TTIP – Investment protection and ISDS

BEUC response[1] to the European Commission's Public Consultation[2]

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1 This response is based on a TACD (Trans Atlantic Consumer Dialogue) analysis.

2 The text of the Public Consultation's questionnaire is available here: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

Investor - State Dispute Settlement (ISDS) is an arbitration mechanism usually included in international investment treaties to protect foreign investors from unlawful and discriminatory practices. In recent years ISDS schemes have allowed an exponentially growing number of costly claims by private firms, often big multinational companies, over public interest policies adopted by governments, such as consumer, health, labour and environmental issues.

Given the growing criticism on the inclusion of an ISDS scheme in the TTIP, in April 2014 the European Commission launched a public consultation asking the public for inputs over template ISDS provisions for TTIP, as contained in the CETA draft agreement text.

This document contains BEUC reply to the public consultation, which closed on 13 July 2014.

The main problems we highlight about ISDS schemes are:

- ✓ Claims are handled behind closed doors and decisions are kept secret in most cases. This allows unaccountable private tribunals to bypass well-functioning national court systems.
- ✓ The chances of dismissal of frivolous or unlawful cases are very limited.
- ✓ The impartiality and independence of arbitrators remains a major problem, as they often rotate between being 'judges' and bringing cases for corporations against governments, thereby creating inherent conflicts of interest.
- ✓ Consistency and predictability of decisions are not guaranteed due to the wide margin of interpretation left to arbitrators. Consequences can be particularly serious due to the absence of the possibility of appeal.
- ✓ Proceedings are hugely expensive and place a high burden on what are often cash-strapped governments and, by extension, the tax payer.
- ✓ Investors are increasingly using ISDS provisions to challenge and thus undermine legitimate public policy objectives such as controls on the sale of tobacco (See Philip Morris Asia vs. Australia case).

The potential risks for consumer interests posed by ISDS mechanism are:

- ✓ Consumer, health, labour and environmental regulations are regularly challenged as violations of 'investor rights'.
- ✓ Arbitrators are unaccountable and free to disregard or interpret jurisprudence and national consumer rights-related laws as they wish because the treaty provisions limiting their powers are very lax.
- ✓ ISDS can be a huge deterrent, especially for smaller countries, to pass legislation to protect consumers, public health and the environment for fear of being challenged by large companies (the so-called 'chilling effect').
- ✓ It allows foreign companies to demand financial compensation which represents significant burdens on states' public finances and ultimately means a waste of hundreds of millions of taxpayers´ money.
- ✓ It is discriminatory against national companies and consumers as it is accessible only by foreign investors.

Our key demands are the following:

- ✓ We warn against the inherent flaws of ISDS schemes and we advocate for the exclusion of ISDS schemes from TTIP and future trade deal: the system is too flawed to be fixed.
- ✓ We recognise the right of access to justice of foreign investors in cases of unlawful behaviour by the host State but we believe both the US and EU court systems are sufficiently equipped to address such cases in the most effective and efficient way.
- ✓ We ask the Commission to refrain from closing a trade deal between the EU and Canada (CETA) including an ISDS mechanism, while the results of the public consultation on ISDS in TTIP – based on the CETA ISDS provisions – are not available yet.
- ✓ We urge EU member states and the European Parliament to reject any final TTIP, CETA or future deal including ISDS provisions. If further investment protection is deemed needed with EU trade partners, the European Commission needs to look for alternatives.

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?

Preliminary statement:
BEUC opposes additional investment-related provisions and in particular the inclusion of an ISDS mechanism, which would elevate individual foreign investors to equal standing with signatory governments and grant them greater procedural rights than domestic investors who do not have access to this parallel legal track. Considering also that the EU and US have some of the most trustworthy domestic judicial systems to which investors have access, there is no need for additional such extrajudicial enforcement.

Substantive comments:
The definition of which investments and investors are subject to the substantive protections must be limited to forms of property and investors that would be granted similar substantive protections in both US and EU member nation laws. However, the definition of investment in past FTAs and BITs and in the exemplar text provided would extend the substantive property rights protections to categories of activities and instruments that would not be provided the same substantive protections in domestic law.

Of particular concern would be inclusion in the definition of an investment of vague concepts such as "assumption of risk", "commitment of other resources", "expectation of gain or profit", "certain duration" and even more generally "forms that an investment ***may take"***. Such highly subjective standards would grant excessive discretion in determining whether an actionable investment exists in the form of a veritable investment. While language should be added to make clear that such vague concepts are not to be used as a basis for determining whether an investment exists, a way to foreclose these risks would be to use definitions that require the commitment of capital or acquisition of real property or other tangible assets, so to avoid unintended ever-expanding categories of deemed investments.

A more general problem with attempting to define "investment" in an international treaty is the reality that the jurisprudence defining various property rights is a living doctrine. Even if a trade pact text were to include provisions that described the state of European property rights jurisprudence at any particular juncture, over time the pact could result in greater rights for foreign investors, as domestic jurisprudence continues to be refined. To solve this problem, a direct link to the domestic laws of the host country should be added. This could read: "investment means property, property right or property interest as defined under the applicable law of the respondent state at the time the alleged injury occurred."

Regarding the definition of an investor, requiring "substantial business activities" in the host country is a step in the right direction. However, "substantial" is not defined in the exemplar text, allowing for the possibility that companies with irrelevant shares of their business activities can lodge a claim or that foreign firms set up shell companies in a Party so as to launch an investor-state case against its policies or governmental actions. To foreclose these risks specific requirement of minimum percentages of annual average per capita employment of natural persons and purchases or sales of goods or services, and their relevant duration prior to the alleged injury must be explicitly defined so to avoid opportunistic "nationality planning". Another critical aspect is ensuring that nationals of a given country are not challenging their own country's regulations using offshore subsidiaries.

Denial of benefit provisions must also be tightened to ensure a firm has substantial business activities in the home Party and the burden of proving that any TTIP investor protection provision applies must be borne by the investor who must prove the tightened standards noted above (see, among others, the *Plama v. Bulgaria* case under the Energy Charter Treaty where the investor-state arbitral tribunal ruled that a government must affirmatively invoke the denial of benefits provisions).

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.

If an ISDS mechanism is included in the agreement, and if the referenced wording for the national treatment provision is kept, it would allow tribunals to interpret the text as a prohibition of regulatory actions resulting in *de facto* discrimination even when there is no facial or intentional discrimination involved. This interpretation could result in tribunal orders to compensate foreign firms for environmental, health and other public interest policies that are facially neutral but that have an inadvertent impact on foreign investors. For example, a governmental measure restricting hydraulic fracturing ("fracking") in natural gas production could be interpreted by a tribunal as a national treatment violation if most domestic energy companies did not yet use fracking as a primary method of gas extraction while the foreign investor launching the ISDS claim depended significantly on fracking. To limit national treatment claims against such facially non-discriminatory policies, the national treatment text should be explicitly limited to instances in which a measure is enacted for a primarily discriminatory purpose.

Regarding the MFN text, the attempt to prevent the "importation of standards" is positive. However, the clarification that MFN does not cover ISDS procedures "provided for in other international investment treaties and other trade agreements" would be advisable as to limit satisfactorily the ability of foreign firms to import greater procedural rights from treaties signed with third Parties. Moreover, more comprehensive language should bar foreign investors from importing the substantive rights afforded in such treaties. For example, the proposed text would appear to allow investors, upon request, to access the more expansive, earlier definitions of substantive foreign investor rights such as indirect expropriation and FET from an EU member state's earlier BITs. By doing so, the EU would expose itself to a broader array of investor-state challenges to domestic policies. The EC could close this loophole by explicitly excluding from the definition of "treatment" the substantive rights afforded in other BITs and agreements.

We want to see implemented the declared intention to explicitly provide an exception for consumer protection, citizens, health, safety, environmental and other public interest measures in this section, but the proposed importation of GATT Article XX and GATS Article XIV replicates weaknesses of those texts. Only 1 of 40 attempts to use these exceptions at the WTO has ever succeeded due to legal hurdles contained within the exception that would be replicated under the current proposal (https://www.citizen.org/documents/general-exception.pdf). For example, a government would first have to prove that the policy was designed to fulfil a public interest objective and that the policy was "necessary" for its fulfilment. An investor-state tribunal can demand high thresholds of necessity and it would have the discretion to require the State to prove that no less trade restrictive alternative measure existed and that the measure was not applied in a discriminatory manner or as a disguised restriction on investment, placing the State in the unenviable position of proving a negative. The EC should develop a more robust general exception that avoids these legal hurdles, particularly omitting any "necessity" test.

Finally, the proposed general exception is not actually generalized as it would not apply to the claims most frequently and successfully used in investor-state claims: "fair and equitable treatment" and expropriation. Of the ISDS cases brought under U.S. FTAs and BITs in which the tribunal ruled in favour of the foreign investor, 74 % of the claims were "successful" on the basis of FET violations (http://www.citizen.org/documents/MST-Memo.pdf). Halting tribunal rulings on the basis of such broad rights requires that public interest exceptions apply to those rights.

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 EC is correct to attempt to narrow the FET obligation, given the wide discretion that tribunals have employed in interpreting vague FET provisions as expansive obligations for respondent States, including obligations to maintain a static regulatory environment and to respond to investors' unlawful behaviour in a manner that the tribunal deems proportional.

However, the proposed text includes two extremely problematic provisions that replicate the flaws of prior pacts. First, the list defining FET includes "manifest arbitrariness" as a qualifying criterion. While the other criteria in the list are more precisely defined (e.g. "targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief), "manifest arbitrariness" is a more open-ended term that tribunals could interpret widely to rule against domestic measures taken in the public interest. For example, in *S.D. Myers v. Canada*, brought under the North American Free Trade Agreement (NAFTA), the tribunal concluded that a FET violation was one in which "an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective" (*S.D. Myers, Inc. v. Government of Canada*, Second Partial Award, Ad hoc—UNCITRAL Arbitration Rules (2002), at para.263). On the basis of this definition, the tribunal ruled that Canada had violated S.D. Myers' right to "fair and equitable treatment" by banning the export of a hazardous waste called polychlorinated biphenyls (PCB) that is proven to be toxic to humans and the environment. Though the PCB export ban complied with a multilateral treaty encouraging domestic treatment of toxic waste, the tribunal deemed Canada's non-discriminatory ban as "arbitrary" and ordered the government to compensate S.D. Myers with $5.6 million (http://www.citizen.org/documents/investor-state-chart.pdf). Simply adding the qualifier "manifest" to "arbitrary" is not likely to rein in such overreaching tribunal interpretations. Instead, "manifest arbitrariness" should be eliminated from the FET language.

Furthermore, the EC proposal's allowance for tribunals to consider an investor's "legitimate expectation" threatens to expose EU member countries to investor-state claims against policy reforms in the public interest. While the proposal ties the consideration of legitimate expectations to instances in which "a Party made a specific representation to an investor to induce a covered investment," this qualifier is not likely to be sufficient to foreclose the risk to progressive policymaking. Under the proposed language, a tribunal could conceivably find that a government's decision to respond to a financial crisis by restricting banks from dealing in risky derivatives, for example, frustrated a foreign bank's legitimate expectation, based on communications from an earlier administration under a more lax regulatory framework that the bank would be free to engage in derivative trading. A tribunal could well reason that this statement of permissiveness toward derivatives was one "upon which the investor relied in deciding to make or maintain" its investment, and that the subsequent restriction on derivatives "frustrated" that legitimate expectation. Similar logic could be envisioned for policy responses to climate crises, emerging food safety concerns, or other areas in which governments choose to alter policies, despite the fact that doing so contradicts earlier statements by government officials, in response to emergent crises or consumer demands. To not expose such responsive policymaking to foreign firms' demands for compensation, the provision regarding investors' expectations should be deleted.

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.

While the annex clarifying the meaning of expropriation may be helpful in deterring the most far-fetched claims against domestic policies, it still allows for a broad definition of indirect expropriation that invites tribunal decisions against regulatory policies on the mere basis that they adversely affected the value of an investment.

The combination of the right to compensation for such "indirect" expropriations and investors' ability to launch claims over "investments" that go far beyond real property would mean that States would be obliged to compensate foreign investors for regulatory actions that would not be subject to compensation for expropriation claims under domestic law. While domestic legal systems normally allow for claims of indirect expropriation affecting real property, the proposed language would enable foreign investors to claim indirect expropriations for regulations implicating copyrights, money, trade secrets or other forms of intangible property. Indeed, the definition is intended for measures affecting "the fundamental attributes of property" in a firm's investment "including the right to use, enjoy and dispose of its investment." Such an expansive definition invites tribunals to allow claims against regulations blamed for losses extending beyond traditional business assets (e.g. diminished market share, which can arguably be used, enjoyed and disposed of).

The current definition of indirect expropriation also allows that government actions constitute acts of indirect expropriation, even if there was no government appropriation of the asset in question. This contradicts the dominant legal standard which typically requires government compensation only if there has been government acquisition or an action short of acquisition, not when a regulation merely diminishes an asset's value (no matter how "substantially"). Offering foreign investors "indirect expropriation" rights that go beyond the domestic takings laws of the EU member states would expose EU regulations to significant ISDS liability.

While the proposed text includes a seeming safeguard for "non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives," the language requires a respondent government to overcome high legal hurdles to successfully use the safeguard. Based on the wording, a tribunal could require the government to prove that a given welfare objective is "legitimate," that the measure is designed to protect that objective, that the measure has been applied to protect that objective, and that the measure is non-discriminatory. Even if a given measure would clear this series of hurdles in the eyes of a tribunal, it could still constitute indirect expropriation in "rare circumstances." These legal obstacles significantly undercut the utility of the safeguard and should be excluded. Moreover, the text should explicitly and consistently, in all its parts, mention other "welfare public objectives" - other than health, safety and environment (protection) - such as consumer protection (as it is in the explanation to question 8).

To avoid exposing a broad array of domestic measures, including public interest policies, to ISDS claims of indirect expropriation, the annex defining expropriation should be rewritten. It should clarify that an indirect expropriation occurs only when a host State acts indirectly to seize or transfer ownership of an investment, and not when the government merely acts in a manner that decreases the value of profitability of an investment. One option would be to include language defining indirect expropriation as when "a Party acts indirectly, including through a series of actions, to seize, appropriate, or transfer ownership of a property right. Non-discriminatory regulatory actions by a Party that are designed and applied for a public purpose, such as public health, safety, consumer protection and the environment do not constitute indirect expropriations."

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?

"Recognizing the right of the Parties to take measures to achieve legitimate public policy objectives" is a non-binding recognition that does not carry the same legal weight as the substantive rights afforded to investors. It represents a mere exception that can be raised after a prudential measure has been challenged. A prudential "carve-out", which would state that the terms of the entire agreement simply are not applicable to prudential measures, should instead be included so to forbid foreign investors from bringing claims against prudential measures.

The prudential language is also weakened by the stipulation: "These measures shall not be more burdensome than necessary to achieve their aim" as tribunals can require the State to prove that there existed no less "burdensome" policy option that could have plausibly been pursued instead. Such burden of proof (requiring the State to prove a negative) can be especially high in times of crisis where rapid state interventions are often needed, inhibiting a government's attempt to defend a legitimate prudential measure. This provision should be therefore eliminated. Moreover, text should be added so that it is the investor that bears the burden of proving that a measure argued by the State to be prudential does not qualify (e.g. "For greater certainty, the exception shall apply unless the investor initiating the claim can demonstrate that the measure is not intended to protect investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier, or is not intended to ensure the integrity and stability of the financial system").

The proposed text also indicates that the EC intends to replicate the terms of prior agreements that generally prohibit a Party from restricting transfers. This acts as a ban on capital controls, which – as for the post-crisis measures adopted by the EU - have officially been recognized as a legitimate policy tool to limit destabilizing speculative capital flows and mitigate/prevent financial crises in certain instances (http://www.imf.org/external/np/pp/eng/2012/111412.pdf; http://www.ase.tufts.edu/gdae/policy_research/CapCtrlsLetter.html). The Safeguard language is limited to narrow uses of capital controls which deny some of the legitimate policy objectives they usually serve: since policies falling under the exception must address "difficulties for the operation of the economic and monetary union" rather than other domestic difficulties created by speculative capital flows, only ensuring economic stability in the face of Balance of Payment (BOP) crises, maintaining effective monetary policies in the face of procyclical flows and avoiding currency appreciation might be covered, while the elimination of rent-seeking activities, the prevention of asset bubbles and the building of a stable climate for long-term domestic investment would not be so. In addition, the requirement for capital controls to be temporary (max 6 months) prohibits their valid use as a preventative tool, while those that circumstances must be "exceptional," the difficulties caused "serious," and the measure itself "strictly necessary" put other burdensome "necessity" test and legal hurdles upon the respondent State.

The proposed BOP provision replicates many weaknesses of GATS Article XII´s BOP exception: 1. It only applies to capital controls used to address BOP problems, excluding other legitimate policy objectives (see above); 2. It obliges any BOP-focused capital control to be temporary, barring its use as a measure to prevent rather than respond to crises; 3. It poses a series of hurdles for a government wishing to use it, such that the measure must "avoid unnecessary damage to the commercial, economic or financial interests of the other Party." being the threshold for "damage" not even specified. It needs to be made explicit. that any included transfers provisions do not apply to financial transaction taxes or capital controls.

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 proposal to make public most ISDS documents and hold public hearings (with limited exceptions) is welcome. However, doing so in accordance with the new transparency rules of the United Nations Commission on International Trade Law (UNCITRAL) would be problematic. The proposed importation of UNCITRAL rules would mean the incorporation of a provision empowering the tribunal to block information that would "jeopardize the integrity of the arbitral process" (Article 7:7) [http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf]. The text lists several reasonable instances in which this exception could be invoked: when the information would "hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal." But it also includes this catch-all: "or in comparably exceptional circumstances," giving the tribunal wide discretion for determining that a given document or hearing should not be public due to suspicion that it could interfere with the arbitral process. If, for example, a controversial ISDS case spurred public demonstrations against the investor's claim, the tribunal would seem to have ample room to use the demonstrations as a pretext for not making documents or hearings public, even in the likely scenario that the demonstrations posed no actual threat to witnesses, lawyers, parties, or tribunal members. This tribunal discretion should be narrowed by adding an exception to the importation of UNCITRAL rules that negates the "comparably exceptional circumstances" basis for not making documents 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.

Preventing investors from simultaneously pursuing the same claim in domestic courts and via the ISDS mechanism, as proposed here, is indeed critical to make sure that investors are not doubly compensated. However, this limitation does nothing to counter the much more fundamental problem of empowering foreign investors to circumvent domestic laws and courts and directly pursue claims before three-person extrajudicial tribunals, as the proposed TTIP investment chapter would allow, undermining the validity of U.S. and EU domestic legal systems.

Given its overreach and its unnecessary nature and the above considerations, the inclusion of an ISDS mechanism – per se non auspicable – should imperatively require prior exhaustion of domestic remedies, which is a fundamental principle of international law [Interhandel Case (Switz. v. U.S.), 1959 I.C.J. Rep. 5, 27 (Mar. 21).]. An alternative possibility to an ISDS would be to include a state-to-state (StS) mechanism for settling investment disputes in TTIP. In addition to not giving foreign firms greater rights than domestic rule of law, StS dispute settlement has proven to be an effective enforcement mechanism in for a such as the World Trade Organisation.

No matter the option, if an ISDS is to be included in TTIP despite the dangers, foreign investors must not skirt a nation's judicial system in pursuing claims against that nation. The requirement of exhaustion of remedies, under international law, does not apply only when attempts to use domestic legal remedies would be futile. This would allow investors to proceed to international tribunals only if, for example, domestic remedies caused undue delay (See, e.g., El Oro Mining and Railway Co. Case (Gr. Brit. v. Mex.), 5 Int'l Arb. Awards 191, 198 (Perm. Ct. Arb. 1931) or if domestic courts lacked jurisdiction to provide relief (See, e.g., Panevezys-Saldutiskis Railway (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76, at 18 (Feb. 28) ("There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief . . .") See also generally The Finnish Ships Case (Finland v. U.K.), 3 R. Int'l Arb. Awards 1484 (1934) (domestic judicial appeal not required where it would not afford a basis for reversing determination of British Admiralty Transport Arbitration Board that the British government had not requisitioned certain Finnish ships).

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 proposal regarding arbitrator independence is an improvement over the current scant conflict-of-interest rules. Still, if ISDS is to be included, the proposed language should be strengthened as to include: a prohibition on those who seek to serve as tribunalists to also represent corporations in ISDS challenges; public disclosure of any indirect association with any party – State, investor or other tribunalists – in the case; and a process for removal of tribunalists for reasons of conflict and qualifications.

While the text states that tribunalists shall "not be affiliated with or take instructions from any disputing party or the government of a Party with regard to trade and investment matters," it does not bar selection of arbitrators affiliated with the foreign investor in ways unrelated to trade and investment. Nor would it appear to prevent the appointment of arbitrators who used to be affiliated with a disputing party in the past (even in a capacity related to trade and investment matters). Appointments of former employees, current Board members (as long as not responsible for trade and investment) or close (but not trade-related) business partners are still possible under the proposed text, even though they would violate the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, which are invoked by the same text.

Concerning the removal of tribunalists after the identification of such conflicts: though the proposal stipulates that a party in the dispute can contest the other party's arbitrator selection as a violation of conflict-of-interest rules, the contested tribunalist would not be removed unless the other party agrees, the arbiter removes herself, or the Secretary General of the ICSID decides she should be removed. The first scenario seems unlikely, the second one has rarely played out, and the third one does not inspire confidence that conflict-of-interest rules will be effectively enforced. Though the ICSID Convention contains a rule against conflicts of interest, only 4 attempts to disqualify arbitrators have ever been successful in ICSID's 50-year history, while 37 attempts have failed (http://www.iareporter.com/articles/20140319_1). While the proposed conflict-of-interest language is stronger than that of ICSID, such wording risks being neutralized by delegating the ultimate decision back to ICSID, given its pattern of failed attempts to remove compromised arbitrators.

The proposal to have the Committee on Services and Investment create a code of conduct for arbitrators represents an iterative improvement but it is not clear how effective this will be if hortatory guidelines rather than binding rules are envisaged. First, the development of the code depends on the agreement of both Parties, which "shall make best efforts" within two years of the agreement's implementation [loose language opening to long (or indefinite) delays]. Second, its prospective contents remain unknown – the text only states that it "may address topics" such as disclosure, independence and confidentiality. Third, assuming that robust rules are included, it is not clear what mechanism, if any, would ensure the code's enforcement.

Alternatives to the proposed process would likely prove more effective in ensuring arbitrator impartiality. For instance the creation of a roster of arbitrators from which all tribunalists would be randomly assigned. The criteria for appointment to the roster would need to be publicly accountable and include comprehensive conflict-of-interest rules. Parties would still be empowered to challenge a roster-appointed arbitrator's impartiality, though a judicial process would be used to determine whether the arbitrator should be removed, rather than delegating the decision to ICSID or to the two other arbitrators, as often done under ICSID rules (resulting in the consistent failure to disqualify contested arbitrators).

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 creation of an ISDS mechanism would bring to an increase of the expenditure of State resources on claims that are frivolous or legally unfounded. Pointing out that the best mean to avoid this would be not to include an ISDS mechanism into the agreement, the attempt to limit such expenditure is a welcome one. However, the proposed provisions are not likely to have prevented the recent surge in investor-state challenges to public interest policies, nor tribunals' decisions against many of these policies, given that most of the claims could not have been accurately described as "manifestly without legal merit" or "unfounded as a matter of law."

First, a careful definition of what "manifestly without legal merit" or "unfounded as a matter of law" mean should be included. Secondly, and most importantly, the remaining core problem should be addressed: many investor-state claims are not encompassed by the above two categories because indeed they do fall within the wide ambit of investor rights enshrined in most FTAs and BITs. The increase in investor-state claims owes not to the ability of investors to pursue claims outside of investor-state protections, but to their ability to pursue an increasingly broad array of claims that are indeed covered by those protections, due to the vague rights that the treaties grant to investors, to tribunals' ample discretion to interpret those rights broadly and to the expansive definition of investor in past agreements. Until the substantive rights, definition of investment and tribunalists' discretion are not narrowed, language to prevent claims not falling under those rights will have limited impact in preventing investor-state challenges and rulings against public interest measures.

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?***

The proposed addition of a filter in which regulators from both Parties may offer binding judgments on whether claims should be dropped for prudential reasons marks a significant improvement over standard U.S. and EU pacts that contain no such provision. It is critical that this filter step takes place early in the investor-state process so that resources are not needlessly expended in cases where claims are dismissed for prudential reasons.

While this proposal is a welcome addition, a more effective means of filtering out undeserving claims would be to use an ex-ante regulatory and diplomatic screen. Under such a provision, investors would be required, before mounting an investor-state claim, to present their case to a panel of regulators and other officials from their own government. The panel would determine whether to allow the claim to proceed as an investor-state challenge to the other Party's measures. Such panels would help diminish the extent to which investor-state proceedings impinge on governments' right to regulate. Regulators in the investor's home country would have the incentive to not allow cases to proceed if they were likely to infringe on the other government's regulatory prerogatives, given a desire to not have to respond to similarly overreaching cases from the other country's investors. (The presence of foreign affairs officials on these screening panels would further help in vetting the merits of prospective investor-state cases, as they would be hesitant to incur the diplomatic costs of investor-state challenges launched against other governments if the claims were particularly spurious.) In addition, establishing this screen before the launch of a new investor-state case (as opposed to afterwards, as in the proposed filter provision) would prevent both parties from expending money for tribunal costs and legal fees for claims deemed unfit to proceed.

The benefits in reduced costs and increased regulatory autonomy of this screening process would be amplified if it were not limited to claims affecting prudential financial measures, but instead applied to all investor-state claims (Regulators serving on the screening panel would be selected based on the type of regulation at issue in the claim). The EC should consider developing an ex-ante regulatory and diplomatic screening process for all ISDS claims in place of the proposed filter mechanism, providing a more effective check on unwarranted investor-state challenges.

If, instead, the current filter proposal is kept, then the EC should expand the range of measures covered to those beyond financial regulations. The Parties could use such a filter, for example, to examine cases in which the general exception (hopefully a strengthened version of it) is invoked as a defence for challenged environmental, consumer protection, health, safety and other public interest measures. A regulatory check is just as important in such cases as in those implicating financial stability.

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?

Non-disputing Parties in investor-state cases should indeed have the opportunity to inform tribunals how they believe the investor rights and other provisions of the pact should be interpreted, as provided for in this proposal. However, recent investor-state cases have shown that when not forced to heed such governmental input, tribunals have few qualms with ignoring it. For example, in the *RDC v. Guatemala* case brought under the U.S.-Central America Free Trade Agreement (CAFTA), three sovereign governments submitted comments to the tribunal as non-disputing Parties. Each argued that the substantive investor right at issue – "fair and equitable treatment" – should be interpreted narrowly as derived from State practice. But the tribunal simply rejected this input from three States, indeed noting that the States were in error in their interpretation of Customary International Law (CIL) and instead imported a much broader interpretation of "fair and equitable treatment" from another investor-state tribunal's award (http://www.citizen.org/documents/RDC-vs-Guatemala-Memo.pdf).

Such runaway tribunal interpretations could plausibly be reined in by the proposed provision allowing the Parties to the agreement to provide a new interpretation of the pact's terms. However, while the proposal states that such an interpretation would be "binding" on tribunals, it is unclear what enforcement mechanism would make the revised terms any more "binding" than the original terms that failed to bind the tribunal. That is, if the Parties feel the need to provide a reinterpretation of the pact's provisions because of "serious concerns as regards matters of interpretation," as provided for in the proposal, then it is likely that those concerns were sparked by tribunal interpretations that overstepped the intended bounds of the original written terms. What then would keep tribunals from simply overstepping the newly-defined bounds? Indeed, in the *RDC v. Guatemala* case, the Parties to CAFTA had included an annex in the pact that tried to narrow the "fair and equitable treatment" obligation, given serious concerns that tribunals had been interpreting the provision too broadly. The insertion of that annex did not stop the *RDC* tribunal from once again using a broader interpretation, paying little heed to the added language (http://www.citizen.org/documents/rdc-v-guatemala-rebuttal.pdf).

The proven difficulty in limiting tribunals' ability to defy the opinions of States and the revisions of a pact's terms indicate once again the fundamental dangers of investor-state dispute settlement. While some textual reforms, such as narrowing the scope of covered "investment" and the narrowing of substantive investor rights, can help somewhat in reining in the wide discretion of tribunals, they are unlikely to foreclose tribunals' overreaching rulings against public interest policies.

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.

Any ISDS mechanism, if included, should include a robust appellate mechanism. This may provide one of the better hopes of tempering the expansive decisions of tribunals that threaten the right to regulate. To be effective, it is critical that the mechanism allow appeals on the legal merits of the tribunal's decisions, not merely attempts to correct factual errors or to contest major procedural miscarriages (as provided for in the extremely limited annulment mechanism).

It is also critical that the appeals mechanism be established by the pact itself, rather than being included as language promising the future creation of such a mechanism. Certainly the non-binding language from the CETA text would be insufficient. That text does not even require the future creation of an appellate mechanism, but only requires a "forum" for the EU and U.S. governments to consult on the question of whether to create such a mechanism.

But even when pacts have included binding language to create an appellate mechanism in the future, the promised mechanism has failed to materialize. For example, CAFTA stated, "Within three months of the date of entry into force of this Agreement, the Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter. The Commission shall direct the Negotiating Group to provide to the Commission, within one year of establishment of the Negotiating Group, a draft amendment to the Agreement that establishes an appellate body or similar mechanism.” http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf).

Nearly eight years have passed since CAFTA took effect in most participating countries, and no such amendment has been produced. If an appeals process is to be a reality under TTIP, it should be created by TTIP itself.

C. General assessment

Question 13

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?

A.

The comments that follow need to be understood against the background that BEUC acknowledges the right for investors to have access to justice and compensation in case their rights have been unlawfully infringed, but that we question that ISDS mechanisms are the adequate answer to this. ISDS mechanisms have historically been included in trade deals among countries with highly different legal and judicial standards in order to protect foreign investors from unlawful expropriations and discriminatory measures. However, in the past few decades these provisions have in some cases escaped their original intent and been used to skirt national courts or even to challenge their decisions (see Phillip Morris vs. Australia case). The current FDI flows between the EU and the US prove that fears of lack of investment protection are not justified, as over 65% of US FDI flows are already directed to the EU, despite only 9 BITs are in place between the US and EU countries (UNCTAD). While investors and investments should be granted legitimate protection through strong investment protection provisions into the agreement, based on the fact that both parties have robust, developed legal systems for resolving disputes between foreign investors and government, no provision for ISDS should be included.

One argument often brought forward by the EC is that current BITs lack improved provisions on, among others, transparency and accountability. However, only 8 EU countries have now in place a BIT with the US and according to Reg. 1219/2012 they can continue maintaining in place such agreements. This is not a sufficient reason to impose to the other 20 EU states unnecessary and harmful provisions.

Another frequent pro-ISDS argument is that its exclusion will set a precedent for future agreements (e.g. with China). This is without acknowledging the fundamental difference between the legal and judicial systems of respectively US and EU on the one hand and China or any other countries with similar features on the other hand, that fundamentally could justify the application of an ISDS mechanism.

B.

Research has already highlighted valuable alternatives to ISDS mechanisms which would not have the same perverse effects. They include private risk insurance schemes, contract-based arbitration systems and the creation of an International Investment Court, which would solve once for all the inconsistencies deriving from the proliferation of private arbitration tribunals (UNCTAD). Another alternative is the inclusion of investment protection clauses in standard state-to-state dispute resolution provisions (e.g. allowing state parties to uphold the cause of an investor under specific circumstances, leaving untouched that host country national courts remain the main forum for private investment protection).

C.

The current public consultation: 1. Does not pose the basic question whether stakeholders want at all an ISDS into the TTIP, taking for granted that it will be inevitably part of the agreement; 2. Represents a debatable practice by the EC as it quotes as a template excerpts of the CETA ISDS provisions while CETA has not yet been initialled, its text is not available to the public and it has still to pass the democratic scrutiny of the EP. The EC should not initial the CETA agreement while a public consultation over its provisions is still open and it should withdraw ISDS from CETA and TTIP if the results of the consultation advocate for it.

BEUC has provided technical inputs based on the questionnaire structure but it does not agree with the inclusion of an ISDS in TTIP: it would allow for foreign firms to challenge public policy decisions and discriminate domestic firms not having access to it. We advocate for its exclusion because we believe that as ordinary citizens and national companies, US and EU investors should use the functioning domestic court systems of the host country. TTIP shall not be creating two parallel judicial tracks.

END