Irish Congress Trade Unions

Response to the EU Commission

Public consultation on modalities for investment protection and ISDS in TTIP

July 2014

Overview

The Transatlantic Trade and Investment Partnership (TTIP), is a proposed trade deal between the US and the EU. It is currently the subject of intense negotiations and given the scale of the two economies, which together account for more than 50 percent of world GDP and one-third of global trade flows, the sheer magnitude of the potential deal means there is a lot at stake. The stated aim of TTIP is to provide a boost to the EU economy, and create jobs for citizens. There are numerous economic forecasts of the benefits of the deal however these forecasts may be exaggerated.

However the TTIP is about far more than trade. The agreement under discussion will tie governments' hands in many areas that are only loosely related to trade. It does this in six ways

1) TTIP aims to remove or reduce tariff barriers but not just taxes on good on goods and service, instead the main focus of TTIP is removing or reducing 'non tax barriers' (NTBs) such as regulation. This means, to be successful, regulations with regard to chemicals, pharmaceuticals, food environmental protection, patent protection for drugs, local government purchasing, public services and labour rights must be removed or reduced under TTIP.
2) Where 'NTBs' cannot be removed or reduced TTIP plans to harmonise the regulatory standards, the plan is to accomplish this by means of mutual recognition of standards. There is a concern that higher regulatory standards will be undermined by mutual recognition of the lower standard, for example the EU uses the 'precautionary principle' that requires where proof that new products causes no harm before it can be marketed or used in the workplace, there are no such safeguards in the US.
3) TTIP aims to further liberalise the trade in services, including public services. It is not clear what public services will be included and whether any public services will be ruled out of the TTIP provisions.
4) A central concern about TTIP is the threat to democracy, labour rights and public services posed by additional 'investor protections' these allow investors to challenge state actions which they perceive as 'expropriation' and' indirect expropriation', i.e. threatening their investment.
5) Investor protections do not automatically prevent the EU or a Member State from adopting laws in the future, nor will it necessarily mean that States have to pay compensation to investors whenever doing so. However, the results of companies being able to sue for compensation and the resulting cost to the exchequer are likely to have a significant chill factor resulting preventing any new regulatory initiative and effectively preventing the reversal of privatisations.
6) Companies who launch a claim under the enhanced investor protections do so not in courts of law but in secret and unaccountable private arbitration known as 'ISDS' Investor State Dispute Service. Usually a three person tribunal comprised not of judges but lawyers who specialise in company law. Their decisions are final and binding. There are no matching rights or mechanisms for citizens, workers or communities harmed or abused by investors' projects and products.

The Irish Congress Trade Unions is not alone in raising concerns, the trade unions throughout the EU and US have called for improvements to TTIP with AFL-CIP President Trumka stating that 'Trade policy for the privileged few must end. TTIP must work for the people, or it won't work at all. " and ETUC General Secretary, Bernadette Ségol, stating that "European and American trade unionists are united in supporting a free trade deal between the EU and US only if it promotes workers' rights, generates quality jobs, upholds public services and procurement, democratic decision making and international conventions."

The ETUC and AFL-CIO have agreed that the Transatlantic Trade and Investment Partnership currently being negotiated between the US and EU must

- ensure that the core conventions of the International Labour Organisation are adopted and enforced by all parties -including the freedom for workers to organise a union, collectively bargain with employers and strike when necessary
- reject all provisions, including investor-to-state dispute settlement (ISDS), that allow corporations, banks, hedge funds and other private investors to circumvent normal legislative, regulatory and judicial processes
- not undermine the role of the state in nurturing innovation, economic development and technological transformation
- not constrain national and local choices about the provision of public services, notably healthcare, education and environmental protection
- maintain the right of governments to make choices about procurement that alleviate joblessness, promote environmental responsibility, or address social injustices
- align with international agreements to protect the environment, including commitments to slow catastrophic climate change
- not be used to set a permanent ceiling on workers' rights, environmental protections, or any other public interest measure—instead it must set up mechanisms that will support ever-improving norms that will help raise standards of living for all
- be negotiated and agreed through a transparent, democratic process

The Irish Congress Trade Unions supports these demands and we are calling for an overhaul of the TTIP proposals to protect the right of governments to regulate, to maintain existing regulatory protections and remove provisions that will allow the opening up public services to liberalisation and ensure that employment and labour rights such as collective bargaining and collective action cannot be considers as a bar to trade. Importantly we are calling for the removal of additional investor protections and ISDS.

The following submission is in response the EU Commission public consultation on the ' modalities for investment protection and ISDS in TTIP'.

This Public Consultation was an online consultation and only submissions made on-line will be considered by the Commission. The Consultation is restricted to two aspects of TTIP namely the 'investor protection' and ISDS provisions. The consultation does not ask whether

including investor protection or ISDS in TTIP is desirable; rather it simply asks for feedback or amendments to the basic idea.

There are 12 questions, couched in very technical language and only the final question allows for a more comprehensive view to be expressed. Each answer is limited to 4,000 characters including spaces.

THE European Trade Union Confederation made a submission and Congress took the approach of supporting the comments made by the ETUC submission and then adding additional comments, as a means to address the limited space available for comments. For ease of reference the ETUC Submission follows immediately after the ICTU submission.

Response the EU Commission
Public consultation on modalities for investment protection and ISDS in TTIP

July 2014

Question:1

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?

If you do not want to reply to this question, please type "No comment".

* (compulsory)

The Irish Congress Trade Unions (ICTU) supports the position of the European Trade Union Confederation (ETUC) and we would like to make the following points in respect of Ireland.

There is no justification for including additional investor protection provisions or ISDS arbitration in TTIP.

The Commission's own figures show that in 2012, the foreign direct investment from the US in Europe was 1.5 trillion euros, while Europe's in the US was 1.6 trillion euros. If over 3 trillion euros have been invested without ISDS, there is clearly no problem to solve here

There is no evidence that investors have ever lacked appropriate legal protection through the legal system in the EU or Ireland.

There is no bilateral investment treaty between the US and Ireland and yet US investors are a significant presence in Ireland clearly demonstrating that investors seem to be satisfied with the rule of law in Ireland. Moreover it is unlikely that the exclusion of an investment protection chapter in the TTIP would significantly impede the conclusion of an agreement, particularly as trade and investment relations between Europe and North America traditionally do not involve investment protection agreements. In addition, countries such as Australia have shown that a country can credibly exclude investment protection in a trade agreement with one country (e.g. US-Australia FTA) and still include it in an agreement

with another country (e.g. Korea-Australia FTA). It is no plausible argument why the EU could not follow a similar path.

ISDS provisions bypass existing judicial remedies in favour of secret and unaccountable dispute settlement mechanisms and as such may be contrary to the Constitution of Ireland. Under the Constitution of Ireland, the State, is answerable before the courts for wrongs committed against companies for breach of their constitutional or legal rights. The Constitution is the canopy under which the way in which laws must be made (Article 15.2.1) and justice must be administered 'in courts established by law by Judges appointed in the manner provided by this Constitution' (Article 34)

The Constitution may only be altered following a referendum, provision for which is made in Article 46.

Although the negotiation of the TTIP agreement is being undertaken by the EU the agreement is separate from the Treaty Functioning of the European Union. Further arguments can be made that ISDS violate the exclusive jurisdiction of the European Court of Justice, and as such are not compatible with EU Treaties.

ISDS is an unfair one-way mechanism that is not fair to states, since only investors can initiate claims on their own terms; states are limited to making counter-claims, likewise there are no matching rights or mechanisms for citizens, workers or communities harmed or abused by investors‘ projects and products to launch claims is the ISDS arbitration.

The ICTU therefore argues that the inclusion of investor protection provisions in TTIP is fundamentally misguided, wrong and inequitable. The solution is to drop additional investor protections and ISDS from TTIP completely, and to allow the national legal systems to do their job relying on the existing rule of law.

Under investment protections companies are able to bring claims for damages against the host country even if they have no contract with its government. In addition, investors are permitted to bypass domestic courts and take their claims direct to ISDS breaching the traditional requirement that local remedies must be exhausted before having recourse to international forums.

There is nothing to prevent domestic companies reinventing themselves as ‘foreign’ investors simply in order to take advantage of ISDS privileges and sue their own government.

Question:2

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.

If you do not want to reply to this question, please type "No comment".

* (compulsory)
The Irish Congress Trade Unions fully supports the submission made by the ETUC and we wish to stress the following points in the context of Ireland.

Congress argues that provision should be made in TTIP to allow Member States to defend what may be discriminatory measures taken for specific legitimate policy goals provided that the measures do not constitute a disguised restriction on trade.

It should not be possible for a foreign investor to claim discriminatory effect because working conditions are more protective in a given EU Member State than in the investor's country of origin, thereby allegedly placing the investor at a competitive disadvantage. Other measures such as the protection of public services and other social clauses should be included in the part exception clause.

Exemption clauses must be provided such as, public order and public security measures, health and safety measures and environmental measures and it is absolutely essential that labour law and collective agreements are also covered by exception clauses.

Question:3
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?

If you do not want to reply to this question, please type "No comment".
* (compulsory) -
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The ICTU supports the submission made by the ETUC and we wish to raise the following, additional concern.

'Fair and equitable' has become a catch-all clause under which investors have dramatically expanded the investor protections. The 'fair and equitable treatment' standard has been repeatedly interpreted under ISDS to mean that an investor must be compensated for any government action that undermines an investor's expectations with regard to profit. The amount of loss may be an imputed loss as well as a real loss.

Attempts by the US in its recent free trade agreements to limit ISDS arbitrators' continuing imposition of new obligations on States using the 'fair and equitable' standard has proved ineffective, as ISDS arbitrators have discretion and the regime provides no outside appeal to rectify such conduct.

Under the TTIP proposals additional ways for investors to challenge regulations are also anticipated, for example in the explanation text the EU Commission proposes that a state

could also be held responsible for claims from investors on grounds of religious belief. The recent ruling of the US Supreme Court in Hobby-Lobby highlights the far reaching implications of including this type of protection for corporations. It is reasonably foreseeable that this inclusion will open the way for corporations to object on religious grounds to all manner of citizen and in particular worker rights, raising the possibility that discrimination and practices contrary to the EU Charter of Fundamental Rights and ILO Conventions, might be cloaked as religious practice to both escape legal sanction and claim compensation for compliance.

Arguments to include such provisions such as these in TTIP should hold no sway, rather the opposite, TTIP should require uniform compliance with the law of the State ensuring respect for equality between men and women and the EU Charter of Fundamental Rights in addition TTIP should include a robust mechanism of sanctions under the Treaty for companies for any such breaches.

Question:4
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.

If you do not want to reply to the question, please type "No comment".
* (compulsory)

The ICTU supports the position of the ETUC and we wish to raise the following.

It is difficult to make recommendations on the provisions on expropriation without seeming to legitimise an idea that trade unions strongly believe should not be included in TTIP.

Indirect appropriation is particularly open to abuse. Direct expropriations, which entail the outright seizure of a property right by the State are unlikely to be main the source of claims, companies are far more likely to raise claims for compensation in respect of a regulatory measure of a state, which does not entail the direct transfer of the property right, but might be considered by the arbitrators as equivalent to expropriation (indirect expropriation).

This provision could threaten almost any means by which governments might seek to defend their citizens or protect labour rights or public services.

The proposal to *'make it clear that non-discriminatory measures taken for legitimate public purposes, such as to protect health or the environment, cannot be considered equivalent to an expropriation, unless they are manifestly excessive in light of their purpose'* . This does not provide any meaningful protection from abuse. It still enables companies to make a claim against the State for 'indirect expropriation' on the basis that the regulatory measure, for example an employment right, is having an impact on the economic value of their investment. For example, the government of Egypt is being sued for compensation under investor protections for increasing the minimum wage.

In addition the inclusion of 'manifestly excessive' in the proposed exclusion clause provides companies with an additional avenue of argumentation. 'Manifestly excessive' means that companies can argue that a regulation, such as the entitlement of employees to paid parental leave, places a burden on them while the less excessive option they will argue, to meet the objective of the Regulation, would be for the State to meet the costs out of public funds, leaving once again the general public, to pick up the tab. This line of argumentation was shown to be very successful in the US Supreme Court in Burwell v. Hobby Lobby decided 30th June 2014.

Moreover, in States where investor protections such as those proposed under TTIP exist, companies are launching pre-emptive claims that aim to stop or significantly delay the enactment of Regulations significantly interfering with the democratic processes. Investor protection provisions were invoked against Slovakia when it sought to bring health insurance back into the public sector and against Australia for legislating for plain cigarette packaging.

These provisions will make it virtually impossible for any privatises public services to be taken back into public service provision.

Question:5

***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?*

If you do not want to reply to this question, please type "No comment".

* (compulsory)

The ICTU fully supports the position of the ETUC and we want to raise the following additional points in respect of Ireland.

The EU Commission consultation document is based on a false premise, namely that there is a need to balance the "right to regulate" with the "right to investment protection." There is no balance to be achieved, because the former must clearly take precedence in a democratic, sovereign state.

The proposals as outlined in the Consultation document are of grave concern to Congress as there seems to be no intention to exempt, from the threat of a claim of compensation under indirect expropriation, public interest objectives such as fundamental labour rights, protection of safety, health and welfare of workers, rights of employees and social legislation from the scope of this chapter.

TTIP needs to recognise that investment protection is already adequately provided for under the laws of the State and instituting a parallel system "guaranteeing" additional protection is a fundamental attack on sovereignty - and on democracy. In democratic societies, uniform application of the law is necessary and rather than undermine this principle, TTIP must require international investment to comply with domestic regulations even if they have negative impacts on private business activities.

Under TTIP as it is currently constructed, States maintain the right to regulate" but it will be severely constrained, subsumed under the overall priority of reducing barriers and curtailed by the threat of big payments of public money to transnational corporations or, even more seriously, legislation being abandoned for fear of such pay-outs.
The inclusion of additional investor protections does not automatically prevent the EU or a Member State from adopting laws in the future, nor will it necessarily mean that States have to pay compensation to investors whenever doing so. However, the results of ISDS proceedings are unpredictable. Some arbitration tribunals have taken a restrictive approach to governments' regulatory freedom; others have deemed government regulation not to violate investment law. These uncertainties result in considerable risks for democratic government and the rule of law exacerbated by the fact that ISDS proceedings take place in private. It is reasonably foreseeable the chilling effect this will have, especially on smaller States such as Ireland, being able to take the lead on any regulation. For example, Ireland was the first to introduce regulation to ban smoking in workplaces and public buildings, under the enhanced investor protections envisioned under TTIP it is likely that a claim for compensation would have been initiated against Ireland on foot of this regulation.

Public services must be explicitly excluded from the scope of TTIP. In particular we want to ensure that TTIP adopts a 'positive list' approach towards liberalisation commitments is taken, so that only services expressly specified in the agreement can be liberalised, rather than the 'negative list' approach, which means that all public services are potentially included except those that have been specifically excluded.

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

Question:6

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.

If you do not want to reply to this question, please type "No comment".

* (compulsory)

The ICTU supports the position of the ETUC and we wish to stress the following.

Congress' view is that the ISDS system undermines national sovereignty and democracy and the EU Commission proposals to make ISDS more transparent do not render it legitimate. Importantly no compelling argument has been made to explain why TTIP needs to include private arbitration at all. Where ISDS has been included in other trade agreements, it is on the basis that courts may be biased or lack independence", but in TTIP which countries courts are being talked about?

Where they have been established, ISDS processes are often conducted in secret, are not based on existing case law and have no right of appeal significantly undermining governments' ability to defend their actions.

ISDS is unacceptable and possibly unconstitutional as ISDS allows the State to be sued, and the tax payer incur substantial liabilities by an ad hoc, off shore tribunal composed of unaccountable lawyers making decisions in private. Under the Irish Constitution, the State, is answerable before the courts, the Constitution also provides that laws can only be made by the Parliament (Article 15.2.1) and that justice can only be administered 'in courts established by law by Judges appointed in the manner provided by this Constitution' (Article 34)

Although the negotiation of the TTIP agreement is being undertaken by the EU the agreement itself is not an 'EU Treaty' so ISDS process are not required to take into account the EU Charter of Fundamental Rights or the European Convention on Human Rights in their determinations. It is also arguable that ISDS violate the exclusive jurisdiction of the Court of Justice of the European Union and as such are not compatible with EU Treaties.

Question:7

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.

If you do not want to repy to this question, please type "No comment".

* (compulsory)

The Irish Congress Trade Unions fully supports the submission of the ETUC and we would like to highlight the following

Integrating ISDS into domestic court system is highly problematic and does not allay our concerns about this this being an undemocratic mechanism.

Under the proposals, investors can still choose ISDS to launch challenges that have no basis in domestic law, as there is no requirement that domestic remedies be first extinguished prior to filing such a case. Examples of this include the investor-state suit related to Germany's decision to phase out nuclear power.

Conflicts of the two regimes can be anticipated, for example where an EU member state introduces regulation on foot of a Directive the State will be exposed on the one hand to Investor claims for loss of profits under ISDS and on the other to infringement proceedings being initiated by the EU Commission for non-compliance with the Directive. It is also unclear in these circumstances is it the EU or the Member State that pays out under ISDS?

It is also the case that Regulations and government actions that have withstood challenge by investors in domestic courts can be re-litigated before ISDS tribunals. This is now occurring with an investor-state attack on Australian's cigarette plain packaging rules, which the Australian Supreme Court validated after a series of Phillip Morris challenges in Australia's court system.

The ICTU concludes that rather than create these legal and financial uncertainties TTIP should use the robust judicial systems and property rights protections on both sides of the Atlantic. These have proved sufficient in the past to resolve any claim of unfair treatment by States. Our view is that state-state and state - EU dispute resolution (rather than investor - state or investor- EU dispute resolution) is the appropriate mechanism for resolving legitimate trade-related disputes.

Question:8

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?

If you do not want to reply to this question, please type "No comment".

* (compulsory)

The ICTU supports the position of the ETUC and we would like to raise the concern that ISDS tribunals are usually decided by a tribunal of three for-profit arbitrators. Unlike judges, arbitrators they do not have a flat salary, but are paid per case, earning daily fees. Unlike national courts there is no system of judicial review nor is there any appeal. ISDS Arbitrators are free to represent the companies in the sector and act as ISDS Arbitrators.

The proposed Code does not address fundamental Constitutional difficulties associated with ISDS.

Question:9

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.

If you do not want to reply to this question, please type "No comment".

* (compulsory)

The ICTU supports the position of the ETUC and we would like to highlight that ISDS has already escaped its original justification, i.e. to essentially protect from governments with unreliable judicial systems unjustly appropriating the property of investors. The number of such cases is growing exponentially, with fewer than 50 litigated from the 1950s until 2000 but now there are 514 known cases as of the end of 2012.
In a one-sided system where only the investors can bring claims, this creates a vulnerability as it will be difficult for Arbitrators to take a decision not to consider the case on the basis that it is frivolous or unfounded. It is foreseeable that this will lead to additional ISDS Arbitration.

The growing number of investor-state cases, rulings and awards against states, plus the broad range of policies attacked has created an environment in which it will be expensive and time consuming for governments to mount arguments that the case should not be considered under ISDS as it is 'frivolous' or unfounded.

It is worth pointing out that in some instances investors have even launched proceedings following unfavourable court rulings.

Question: 10

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?***

If you do not want to reply to this question, please type "No comment".

* (compulsory)?

The ICTU supports the submission made by the ETUC.

Question:11

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?

If you do not want to reply to this question, please type "No comment

The ICTU supports the position of the ETUC and EU and agrees with the Commission that there is a benefit to the parties to include binding definitions on specific points. In this regard we have recommended that TTIP should have binding provisions to ensure

- ensure that the core conventions of the International Labour Organisation are adopted and enforced by all parties -including the freedom for workers to organise a union, collectively bargain with employers and strike when necessary making it clear that employment and labour rights such as collective bargaining and collective action cannot be considers as a bar to trade.
- ensure that EU Directives and equality as between men and women is respected by all parties and capable of being enforced by sanctions under TTIP
- not undermine the role of the state in nurturing innovation, economic development and technological transformation
- not constrain national and local choices about the provision of public services, notably healthcare, education and environmental protection
- maintain the right of governments to make choices about procurement that alleviate joblessness, promote environmental responsibility, or address social injustices
- align with international agreements to protect the environment, including commitments to slow catastrophic climate change
- not be used to set a permanent ceiling on workers' rights, environmental protections, or any other public interest measure—instead it must set up mechanisms that will support ever-improving norms that will help raise standards of living for all.

Question:12
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.

If you do not want to reply to this question, please type "No comment".

* (compulsory)

The ICTU supports the submission of the ETUC and we would like to make the following observation. The EU Commission proposal provides very sketchy on what the nature, role, function and powers of the Appellate body will be, it seems to simply provide for 'a standing Appellate Body' to hear appeals on issues of law covered in the ISDS Tribunal's decision or award and legal interpretations developed by the Tribunal.

Therefore there is inadequate information to make an assessment. It is unclear if the Appellate Body is an existing Court or will it be established as an Independent Court of Law or is what is envisioned another form of private Arbitration.

There seem to be some serious omissions such as the approach contains no provisions on obligations of investors or the promotion of human rights, labour rights and environmental standards.

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?

If you do not want to reply to these questions, please type "No comment".

*** (compulsory)**

Moreover, any company that feels for whatever reason that it needs better protection than the EU and US courts are able to offer is at liberty to take out insurance to provide it, for example from the World Bank. ISDS is a classic attempt to socialise risk while privatising profit,

ETUC SUBMISSION

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?

The scope of the EU's investment chapter is based on the definitions of the terms "investor" and "investment". Both definitions are very broad.

The definition of investment is "asset-based" and covers enterprises, equity participation in an enterprise, debt instruments, interests arising from concessions and contracts, intellectual property rights, property and claims to money or claims to performance under a contract. This definition therefore includes portfolio investment. We oppose this. A lasting or significant interest in a foreign enterprise is not necessary. Investments which are not made in accordance with the applicable law at that time are not considered protected investments. However, there is no requirement that the investment does not cause or contribute to serious adverse human and labour rights impacts.

The definition of an investor is limited to enterprises with substantial business activities. Hence, “mailbox companies” which establish a minimal presence in a country would not be covered by the chapter.

More generally, international investment law should:

- protect domestic and foreign investors engaged in sustainable investment activities against arbitrary state actions
- promote the rule of law and the protection of property rights in order to foster sustainable development and growth in all countries
- be compatible with domestic regulations aimed at legitimate public interests even if they have negative impacts on private business activities
- be integrated into domestic legal systems and support the development and maintenance of an impartial and functioning judicial system which is compatible with international human rights standards.

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.

The non-discrimination treatment clauses (national treatment and most-favoured nation treatment) cover de jure and de facto discrimination. There is also no further definition of the scope of de facto discrimination. In particular, even general laws which have de facto a discriminatory effect could be a violation of the non-discrimination clauses.

The national treatment obligation applies to “the establishment, acquisition, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory”. In other words, national treatment covers both pre- and post-establishment phases. However, this does not amount to a right to establishment which depends on the scope of market opening in the relevant sector. In the CETA and potentially also in the TTIP, this will be regulated in a separate chapter on establishment.

National treatment and most-favoured nation treatment are subject to general exceptions modelled on the basis of the relevant WTO provisions (Art. XX GATT and Art. XIV GATS). This would allow states to defend discriminatory measures taken for specific legitimate policy goals provided that the measures are necessary and that their application is not discriminatory and does not constitute a disguised restriction on trade. It should be noted that these general exception clauses only apply to the non-discrimination provisions, but not to the rest of the agreement. In other words, a measure amounting to an indirect expropriation could not be justified on the basis of the exception clauses.

Furthermore, the scope of the exception clauses is limited to those policy goals mentioned in Art. XX GATT and Art. XIV GATS. Generally, these include public order and public security measures, health and safety measures and environmental measures. It is absolutely

essential that labour law and collective agreements are also covered by exception clauses. It should not be possible for a foreign investor to claim discriminatory effect where working conditions are more protective in a given EU Member State than in the investor's country of origin, thereby allegedly placing the investor at a competitive disadvantage. Other general measures such as subsidies, procurement, tax, or the protection of essential public services should also be part of an exception clause.

The EU approach seeks to exclude the import of standards from other investment agreements through an MFN clause. However, the exclusion only applies to procedural matters and not to substantive clauses. This presents a major problem, because the restrictions of Fair and Equitable Treatment and indirect expropriation proposed in the EU document could be circumvented if the MFN clause does not exclude the importation of substantial standards from other investment agreements as well.

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?

The EU tries to limit the FET standard by reducing it to specific cases such as denial of justice, fundamental breach of due process, manifest arbitrariness, and targeted discrimination on manifestly wrongful grounds or abusive treatment of investors. This would reduce the scope of this clause which has been used to curtail a number of regulatory policies in past investment cases. However, FET is not limited to its core standard under customary international law. In addition, the parties may amend the list of specific cases which might amount to a breach of FET.

The term "full protection and security" is limited to the protection of the physical security of investors and covered investments. This is a useful restriction.

There should at least be a clear statement that invertor's expectations are only relevant if they are based on formal statements issued by competent authorities and do not prejudge the legislative process.

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.

The EU approach covers direct and indirect expropriation. These terms are further defined in an Annex on Expropriation. Indirect expropriation is a measure or a series of measures with an effect "equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure." This is a standard and broad definition of indirect expropriation. It is further specified by a list of factors which should be taken into account when determining indirect expropriation. Furthermore, measures designed and applied to protect legitimate public

welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations except in rare circumstances.

These definitions clarify the scope of indirect expropriation and reject an understanding of indirect expropriation which is only based on the effects of the measure. However, the definition is still relatively broad and is not limited to cases “in which a host state appropriates an investment for its own use, or the use of a third party” as suggested by ETUC.

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 mentioned above, the general exclusion clauses only apply to non-discrimination clauses (national treatment and MFN), but not to other provisions or to chapter in general. In addition, they only cover a limited set of policy goals.

There is no clause which would exempt public interest objectives including fundamental labour rights, protection of public, health, security, rights of employees, social legislation, human, rights, financial market regulation, industrial, policy and tax policy and environmental protection from the scope of the investment protection chapter.

However, it should be noted that the EU approach does not contain a so-called umbrella clause. International investment law should in principle be compatible with domestic regulations aimed at legitimate public interests even if they have negative impacts on private business activities.

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.

The EU Commission proposes to include the 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-State-Arbitration as mandatory in any ISDS. This would require the publication of all relevant documents (briefs and statements of the parties including annexes and all decisions of the tribunal). Furthermore the Tribunal would have the right to receive amicus curiae briefs. Finally all hearings would be public.

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.

“Fork-in-the-Road”- and “No-U-Turn”- clauses exclude parallel proceedings before investment tribunal and domestic court. Investors cannot bring claim to ISDS if there is a pending domestic case and must waive right to bring claim. However, if domestic legal system made a final judgement, investor can bring claim.

This raises the following problem: What if a parent company lodges ISDS claim while domestic subsidiary raises claim in domestic courts. Is this excluded? E.g. Vattenfall Sweden would address investment tribunal while Vattenfall Germany files complaint to German courts.

Regarding the requirement of the exhaustion of local remedies unless these are not available or effective, one option could be to require the investor to prove that he or she cannot expect effective remedies from the domestic legal system, because these remedies are not available to him or her and may not offer effective remedies.

International investment law should in principle be integrated into domestic legal systems and support the development and maintenance of an impartial and functioning judicial system which is compatible with international human rights standards.

An alternative investment protection system could be built on a number of ideas including reliance on specific state-investor investment contracts. Another option could be to include chapters on judicial reform and the rule of law international trade and investment agreements should and offer cooperation and support for countries which are struggling with these issues. For example, it might be worth exploring this avenue in negotiations with Thailand, Vietnam or other countries. However, a trade agreement with the US does not need such a chapter, because the US legal system offers sufficient protection for economic actors including foreign investors.

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?

The EU approach foresees a TTIP Committee on Services and Investment which shall establish a roster of panellists to be used if parties cannot agree (no mandatory roster). The approach would require arbitrator experience in public international law, in particular investment law, but not domestic administrative law.
In order to avoid a conflict of interests, arbitrators shall comply with

- International Bar Association Guidelines on Conflicts of Interest in International Arbitration (only relate to individual conflict of interests, but not to systemic interest in upholding investment arbitration for the benefit of investors)

- Code of conduct for arbitrators adopted by Committee on Services and Investment (broad mandate in agreement, no specific guidance on what to avoid).

Therefore, the EU approach is insufficient because it fails to oblige the parties to adopt binding rules on arbitrator ethics and specify the contents of these rules.

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.

The EU included provision to quickly reject a claim which is manifestly without legal merit or which is unfounded as matter of law. This is already possible under ICSID Arbitration rules.

At the same time, there is no general "Investor Screen" which would exclude claims which would cause serious public harm or which concern areas such as taxation or financial regulation. This is a significant lapse.

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?

Filtering mechanism enables responding state to refer a matter which relates to financial services mechanism to the Financial Services Committee in order to determine if state could rely on prudential carve-out.

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?

The EU foresees the potential for the parties to the agreement to issue binding definitions on specific legal points.

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.

Proposal includes appellate Mechanism, but only for TTIP cases, not a general appellate mechanism for all investment cases.

The establishment of an appeals mechanism which would apply to all investment treaties and not only TTIP should be considered.

Finally, it should be noted that EU approach contains no provisions on obligations of investors or the promotion of human rights, labour rights and environmental standards.

Ends