



ACCESS' SUBMISSION TO THE EUROPEAN COMMISSION'S CONSULTATION ON THE INVESTOR TO STATE DISPUTE SETTLEMENT MECHANISM

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 text proposed by the European Commission contains vague and subjective definitions, broadening the scope of investor protection. These provisions would not be sufficient to fulfil the objective to “avoid abuse” articulated by the EU in the consultation document. For this reason and the ones outlined throughout this consultation, Access urges the EU to exclude ISDS from the TTIP.

First, the definition of “investment” is far too broad. The text does not set limits on the definition as it only lists some of the forms an investment “may take” but does not close this list. The proposed definition also includes unspecified concepts such as “assumption of risk” and “expectation of gain or profit,” which would not provide sufficient clarity to guide arbitration courts in determining the existence of investment while simultaneously protecting fundamental rights. As a consequence, firms would have the ability to sue governments under ISDS even when a tangible investment involving the purchase of real property or assets, or the acquisition of capital has not been made.

Second, the definition of “investor” is vague and subjective. Indeed, the definition included in the proposed text only requires companies to undertake “substantial

business activities” in the host country. The lack of a definition of the term “substantial” leaves room for interpretation by the arbitrator to determine if a company would be considered an investor.

Ultimately, the interpretation of these two broad definitions under ISDS could lead to abuse and enable companies to challenge national legislation without having formally invested in a country. This has already occurred under previous FTAs, where a company successfully changed its nationality in order to file an ISDS case. Specifically, in 2010, a firm used the broad definition of “investor” included in the US-Central America Free Trade Agreement (CAFTA) to initiate a complaint under ISDS. The company was allowed to change its nationality from the Cayman Islands to a CAFTA Party (in this case, the USA) in order to bring a pre-existing dispute to arbitration even though the firm had never made an investment under this treaty.¹

In summary, the scope of the investment protections is far too broad and gives too much discretion to the arbitration courts. To avoid these serious risks, ISDS should not be included in the Transatlantic Trade and Investment Partnership.

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 changes proposed in the consultation text do not adequately address the loopholes contained in the non-discrimination clause.

On one hand, the current reference text regarding “national treatment” is not specific enough as to exclude indirect or ‘de facto’ discrimination claims. Even if a measure does not directly discriminate between national and foreign investors, it can still be challenged by a foreign investor. Indeed, if the investor can prove the measure in question has an equivalent effect to a directly discriminatory measure, it could challenge it. For instance, if the European Union was to decide to suspend the Safe Harbour Arrangement, a data transfer agreement concluded with the United States, over privacy concerns due to the difference in standard of protection for personal data on both side of the Atlantic, U.S. companies could sue the E.U. under ISDS for adopting a discriminative

¹ http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf

measure impacting their expected profits. In other words, this broadens the scope of the investment protection provisions in TTIP.

On the other hand, the language used in the text does not exclude ISDS from the Most Favoured Nation clause, and so would not avoid the risk of “treaty shopping.” Therefore, if another U.S. or E.U. trade agreement includes an extended definition of “indirect expropriation” or “fair and equitable treatment,” for example, a company could cherry-pick these definitions to apply under the MFN clause. As a result, the scope of investor protection would be extended and the possibility to challenge legislation under ISDS would grow beyond what the European Commission negotiators, the European Parliament, and other relevant authorities consent to in the negotiations.

Finally, previous experience with ISDS underlines that the proposed exceptions provided through the GATT Article XX and GATS Article XIV, are not sufficient to protect governments’ right to regulate for environmental and other public interest measures. In this scenario, states must first justify the grounds on which they decide public policies. To date, states have used this exception in 40 cases to defend its own legislation, of which on only one was successful (in the other cases, the courts decided that the challenged public measures either failed to meet their purposes, were not necessary or were arbitrary).²

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?

While the reference text seeks to address known loopholes of the fair and equitable treatment provision, the approach fails to clarify and narrow its scope.

First, the proposed text includes “manifest arbitrariness” as a defining criterion for the FET clause, which will not solve the lack of clarity and broad the scope of this clause. So far, this clause has led to a shift in treaty practice, greatly increasing the employment of ISDS. For instance, companies used the wide range of similarly vaguely worded provisions included in FTAs to sue governments, leading to a growth of the number of

² <https://www.citizen.org/documents/general-exception.pdf>

disputes under ISDS from fewer than 50 cases between 1950s and 2000 to 514 known cases between 2000 and 2012.

Second, the vagueness of the FET clause does not provide sufficient clarity to guide arbitration tribunals in determining whether or how a given measure is arbitrary. For instance, in the dispute between S.D. Myers vs. Canada brought under the North American Free Trade Agreement (NAFTA), the tribunal found the Canadian government to have acted in “an unjust and arbitrary manner” thus violating the FET obligation when banning the export of a hazardous waste that is proven to be toxic to humans and the environment. This “arbitrary” measure led the Canadian government to compensate S.D. Myers with \$5.6 million.³

Third, the language used in the reference text does not prevent the risk of ISDS claims through which companies seek to oblige governments to maintain a static regulatory environment. The text invites the arbitration court to consider investor’s “legitimate expectation” when applying the FET clause. Through this provision, the tribunal could interpret that a change in regulation has frustrated investor’s legitimate expectation and thus create the ground for economic compensation. In the past, the threat of investors filing a dispute under ISDS led governments to give up modernising legislation. For example, on already two occasions under the NAFTA agreement, such threats led the Canadian government to abandon its insurance regime and change its regulation on gasoline in order to avoid massive economic damages from expected ISDS complaints.⁴

The vagueness of this reviewed FET clause could significantly undermine governments’ right to regulate. Therefore, the ISDS mechanism should not be included in the TTIP.

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 scope of the substantive provision on expropriation is very broad. The proposed text enables foreign investors to sue governments when they are directly or indirectly expropriated, provided their profits might be reduced due to a change in legislation.

³ <http://www.state.gov/s/l/c3746.htm>

⁴ <http://www.citizen.org/documents/isds-domestic-legal-process-background-brief.pdf>

First, the reference text presented in this consultation still includes a broad definition of “indirect expropriation” as it goes beyond the sole protection of a property to include “the fundamental attributes of property.” Domestic legal systems of most developed countries limit firms’ ability to launch claims of expropriation solely for regulation affecting real property. However, the language of the proposed text would enable foreign investors to claim compensation for indirect expropriation over copyright, patents, and other intangible properties.⁵

This is already the case in some countries where ISDS mechanisms are in place. For instance, in November 2012, Eli Lilly & Co. initiated a dispute under NAFTA against Canada’s standards for granting drug patents, claiming that the invalidation of a patent undermined the company’s “expected future profits” and that Canada committed an “indirect expropriation,” demanding compensation of \$500 million.⁶ While the resolution of this dispute is yet to be determined, the Canadian government is already starting to rethink its patent legislation in order to avoid paying this penalty.⁷

Second, the proposed text fails to include limitations to the scope of “indirect expropriation” to protect legitimate public welfare objectives, such as health, safety, the environment and the protection of fundamental rights from being challenged under this provision. Indeed, the text introduces exceptions allowing companies to challenge public policies when the measure is “manifestly excessive” or “discriminatory.” These definitions would not provide sufficient clarity to guide arbitration courts in determining whether a regulation is excessive or discriminatory while simultaneously protecting public welfare objectives.

Third, the text establishes further legal hurdles to the application of the safeguard for public policy measures as it refers to “legitimate” public objectives. Based on this wording, governments will have to prove to the arbitration court that its own legislation pursues a “legitimate” objective, thus undermining governments’ right to regulate.

Given the risk of abuse of this clause under ISDS claims, such a mechanism should not be included in TTIP. Domestic court systems should be used to adjudicate these kinds of disputes.

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<https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&rcid=3B15&doctype=cite&docid=76+B.U.L.+Rev.+605&key=b5f40971d0fb684c3bce47b3dfae3512>

⁶ <http://infojustice.org/archives/28426>

⁷ <http://www.cbc.ca/news/business/eli-lilly-files-500m-nafta-suit-against-canada-over-drug-patents-1.1829854>

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?

The ISDS mechanism would undermine democracy. This mechanism gives companies equal standing to states as investors can seek a far-reaching level of protection and challenge public policies, which undermines the government's right to regulate and the will of the citizens as expressed by their elected representatives.

The text proposed gives more protections to investors than it does to states. Whereas the text sets binding rights for investors protection, the preamble only recognises a non-binding right to regulate of states. Moreover, the preamble uses a similar wording as the definition of "expropriation," limiting the right to regulate to "legitimate" public policies.

Regarding the "prudential carve-out," the language of the reference text does not prohibit companies from bringing claims under ISDS on prudential measures taken by states for the protection of key public interests areas such as the environment, health, safety, the financial sector, and fundamental rights. Indeed, it will be up to the state to use the "carve-out" to justify its challenged measure as well as proving that such measure was the least "burdensome." Whereas the "carve-out" should protect states' ability to regulate, it instead establishes new legal hurdles and puts prudential measures at risks.

Through ISDS, not only would firms be empowered to challenge governments' public policies, but states would be required to justify regulatory decisions. While investors enjoy a broadened scope for protection, governments would find themselves with a limited right to regulate. For this reason, this dispute resolution mechanism should be excluded from the TTIP.

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.

While the European Commission seeks to improve transparency and openness in the dispute resolution mechanism, this objective will not be achieved through the proposed application of the transparency rules of the United Nations Commission on International Trade Law (UNCITRAL).

First, under the UNCITRAL new rules on transparency, the hearings and information in ISDS proceedings will not be automatically disclosed to the public as the arbitration tribunal, after consulting the parties, would be able to decide which documents can be accessed or not. Specifically, under Article 7, arbitration courts would be empowered to block the publication of documents for a broad variety of reasons, including the protection of information that would “jeopardize the integrity of the arbitral process.”⁸ The current language does not provide sufficient clarity to guide arbitration courts’ decision to close the hearings and block the publication of the documents. For instance, an ISDS dispute that triggers public critics and demonstrations could be reason enough to limit transparency in the proceedings.

Moreover, the list of exceptions to transparency would enable the challenged state not to disclose information or documents that could be considered to be “contrary to its essential security interests,” as stated under Article 7.5 of the UNCITRAL rules. The scope of this particular exception is further broadened in the text proposed by the European Commission in this consultation as it would allow a state to circumvent its national laws requiring the publication of documents in order to object the disclosure of information “that has been designated as confidential or protected.” Moreover, the UNCITRAL rules and the reference text do not clearly specify the procedure for the court to follow in determining which information can be designated as confidential or protected.

Finally, the UNCITRAL rules mostly introduce measures to improve transparency in the hearings of complaints but do not ensure transparency in other aspects such as the appointment of arbitrators.

In short, the proposed rules will not solve the problem of opacity of the ISDS mechanism. To ensure transparency and openness in legal disputes, the domestic court systems should be used.

⁸ <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>

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.

The proposed text by the European Commission promotes the use of the ISDS mechanism to the detriment of national courts.

On one hand, the agreement incentivises "forum shopping" for friendly courts, undermining the integrity of domestic legal systems. Under the proposed rules, investors would be empowered to re-challenge decisions made in domestic courts through ISDS.

On the other hand, through ISDS foreign investors are able to circumvent domestic court systems and challenge legislation in opaque extra-judicial tribunals. However, in the context of a trade agreement between developed countries with functioning judicial systems, there is no need to resort to an extra-judicial system. The ISDS mechanism was created in the 1950s, to protect foreign firms from direct expropriation when investing in countries with weak judicial systems. There is therefore no strong justification for ISDS to apply in the case of a treaty between the EU and the US.

Finally, arbitration tribunals are specifically designed to ensure investment protection whereas national courts not only protect investors' rights but are also bound to uphold fundamental rights.

In sum, ISDS puts the rule of law and fundamental rights at risk. This mechanism furthermore has no place in an agreement between two states with functioning domestic court systems.

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 proposed text does not include the adequate safeguards to ensure the impartiality and the independence of arbitrators.

The proposed procedure for the appointment of arbitrators undermines their impartiality and independence. While the text prevents the appointment of arbitrators that are “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 prohibit *former* affiliations or business partners which could be appointed as long as they are not currently linked to either of the parties.

This lack of independence and impartiality of arbitrators has been recognised as a major issue of the ISDS mechanism by the United Nation Conference on Trade and Development (UNCTAD). In its recent research paper on ISDS aimed at reforming the dispute mechanism, UNCTAD underlined the increasing number of challenges to arbitrators perceived to be “biased or predisposed.”⁹

In addition, the US would likely have a significant advantage over the EU in the nomination of arbitrators. Indeed, each disputing parties choose one arbitrator and the third and last one is appointed by the Secretary General of the International Centre for Settlement of Investment Disputes (ICSID). It is worth noting that ICSID Secretary General is appointed by the President of the World Bank, whose appointment is informally chosen by the US administration. In short, if an EU company decides to challenge the US government, two of three arbitrators will have been appointed directly or indirectly by the US government.

Furthermore, the proposal regarding the resolution of conflict of interest lacks conventional institutional safeguards for independence and accountability. The three scenarios proposed whereby a conflict of interest is solved are thus: a party can decide to dismiss its own arbitrators for being biased, arbitrators can decide to remove themselves from the case, or the Secretary General of the ICSID can decide to dismiss the challenged arbitrator. In the first option, it seems doubtful that a party would dismiss its own

⁹ http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf

arbitrator when it could benefit from his or her help in the case. In the second, the exorbitant level of compensation alone means arbitrators have high incentives to remain in the case, making a self-dismissal rather unlikely. Finally, given the appointment procedure outlined above, empowering the Secretary General of ICSID with the resolution of conflict of interest does not inspire confidence in the neutrality of this solution.¹⁰

Finally, regarding the future binding Code of Conduct, the consultation document does not provide specifications on the types of provisions or on the content the EC would like included. There are furthermore no guarantees of enforcement foreseen, and there's an authorised delay of two years after the entry into force of the TTIP to put in place the Code, without any explanation as to what would happen in the interim.

Impartiality and independence of the arbitrators is not ensured under this proposed text. Therefore, domestic courts, functioning under the principle of separation of power, bound to uphold fundamental rights, and designed to be independent and impartial, should be utilized in place of extra-judicial arbitration courts.

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 proposal text fails to reduce the risk of frivolous and discourage unfounded claims under ISDS.

First, in so-called "frivolous cases," the vague provision included in the reference text will not reduce the risk of such claims proceeding. In order to dismiss a claim, the arbitration court must find it "manifestly without merit." However, the text does not define this provision thus not providing sufficient clarity to guide arbitration courts in determining the merit of the claim while simultaneously protecting fundamental rights.

¹⁰ See *The Backlash Against Investment Arbitration: Perceptions and Reality* available here: <http://www.kluwerlaw.com/Catalogue/titleinfo.htm?ProdID=9041132023>

Second, many of the most controversial ISDS claims are not “frivolous” or “unfounded” in the sense that they do not violate the vague treaty language but where the legal basis is dubious. As an example, consider a current dispute between Australia and the Tobacco company, Philip Morris Asia, taking place under the 1993 Bilateral Investment Treaty between Australia and Hong Kong. Philip Morris is arguing that the Australian cigarette plain packaging legislation, aimed at curtailing the harmful effects of smoking and improving public health constitutes an expropriation of its investments. The arbitration court in this dispute has ruled that the case may proceed even though the Australian government is quite clearly legislating in the public interest on a prudential matter using an approach that exists in several other jurisdictions.¹¹

Finally, existing mechanisms to avoid frivolous cases included in several trade agreements such as the 2012 US Model Bilateral Investment Treaty¹² (BIT), have proven to be insufficient. This mechanism is seldom invoked by States, and when it is, rarely results in the dismissal of a case.¹³

As long as the arbitration courts will have the discretion to interpret vague definitions of “investment,” “investor,” “expropriation,” and imprecise provisions such as “fair and equitable treatment” or “manifestly without merit,” the risk of unfounded or frivolous cases cannot be avoided. Access once again strongly urges the Commission to remove ISDS from the TTIP.

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 measures proposed in this consultation to put in place a filter mechanism are not adequate and create legal hurdles for governments.

¹¹ <http://www.ag.gov.au/internationalrelations/internationallaw/pages/tobaccoplainpackaging.aspx>

¹² <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>

¹³ <https://groups.google.com/forum/#!msg/canada-eu-ceta/ZWMCxkXXb4g/5RAIY51Owp4J>

The proposed filtering mechanism has a limited scope. Indeed, it only protects prudential measures on financial regulations, excluding protection measures for several key public interest areas such as the environment, health, and the protection of fundamental rights.

Furthermore, the “prudential carve-out” establishes legal hurdles for states. In order to filter out an undeserving claim, governments would have to demonstrate that the public measure challenged by the investors was taken for “prudential reasons.” As a result, the state will have the responsibility to demonstrate the “prudentiality” of a given public measure as well as proving that such a measure was the least “burdensome” of approaches. Following this intervention, the arbitration court would then decide whether the claim can proceed or not. For instance, the proposed filter mechanism designed by the European Commission aims at protecting prudential measures adopted in times of financial crisis in “order to protect consumers or maintain the stability and integrity of the financial system.” However, the mere fact of adopting a measure for these purposes does not protect it from being challenged under ISDS. Governments would indeed have to justify its necessity, proportionality, and non-arbitrariness as well as proving that this measure was the least “burdensome” approach.

The proposed filtering mechanism does not prevent risks for the right to regulate as it obliges the state to justify why it has decided to legislate in the first place.

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?

Access welcomes the Commission’s objective to allow the treaty signing parties to provide information on the interpretation of trade agreements. However, these guidelines are not sufficient to “ensure uniformity and predictability in the interpretation of the agreement.”

Arbitration courts could overrule the guidance provided by signing parties. This has happened previously, for instance, in the dispute between Railroad Development Corp. and Guatemala, brought under CAFTA. Signing parties of the treaty had included an annex to CAFTA recommending that the “fair and equitable treatment” clause should be

interpreted narrowly in accordance with the standard of protection under customary international law (CIL) and state practice. However, the arbitration court rejected these inputs, noting that the States were in error in their interpretation of CIL and decided instead to import a much broader interpretation of “fair and equitable treatment” from another ISDS claim.¹⁴

The proposed text allows governments to provide “binding” guidance when “serious concerns arise as regards matters of interpretation,” however, no enforcement mechanism for this new interpretation of the treaty is put forward. It is unclear how a new “binding” interpretation will be any more efficient than the original binding treaty provision. As a result, the tribunal might reinterpret the government’s input, as in the aforementioned RDC vs. Guatemala case, making the state’s interpretation (which was also binding) meaningless. The proven difficulty in limiting arbitration courts ability to challenge the interpretation of states indicates another fundamental flaws of ISDS.

Under ISDS, it is not possible to ensure uniformity and predictability in the interpretation of a treaty, since arbitrators are able to interpret and overrule state interpretations. For this reason, amongst others, Access urges the Commission to exclude ISDS from TTIP.

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.

The proposed appellate mechanism introduced by the Commission is vague and ambiguous.

First, the proposed text does not establish an appellate mechanism, but instead only calls for the creation of a “forum” between both parties to “consult” on the question of whether or not to create such mechanism.

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http://www.iisd.org/itn/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/#_ftn3

Second, the proposal lacks substance. For instance, given the lack of information on the content of the future mechanism, it is unclear at the moment if this appellate mechanism would address key requirements to ensure transparency, independence, and impartiality.

Past experiences have shown a failure to deliver appellate mechanisms after a bilateral agreement has been concluded. For example, under CAFTA, a group was set up to “develop an appellate body or similar mechanism to review awards rendered by tribunals.”¹⁵ Ten years after the signature of CAFTA, no appeal mechanism has been or is in the process of being created.

While the introduction of an appeals facility has been identified by the UNCTAD as one of the most needed reform for the ISDS mechanism, the current proposal would not be sufficient to ensure uniformity and predictability in the interpretation and consistency of rulings.¹⁶ As the EU and the US domestic court systems offer the possibility for court decisions to be appealed in transparent, independent, and impartial institutions, these systems should be preferred instead of ISDS.

C. General assessment

What is your overall assessment of the proposed approach on substantive standards of protection and ISDS as a basis for investment negotiations between the EU and US?

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

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

First, as our responses above have underlined, the proposed text fails to address the inherent and fatal flaws of ISDS. By elevating companies at the same level as states with fully developed rule of law and being designed for the sole protection of investors, ISDS lacks impartiality and independence in its essence. We strongly urge the European Commission to exclude ISDS of the TTIP as it undermines rules of law and would risk undermining democracy.

Second, this consultation does not improve the current lack of transparency in the TTIP negotiations. The European Commission argues that ISDS will benefit investments and

¹⁵ http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf

¹⁶ http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf

publicly announced its decision to include this mechanism in the treaty before launching this consultation. Therefore, respondents to the consultation are not aware of the purposes for which this public consultation is going to be used, which undermines its value and adds more uncertainty to the TTIP process.

Third, ISDS would extend companies influence on legislation. Over the years, we have already witnessed the increasing influence exercised by companies on the law-making process.¹⁷ While it is already difficult to restrain the level of influence on the legislative institutions, ISDS would formalise companies' involvement in the decision making process, granting them the ability to challenge any type of law in secret courts. Thus foreign investors are given the same status as sovereign nations, being entitled to privately enforce a public treaty. If included in TTIP, ISDS will severely undermine governments' right to regulate and the rule of law.

Furthermore, the Commission proposal locks ISDS into the TTIP. Existing Free Trade Agreements with European member states which include an ISDS mechanism have a separate stand-alone investment agreement for this mechanism in order to avoid lock-in and give the possibility for the signing parties to opt-out of the ISDS mechanism at any time.¹⁸ However, in the case of TTIP, the Commission puts forward a single option: having ISDS as a chapter of the trade agreement where it would be impossible for signing parties to opt-out of the mechanism without withdrawing from the whole treaty.

Finally, ISDS has no place in a trade agreement between the EU and the US, and any existing ISDS agreements with EU member states should also be terminated. This dispute resolution mechanism was designed to protect foreign firms from government arbitrary decisions when investing in countries with weak judicial systems and rule of law, a situation that does not exist in the US and EU.

Given the inherent flaws of this mechanism and the risks for government's right to regulate and the rule of law, Access urges the European Commission to exclude ISDS from the Transatlantic Trade and Investment Partnership.

¹⁷ <http://www.theguardian.com/world/2014/may/08/lobbyists-european-parliament-brussels-corporate>

¹⁸ http://people.ffii.org/~ante/ISDS/FFII_NL_ISDS-threatens-privacy.pdf