisdiction, and should not simply

[31] Nathalie Bernasconi-Osterwalder and Howard Mann, 'A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"', International Institute for Sustainable Development (2014), available at: <http://www.iisd.org/pdf/2014/reponse_eu_ceta.pdf>

[32] Prof. Dr. Markus Krajewski, 'Zu Investitionsschutz Und Investor-Staat-Streitbeilegung Im Transatlantischen Handels Und Investitionspartnerschaftsabkommen (TTIP)', der Bundestagsfraktion Bündnis 90/Die Grünen (2014), available at: < www.gruene-bundestag.de%2Ffileadmin%2Fmedia%2Fgruenebundestag_de%2FVeranstaltungen%2F140505-TTIP%2FKurzgutachten_Investitionsschutz_TTIP_Endfassung_layout.pdf&ei=dYyJU9mIFcLZPMLbgcAJ&usg=AFQjCNGKultdmsCFS2RcOcAeP2ycF8OsYQ&sig2=bQRqtxAP2zOzyDO05DYuLw&bvm=bv.67720277,d.ZWU>

outsource the legal claims of foreign corporations to privately constituted courts lacking in any democratic accountability. Legal risks should be taken away by reform of the judicial system, not by creating a parallel one that undermines it.

The Commission should furthermore commit to excluding any ISDS mechanism, not just in the TTIP agreement, but also in CETA and all future international trade and investment agreements. In recognition of the concerns about ISDS expressed in the responses above, a number of states have already rejected any future commitment to ISDS in their investment policies, and it would be prudent of the Commission to do the same.

Are there any other issues related to the topics covered by the questionnaire that you would like to address?

The manner in which this consultation is being conducted is itself illustrative of a lack of genuine willingness on the part of the Commission's to provide a meaningful space for public opposition to the inclusion of ISDS in TTIP. The design of the consultation questions is overly legalistic - leading to the exclusion of any potential participants not previously versed in trade, investment or ISDS issues - and moreover presumes the inclusion of an ISDS mechanism in the final agreement. Scant opportunities are provided for participants to object to the ISDS mechanism generally, only when reaching this last question (number 13) of the 44-page technical document that the respondent has the chance to express his/her broad views on the system.

The Commission's commitments to transparency described in its approach to ISDS in the TTIP agreement are also highly unpersuasive, given the opaque nature of the TTIP and CETA negotiations as a whole. It is questionable to what extent these commitments can be taken seriously when the Commission has gone to lengths to prevent the publication of key negotiation documents. It is also troubling that the consultation on ISDS on TTIP treats the CETA agreement as concluded, despite the fact that it has yet to be ratified by individual EU member states. Furthermore, the timing of the consultation prompts questions around the lack of consultation on CETA and the limited nature of this consultation, which deals exclusively with ISDS and investment protection issues. Other aspects of both the TTIP and CETA agreements constitute issues of equally significant public interest, on which EU-wide consultations could and should be undertaken.

For more information please contact:
Cecile Toubeau
T&E
Cecile@transportenvironment.org