TRANS-ATLANTIC BUSINESS COUNCIL

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Response to European Commission Concept Paper on Investment Policy

Attracting investment and creating additional economic opportunities is the primary objective of the Transatlantic Trade and Investment Partnership (TTIP). A framework aimed at strengthening transatlantic investment ties -including strong provisions for protection- is a crucial pillar of the agreement which has the potential to set a global benchmark. We welcome the general commitment of the EU Commission to protect foreign investors and to engage in a debate about the set-up of the investment chapter and the opportunity to comment on the public consultation last year.

The European Commission's concept paper "Investment in TTIP and beyond – the path for reform" is a preliminary policy response to the public consultation about Investor-State Dispute Settlement (ISDS). As next steps for the investment negotiations are in consideration we call for a careful assessment of all perspectives and stakeholders.

The paper includes several suggestions for reforms of investment protection provisions in the TTIP. The concept paper proposes four areas where particular concerns were raised in the public responses:

i) the protection of the right to regulate;
ii) the establishment and functioning of arbitral tribunals;
iii) the review of ISDS decisions through an appellate mechanism; and
iv) the relationship between domestic judicial systems and ISDS.

The concept paper outlines certain ISDS reforms that have been proposed to be incorporated into recent EU trade agreements, namely CETA and EU-Singapore. The main body of the paper develops further proposals in the four areas of public concern. Below are TABC's views on the proposals as outlined in the paper.

i) Right to regulate

Summary of concept paper proposal

The right to regulate on the basis each country deems appropriate as a fundamental principle should be enshrined explicitly in the agreement in an article (instead of the preamble). Narrow definitions of the terms "fair and equitable treatment" and "indirect expropriation" (as in CETA) should become standard for future agreements. Investment protection treaties should ensure that discontinued granting of state aid cannot be viewed as expropriation. Both parties can adopt binding interpretations in order to control the interpretation of the agreement.

TABC position

The European Union and the United States agree that one of the primary objectives of the TTIP is to establish high standards for future investment treaties. The TTIP investment chapter thus must provide robust investor protections for both economies. This objective is not at all contrary to a government's right to regulate in the public interest.

We underline that ISDS cannot be used to challenge regulation *per* se but only when regulation impacts an existing contract or agreement or the property of a company. Existing investment agreements have been applied in a manner that is sensitive to the right to regulate: tribunals have thrown out claims that inappropriately challenge legitimate and non-discriminatory regulations and have forced investors to pay the costs of the arbitration. Indeed, States win ISDS cases about twice as often as investors[1].

In addition, overly narrow definitions limit the key strength of the standard and the system as such. For instance, the addition of the phrase "on the basis of the level of protection that they deem appropriate" would limit the agreement's ability to respond to arbitrary and discriminatory action across a range of factual circumstances. The EU Commission's already negotiated but not yet ratified investment protection provisions in trade and investment agreements are problematic in this regard, and proposals in the concept paper to perpetuate narrow definitions fundamentally risk weakening investment protection.

This is a worrying trend and antagonistic to the intention of establishing a gold standard agreement. Indeed, the addition of any new text (particularly in an article) to a future agreement may have the unintended consequence of implying that the right to regulate did not exist in previous agreements. TTIP should therefore strive instead to be a positive model for a new generation of investment agreements with highest standards of protection building upon EU and US legal tenants and principles rather than increasing uncertainty for investors.

The right to intervene by third parties will likely add to the cost and length of ISDS proceedings, thus favouring the financially stronger party and deter especially SMEs to pursue justice.

ii) The establishment and functioning of arbitral tribunals

Summary of concept paper proposal

Going beyond provisions outlined in the EU's recently concluded trade agreements with Canada and Singapore, all arbitrators would be chosen from a pre-established list. Specific qualifications will be

[1] Investor-State Dispute Settlement: A Reality Check, report by the Scholl Chair in International Business at CSIS (Center for Strategic and International Studies): http://csis.org/files/publication/141029_investor_state_dispute_settlement.pdf

required to serve as an arbitrator. A right to intervene would be granted to third parties with a direct interest in the dispute.

TABC position

ISDS panels constituted under most agreements are governed by a robust set of rules designed to ensure against conflicts of interest, which are administered by either the World Bank International Centre for the Settlement of International Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL). Therefore claims that the system is rigged in favor of investors due to the selection of arbitrators cannot be substantiated, neither by rules nor statistical evidence[2].

Compliance with a "Code of Conduct" in line with the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration is a useful step in reiterating and formalizing existing guidelines.

The creation of an approved list of arbitrators has proven problematic in practice. ICSID, for example, has difficulty keeping its roster of arbitrators up to date, and since no one can anticipate which disputes may arise, the arbitrators are chosen in a relative vacuum. Also, allowing governments to choose the arbitrators on the roster would create an unfair advantage for respondent parties in most cases.

To the extent potential conflicts are a concern and there is an interest in seeing a diverse pool of arbitrators in ISDS disputes, a closed list can significantly limit the options available to the parties. Moreover, the choice of the arbitrator is a vitally important element for both the claimant and the respondent state, and the parties should not be limited to a predetermined list. Finally, a closed list could prevent the selection of arbitrators with useful industry-specific expertise.

iii) Proposed appellate mechanism

Summary of concept paper proposal

A bilateral appellate mechanism modelled on the institutional set-up of the WTO Appellate Body with some adaptations should be envisaged.

[2] As pointed out above states win about twice as often as investors. See CSIS report (http://csis.org/files/publication/141029_investor_state_dispute_settlement.pdf).

TABC position

TABC agrees that the TTIP can be a vehicle for the European Union and the United States to assess together the potential for an appellate mechanism to review ISDS decisions. In principle, such a mechanism would provide for more consistency and certainty for investors. Still, modelling a mechanism on the WTO appellate body which is designed on a "state-to-state dispute settlement" must consider that investment cases deal with "investor-to-state dispute settlement". This must be taken into account while designing such a mechanism to ensure a fair representation of investor interest versus the allegedly mistreating state. TABC observes that this assessment should not delay further progress on the substantive TTIP investment negotiations, particularly with a view to attempts in the early 2000s when discussion in the WTO's working group on the relationship between trade and investment were inconclusive[3].

An additional consideration is the potential of an appellate mechanism to prolong disputes, which already take many years to resolve. It is in neither the investor's nor the government's interest to prolong the resolution of these cases. This may not end up being favorable even for respondent states, given that states already win cases much of the time. Moreover, the costs for establishing a permanent court need to be taken into consideration.

iv) Relationship between ISDS and domestic courts

Summary of concept paper proposal

Option 1: Require the investor to make a definitive choice between ISDS and domestic courts ("fork in the road" approach).

Option 2: Require investors to withdraw from domestic proceedings before submitting a claim to ISDS ("no u-turn" approach) to avoid parallel claims.

TABC position

As the concept paper notes, international law is oftentimes not applicable in domestic courts, the fork-in-the-road approach could result in investors forfeiting substantive rights under international law simply because it chose to place its confidence in domestic courts. The objective to limit parallel awards is useful but the ability of investors to protect property or other rights via domestic court procedures while arbitration is underway should not be limited.

[3] Report (2002) of the Working Group on the Relationship between Trade and Investment to the General Council: http://www.jmcti.org/2000round/com/doha/wg/WT_WGTI_6.pdf

Additional issues

- The concept paper discusses the development of a permanent investment court with tenured judges in order to advance the bilateral ground work done in TTIP to the multilateral level. This is an aspirational objective which has been attempted unsuccessfully in the past. Given the multitude of challenges the establishment of a permanent investment court would bring, it is essential that its establishment does not hamper the conclusion of the TTIP negotiations and does not prevent the inclusion of strong investment protection provisions in the agreement.

- The concept paper discusses the adoption of a "loser pays" approach to costs. "Loser pays" is already often the rule in practice, but it is applied in a manner that is customized to the facts of a case. A "loser pays" approach may not be appropriate in a close case. A blanket rule sacrifices flexibility and so dis-incentivizes genuine claims as well as abusive ones. In addition, in many cases it may be difficult to identify a clear winner or loser as the large number of settled ICSID cases indicates.

- The concept paper discusses the idea of permitting states to issue re-interpretations of treaties, even in the course of live disputes. Such a function would further politicize disputes, forcing states to choose whether to intervene against their own companies in order to preserve diplomatic relations with trading partners.

General comments:

The TTIP negotiations were launched with the ambition to set a gold standard trade and investment agreement which would set a norm for the 21st century. For this reason the investment provisions in TTIP should not be narrowly defined but leave sufficient flexibility to adapt to the fast changing realities that exist in today's global trade and investment system.

The proposals outlined in the European Commission's concept paper respond strongly to input submitted by the critics of investment protection and arbitration in particular. Submissions raising concerns on the EU Commission proposals highlighting the comparatively weak investor protection standards[4] the EU aims to pursue, in contrast, seem to have received fairly limited consideration. The European Commission should take into account in a more balanced fashion the submissions received from many organizations that represent thousands of companies, large and small.

The impact of the proposals on the timeline of the overall TTIP negotiations needs to be considered carefully. Discussions about an appellate mechanism and a permanent court are complex and require thorough contemplation of all policy options, first within Europe but also by its negotiating

[4] As Prof. Dr. Stephan Schill noted in his assessment for the German Federal Ministry for Economic Affairs and Energy

partner(s). Deliberations for the establishment of such mechanism have the potential to significantly delay the negotiations which is undesirable for the transatlantic business community.

Time and again, European investors have benefitted from meaningful investor protections – indeed, European investors file more than half of investment arbitration claims. It is vital that such protections, which already account for the right of governments to regulate, are not diluted.