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**Report**

**Online public consultation on investment protection and investor-to-state dispute  
settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement**

**(TTIP)**



## *Report*

# **Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)**

13 January 2015

### **Executive summary**

The negotiating directives<sup>1</sup> for the negotiations of the Transatlantic Trade and Investment Partnership Agreement (TTIP) foresee the inclusion of investment protection and investor-to-state dispute settlement (ISDS) provided a number of conditions are met. Investment protection and ISDS have been at the forefront of a vigorous public debate in the EU on TTIP. The Commission therefore organised a public consultation between 27 March and 13 July 2014 to develop further the EU approach on these important issues that matter to Europeans. The consultation outlined a possible EU approach (hereinafter: "the proposed EU approach" or "the proposed approach") and sought feedback on whether that proposed EU approach, which is substantially different from other agreements containing traditional investment protection and ISDS clauses, would achieve the right balance between protecting investors and safeguarding the EU's and Member States' right and ability to regulate in the public interest. It should be recalled that the proposed EU approach to investment protection and ISDS was also developed in light of the experience of arbitration under the many existing agreements, which has sometimes been controversial. The EU, in exercising a competence provided for by the Lisbon Treaty, has the opportunity to set up a reformed EU wide regime which will replace and phase out the existing treaties of Member States.

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<sup>1</sup> <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>

A reference text based on the draft EU-Canada agreement (CETA) was provided to facilitate the participation in the consultation and illustrate elements of the innovative approach proposed by the EU<sup>2</sup>.

The consultation was structured around 12 key issues, concerning both substantive investment protection issues and ISDS questions. It also featured an open general question, allowing respondents to submit general considerations.

With this Report, the Commission services provide an overview of the results of the consultation.

The Commission received a total of nearly 150,000 replies. All replies have been taken into account on an equal basis. The vast majority, around 145,000 (or 97%), were submitted collectively through various on-line platforms containing pre-defined answers which respondents adhered to. In addition, the Commission received individual replies from more than 3,000 individual citizens and from some 450 organisations representing a wide spectrum of EU civil society (business organisations, trade unions, consumer organisations, law firms, academics, etc.).

Broadly speaking, there are three categories of statements in the replies.

While the scope of the consultation was limited to the proposed EU approach to investment protection/ISDS in TTIP, a first category of statements indicates opposition or concerns to TTIP in general. Such views had also surfaced in the earlier consultation of the Commission on TTIP. While taking note of these views, the further assessment for this consultation has to remain focused on the statements provided in relation to the specific aspects presented under each of the questions posed.

A second category indicates concerns or opposition with regard to investment protection / ISDS in TTIP. It is recalled that this consultation takes place within the specific circumstances where the Member States have unanimously entrusted the Commission to negotiate investment protection and ISDS within TTIP, provided that the final outcome corresponds to the EU interests. The negotiating directives therefore include an element of conditionality and make clear that a decision on whether or not to include ISDS is to be taken during the final phase of the negotiations. This second category of replies addresses a broader issue than the one that was the subject of this consultation. Accordingly, this wider question should be answered, in light of the ongoing EU efforts to reform substantially the investment protection and ISDS system and an assessment of such efforts.

A third category contains specific views in relation to the various aspects presented under each question, often accompanied by concrete suggestions for the way forward. The emerging picture from these replies offers a more detailed range of views. There

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<sup>2</sup> [http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc\\_152280.pdf](http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf)

are divisions between various categories of respondents and sometimes even within the same category. For instance, some respondents consider that the proposed EU approach is insufficient to address certain concerns related to the right to regulate, while others caution against not lowering too much the protection granted to investors. Views are divided with regard to almost every question.

On this basis, without prejudice to any other issues, there are in particular four areas where further improvements should be explored:

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

In the first quarter of 2015, the Commission services therefore intend to further consult the EU stakeholders, the EU Member States and the European Parliament on the above mentioned areas, as part of a wider debate on investment protection and ISDS in TTIP with a view to enabling the Commission to developing concrete proposals for the TTIP negotiations. It should be recalled that no negotiations are currently taking place on this issue. The development of a new approach on investment protection and ISDS fully meeting the EU interest and fully complying with the commitment taken in front of the European Parliament is a key objective of the TTIP negotiations.

## Table of Contents

1.	INTRODUCTION AND CONTEXT	6
2.	OVERVIEW OF THE NUMBER AND TYPOLOGY OF RESPONDENTS	9
2.1.	Overview of total responses	9
2.2.	Collective submissions and technical difficulties	10
2.3.	Typology of respondents	11
3.	OVERVIEW OF MAIN OUTCOME OF THE CONSULTATION	14
3.1.	General considerations	14
3.2.	Specific considerations	16
4.	PRELIMINARY VIEWS ON AREAS FOR FURTHER WORK	25
	ANNEX I. METHODOLOGY AND PRESENTATION OF FINDINGS	30
	ANNEX II. PRESENTATION OF THE REPLIES BY INDIVIDUAL CITIZENS	33
	ANNEX III. PRESENTATION BY QUESTION OF THE REPLIES RECEIVED	36

## **List of Abbreviations**

- ACEA Association des Constructeurs Européens d'Automobiles (The European Automobile Manufacturers Association)
- BEPS Base Erosion and Profit Shifting
- BEUC Bureau Européen des Unions de Consommateurs (The European Consumer organisation)
- BIT Bilateral Investment Treaty
- CEEP Centre for European Enterprises providing Public services
- CEFIC Conseil Européen des Fédérations de l'Industrie Chimique (The European Trade Association for the Chemical Industry)
- CETA Comprehensive Trade and Economic Agreement between the EU and Canada
- CNCD National Centre for Development Cooperation
- ECHR European Convention on Human Rights
- ECT Energy Charter Treaty
- EFILA European Federation for Investment law and Arbitration
- ETUC European Trade Union Confederation
- ETUCE European trade Union Committee for Education
- EU European Union
- GATT General Agreement on Tariffs and Trade
- GATS General Agreement on Trade in Services
- FDI Foreign Direct Investment
- FET Fair and Equitable Treatment
- FTA Free Trade Agreement
- IBA International Bar Association
- ICC International Chamber of Commerce
- ICSID International Centre for Settlement of Investment Disputes
- IISD International Institute for Sustainable Development

IIED International Institute for Environment and Development  
ILO International Labour Organization  
IPR Intellectual Property Rights  
ISDS Investor-to-state Dispute Settlement  
MFN Most-Favoured Nation  
MS Member States  
NT National Treatment  
NGO Non-Governmental Organisation  
NHS National Health Service  
OECD Organisation for Economic Co-operation and Development  
SG Secretary-General  
SME Small and Medium Enterprises  
TACD Transatlantic Consumer Dialogue  
TTIP Transatlantic Trade and Investment Partnership  
TRIPS Trade-Related Aspects of Intellectual Property Rights  
UN United Nations  
UNCITRAL United Nations Commission on International Trade Law  
UK United Kingdom  
US United States of America  
WTO World Trade Organisation

## 1. INTRODUCTION AND CONTEXT

In June 2013, the Council unanimously authorised the European Commission to negotiate the Transatlantic Trade and Investment Partnership Agreement (TTIP). The negotiating directives stated that TTIP should include investment protection and investor-to-state dispute settlement (ISDS), provided that the final outcome meets the EU interests.

Given the strong public interest in the issue of investment protection and investor-to-state dispute settlement (ISDS), the Commission launched a public consultation on a possible approach (hereinafter: "the proposed EU approach" or "the proposed approach") and has sought feedback on a series of innovative elements compared to the previous and existing practices of the EU Member States, contained in this proposed approach, that could serve as the basis for the TTIP negotiations.

The public consultation was launched on 27 March 2014 and was closed on 13 July 2014<sup>3</sup>.

This consultation was open to all interested EU citizens and stakeholders. It was available in all EU languages. The Commission sought views structured around twelve key issues, as follows:

1. Scope of the substantive investment protection provisions
2. Non-discriminatory treatment for investors
3. Fair and equitable treatment
4. Expropriation
5. Ensuring the right to regulate and investment protection
6. Transparency in ISDS, Multiple claims and relationship to domestic court
7. Arbitrators ethics
8. Conduct and qualifications
9. Reducing the risk of frivolous and unfounded cases
10. Allowing claims to proceed (filter)
11. Guidance by the parties on the interpretation of the agreement
12. Appellate mechanism and consistency of rulings.

In addition, a final, open question allowed respondents to present general views about investment protection and ISDS in TTIP.

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<sup>3</sup> For the full set of the consultation documents see:  
[http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179)



For every issue, the consultation provided an introductory explanation, a description of the approach found in most investment agreements, a description of the EU objectives for TTIP and reference texts, to illustrate the way the relevant issue could be dealt with in legal language.

This report presents the replies received by the Commission services during the consultation. These views should not necessarily be regarded as the views of the European Commission or its services. The report provides an overview of the number and typology of respondents, a summary overview of the replies, and sets out areas where the Commission services wish to consult further stakeholders, EU Member States and the European Parliament with a view of enabling the Commission to defining the EU position in the negotiations on investment protection and ISDS in TTIP.

An annex presents the methodology followed for the analysis of the replies and the presentation of the results. A second annex features, for each question that was posed in the consultation, a detailed presentation of the views expressed by the various categories of respondents. It also presents a summary of the replies received by individual citizens.

## **2. OVERVIEW OF THE NUMBER AND TYPOLOGY OF RESPONDENTS**

### **2.1. Overview of total responses**

The consultation has mobilised EU civil society to unprecedented levels for public consultations organised by the Commission. The Commission received a total of nearly 150,000 responses.

Respondents from all EU28 Member States participated in the consultation. The largest number of replies was received from the United Kingdom, followed by Austria, Germany, France, Belgium, Netherlands and Spain, which together account for 97% of the replies.<sup>4</sup>

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<sup>4</sup> A detailed statistical overview was published shortly after the conclusion of the consultation – see [http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152693.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf)

**Table 1: Distribution of replies - by Member State**

<b>Member State</b>	<b>Number of replies</b>	<b>% of total</b>
UK	52,008	34.8%
Austria	33,753	22.6%
Germany	32,513	21.8%
France	9,791	6.5%
Belgium	9,397	6.3%
Netherlands	4,906	3.3%
Spain	2,537	1.7%
<b>Total</b>	<b>144,905</b>	<b>97,0%</b>
Other Member States	4,494	3,0%
<b>Overall total</b>	<b>149,399</b>	<b>100,0%</b>

## 2.2. Collective submissions and technical difficulties

It was possible to ascertain that a very large number of replies (around **145.000**) were submitted collectively through various non-governmental organisations (NGOs). These organisations provided pre-defined answers which respondents adhered to. These NGOs made available dedicated on-line platforms or software, often with pre-prepared answers, permitting the loading of replies directly into the database of the public consultation, thus making it possible to submit very significant numbers of replies in a short amount of time. It should be noted that while the vast majority of these replies were introduced by individual citizens, some of them were introduced by various organisations (see table 2). They were all taken into account as valid contributions.

The collective submissions can be grouped as follows:

- About **70.000** replies consist of seven different batches, submitted through eight different NGOs. Each batch contains **identical** or very similar answers to all 13 questions;
- Some **50.000** replies submitted via one NGO contain a different pattern. Questions 1 to 12 were answered with a general statement, as follows: "no comment – I don't think that ISDS should be part of TTIP", while various individual answers were given to the last question (N° 13-general assessment).
- Finally, there are around **25.000** replies which present similar features, i.e. no answer to questions 1 to 12 but only to question 13. The answers to question 13 are different but most of them express similar views. It was not possible to identify the source of these replies. However, given the similarities with the other collective submissions they were considered, for the purposes of this report, as collective submissions as well.

Due to the large number of replies loaded simultaneously into the database, the website of the public consultation was unavailable for 2 hours on 3 July 2014. In order to

remedy the inconvenience caused during this technical incident, the Commission services decided to extend the duration of the consultation for one more week. During this additional week, many respondents resubmitted their answers. However, given that some of these replies had actually been recorded also the first time when they were submitted, at the end of the consultation there were more than **6.000 exact duplicates** (i.e. identical text sent twice by the same respondent). It was decided to remove these duplicates from the total of the replies for the purposes of further analysis and official statistics.

In addition to the collective submissions, the consultation database also recorded **3.144 individual replies by EU citizens and 445 individual replies** by various organisations such as NGOs, academics, individual companies, trade union organisations, consumer protection groups, business association and so on. For the purposes of the presentation of the findings, these types of respondents are referred to respectively as "individual submissions from citizens" and "individual submissions from organisations".

### 2.3. Typology of respondents

The detailed distribution of answers by category of respondent is the following:

**Table 2: Distribution of respondents by category**

<b>Type of respondent</b>	<b>Total replies</b>
Citizens	148,830
Organisations, of which:	569
<i>Academics</i>	8
<i>Companies</i>	60
<i>Consultancy firms</i>	15
<i>Government institutions &amp; regulatory authorities</i>	11
<i>Law firms</i>	7
<i>Non-governmental organisations</i>	180
<i>Trade associations representing EU businesses</i>	66
<i>Trade unions &amp; organisations representing EU trade unions</i>	42
<i>Umbrella non-governmental organisations</i>	22
<i>Think tanks</i>	21
<i>Other organisations</i>	137
Total exact duplicates (resubmissions)	6,346
Total collective submissions (without duplicates)	139,464
Total individual submissions	3,589
<b>Total replies</b>	<b>149,399</b>

During the process of analysis, twelve duplicates were identified, however with no impact on the overall outcome presented in this report.

Only a small number of the respondents (less than 1% of the total) indicated that they have made an investment in the US.

The organisations who have replied are extremely diverse in nature, purpose and size but, taken together, they appear to represent wide sectors of the European civil society.

It should be noted that the classification into the various types of organisations is exclusively determined by what the respondents themselves have declared in the online form available for the purposes of the consultation on the Commission's website.

For illustrative purposes, it is relevant to note the following with regard to the typology of respondents:

#### Academics

Academics included a group of 120 academic experts in trade and investment law, EU law, international law and human rights, constitutional law, private law, political economy and other fields (who provided one joint submission), the Department of European, International and Comparative Law - Section for International Law and International Relations, from the University of Vienna; and the Observatorio sobre la Protección Jurídica de Inversiones en el Exterior, Universidad Pontificia de Comillas (ICAI-ICADE), Madrid (Spain).

#### Companies

In addition, the Commission services received replies from 60 individual companies, including 27 micro companies (less than 10 employees), 14 from SMEs and 19 from large companies. The latter include very large EU (e.g. Total, Alstom, Veolia, GDF-Suez, Versalis, Daimler, Iberdrola, Repsol) and non-EU (e.g. Chevron, Japan Tobacco, Philip Morris) multinationals, many of which have been involved in high-visibility ISDS cases.

#### Consumers

The consumers' interests were represented among others by the Bureau Européen des Unions de Consommateurs (BEUC), the Transatlantic Consumer Dialogue (TACD) and the European Federation of Financial Services Users (Better Finance).

#### Business associations

Business associations include BusinessEurope and the Transatlantic Business Council, as well as a significant number of Chambers of Commerce from various Member States (e.g. Austria, Belgium, Denmark, Finland, France, Germany, the Netherlands, Spain, Sweden, and UK). Many replies were also received by organisations activating in specific sectors or areas, such as services, chemicals, food, alcoholic beverages, retail, oil and gas, automotive, IT, non-ferrous metals, and publishing. Two associations representing public services also participated: Aqua Publica Europea - The European Association of Public Water Operators and the Centre for European Enterprises providing Public services (CEEP).

Examples of European-level trade associations who contributed to the consultation include ACEA (car manufacturers), DigitalEurope (information technologies), CEFIC (chemical industry), Eurometaux (non-ferrous metals), and services (the European Services Forum).

#### Governmental organisations

Regional governments and regional parliaments or political parties replied from one German (Bavaria) and one Austrian (Vorarlberg) region, one political party of the German Parliament and another of one German region, the parliament of Bavaria and the cities of Munich and Nantes participated as well.

#### Non-Governmental Organisations

Non-Governmental Organisations (NGOs) from all main sectors participated in the consultation. Two-thirds of them had less than 500 members while others had an all-EU reach. Notably, there were contributions from major EU-level environmental organisations such as the European Environmental Bureau, Greenpeace, Friends of the Earth Europe, Transport & Environment.

Among the national NGOs, there were notably replies from the German Naturschutzbund, Greenpeace Germany, the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband), the Belgian CNCV 11.11.11, Ligue des Droits de l'Homme, Mouvement Ouvrier Chrétien, Wereldsolidariteit, the French Union Fédérale des Consommateurs, Attac and Amis de la Terre, the British War on Want and Trade Justice Movement; Friends of the Earth Finland, the Danish Consumer Council, and Médecins Sans Frontières - Access Campaign.

The US Public Citizen and the Canadian Council of Canadians and Trade Justice Network were among the non-EU NGOs participating in the consultation.

Contributions from think tanks included the International Institute for Sustainable Development (IISD), the International Institute for Environment and Development (IIED), the International Mediation Institute (who did not submitted replies to questions but provided a recommended set of guidelines for mediation).

#### Trade Unions

Trade Unions include the main umbrella organisation for European trade unions, the European Trade Union Confederation (ETUC). In addition, many national organisations participated directly in the consultation, for instance from Austria, Belgium, Finland, France, Ireland, Italy, Netherlands, Sweden or the UK.

A number of trade unions representing specific sectors also replied, for example in the following activities: education (European Trade Union Committee for Education - ETUCE), publishing (Federation of European Publishers), public service (European Federation of public service unions), manufacturing and energy (industriAll), finance

(e.g. Nordic Financial Sectors), transport (European Transport Workers' Federation), services (UNI Europa).

Most of them provided detailed replies on substance. There seems to be a degree of coordination as reflected by a significant number of replies that are similar or even identical.

#### Other respondents

Notable respondents in other categories included the Law Society of England and Wales, the Energy Charter (ECT) Secretariat, EFILA (European Federation for Investment Law and Arbitration), as well as the main international arbitration courts (the Hague Permanent Court of Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce and the International Centre for Settlement of Investment Disputes - ICSID).

### **3. OVERVIEW OF MAIN OUTCOME OF THE CONSULTATION**

The various stakeholders that have participated in the consultation represent a wide diversity of interests within the EU. It is therefore not surprising to find some important divergences of points of view, not only between different categories of respondents but also within the same categories. It is also useful to note that the most detailed answers containing specific suggestions on the way forward come essentially from various individual organisations.

#### **3.1. General considerations**

The collective submissions reflect a wide-spread opposition to investor-State dispute settlement (ISDS) in TTIP or in general. There is also quite a majority of replies opposing TTIP in general.

In these submissions, the ISDS mechanism is perceived as a threat to democracy and public finance or to public policies. It is also considered as unnecessary between the EU and the US, in view of the perceived strength of the respective judicial systems. Such views are largely echoed by most of the trade unions, a large majority of NGOs, Government institutions and many respondents in the "other organisations" category, including consumer organisations. Many among the collective submissions express specific concerns about governments being sued by corporations for high amounts of money which in their view create a "chilling effect" on the right to regulate. In addition, certain replies from trade unions express a generic mistrust with regard to the independence and impartiality of the arbitrators or are concerned that ISDS may create a possibility for investors to circumvent domestic courts, laws or regulations.

By contrast, a large majority of business associations and the majority of large companies strongly support investment protection and ISDS in TTIP, while small companies are more critical. A considerable number of replies stress the positive role that foreign direct investment can play in relation to economic growth and jobs. They

indicate that investment protection rules can support investment through the setting up of a level playing field between the EU and the US. Some indicate that EU investors may not always receive adequate protection in US courts. There is, consequently, an important call for caution not to lower the level of protection to which the European investors are accustomed.

Due to the diversity of interests represented by respondents in this broad category, views expressed by the "other organisations" category are generally divided. Those opposing investment protection and ISDS mention essentially the same arguments as those mentioned above. Those in support are of the opinion that there is a lack of evidence that the ISDS mechanism is flawed. They feel that there is no crisis with respect to investment protection and the use of ISDS that supports any significant overhaul.

With regard to the proposed approach on investment protection, many among trade unions, NGOs, business organisations or other types of respondents recognise the EU's efforts in bringing about improvements to the investment protection system. However, a significant number of trade unions and a large group of NGOs consider that the changes included in the proposed approach are not sufficient to address their concerns with investment protection and ISDS. On the other hand, several respondents in different categories consider that the proposed approach goes too far and express serious concerns with regard to a lowering of the level of investment protection.

A notable number of business associations indicate in various ways support for the proposed improvements regarding ISDS in TTIP, or in general terms indicate that they would support a more inclusive and coherent ISDS system, characterised by transparency and ethics. As it currently stands the proposed approach for TTIP is considered by several companies to significantly decrease the level of protection contained in existing investment agreements. Some respondents, which declare themselves as being NGOs criticise the proposed approach as undermining the protection given to investments and argue that lower investment protection standards might have a negative impact on Europe by attracting less investment than before.

Many respondents in several different categories underline the need to safeguard the right to regulate in the public interest. However, other respondents, mainly among individual companies and business associations, consider that there was no contradiction between international rules on investment and the right of States to regulate.

A significant number of respondents in different categories consider that the proposed approach is unbalanced in favour of investors. There is therefore a call from these respondents for stronger investor obligations, in particular in relation to human rights, social and environmental regulations or, more generally, to corporate social responsibility.

With regard to the proposed approach on ISDS, many respondents support the principle of increased transparency. However they also consider that the existence of a clause to

protect confidential information in ISDS proceedings could be abused by investors to withhold key information from the public. The introduction of a code of conduct for arbitrators is also generally viewed in a positive light although many doubt that independence of arbitrators can be guaranteed. There is also a general view that domestic courts are more appropriate than ISDS and in many cases it is stated that domestic courts should be exclusively used to settle disputes between States and foreign investors. Nevertheless, despite some supportive replies, many respondents consider these reforms insufficient to meet the concerns they have with ISDS in general.

Concerns are also expressed that the accessibility to the ISDS mechanism remains *de facto* a prerogative mainly of large-scale firms, as its costs and complexity make it difficult for small private investors to resort to it. A dispute resolution mechanism more suited to SMEs is seen as desirable.

### **3.2. Specific considerations**

#### *Question 1. Scope of the substantive investment protection provisions*

With regard to the scope of investment protection, the views are diverse.

The exclusion of mailbox companies through the substantive business operations requirement is welcomed by many respondents across different categories, but this support is not unanimous. For instance, a number of citizens express doubts about the effectiveness of the proposed approach in practice. Some academics, law firms, companies or trade unions ask for greater clarity in the wording and the definition of substantive business operations. On the other hand, a minority of business associations consider that treaty shopping and mailbox companies – if set up in accordance with applicable law – should be allowed. Some respondents, for instance among business associations, recommend the inclusion of a denial of benefits clause instead of a reference to substantive business operations.

With regard to the definition of investment, some respondents consider it to be too narrow, others too broad. There were widespread calls from respondents in different categories for greater clarity of certain terms used, notably related to the characteristics of an investment. A considerable number of trade unions indicate they would prefer a narrow definition, for instance limited to FDI only. Many respondents in different categories refuse the idea that portfolio investment or speculative investment could be protected.

There are various calls for horizontal exclusions, for example of public services or certain sensitive sectors (e.g. health, education, environment or financial markets), something which is strongly opposed by a significant number of business associations who want to see exceptions and limitations brought down to a minimum.

Several respondents among business associations and companies would like to see broad definitions, e.g. covering all intellectual property rights, intangible investments as well as a number of specific contracts. Some also call for the extension of investment



protection, including ISDS, to the pre-establishment phase. There are also notable suggestions, by respondents in different categories (e.g. academics, business associations, trade unions) to clarify the reference to the applicable law.

*Question 2. Non-discriminatory treatment for investors*

Non-discrimination is conceived by some respondents as a treatment already contemplated under national or EU law and thus not necessary to explicitly include in TTIP. Some consider that discrimination could be justified in certain cases. Conversely, many business associations note that non-discrimination is a very important principle for investment, or even essential to ensure a level playing field.

Views are also divergent on the question of general exceptions. Some (e.g. trade unions) consider that they should be broader, e.g. they should apply to all investment protection provisions, others (e.g. business associations) that they should be kept to a minimum in order to avoid disguised protectionism. Certain respondents question the effectiveness for investment issues of exceptions designed primarily for trade matters.

The Most-Favoured Nation (MFN) clause is similarly the subject of different views. Some (e.g. among NGOs) consider that MFN is not necessary. Other respondents (e.g. in the "other organisations" or "business associations") view it as essential. The EU's intention to avoid the importation of better ISDS procedures or substantive standards through the MFN clause is considered by respondents among citizens as well as organisations either not clear enough, not sufficient or excessive in the sense that it risks rendering the MFN obligation almost meaningless. There is a widespread call for greater clarity.

*Question 3. Fair and equitable treatment*

For most collective respondents, trade unions and for several NGOs, the standards of fair and equitable treatment (FET) raise serious concerns either in light of certain ISDS cases or for fear that the proposed approach still allows expansive interpretations from arbitral tribunals. Several respondents from business, NGOs or other organisations express concern against lowering the level of protection through a revision of the FET standards, which is viewed as providing an essential protection. The most important area of consensus appears to be that of ensuring that FET could not be interpreted as a commitment or promise that the legal environment surrounding the investor would remain unchanged ('stabilisation clause').

There is a general interest in greater clarity, in particular in relation to certain terms used in the closed list of treatment defining this standard. Views are however divided among respondents in different categories as to whether FET should be defined through a closed or open list. Some concerns are expressed on both sides with regard to the possibility for the Parties to review the content of the standard during the lifetime of TTIP (i.e. some fear that this may lead to an expansion in the scope of the standard, while others fear that in practice it would be difficult for the Parties to come to an agreement in this respect).

The question of legitimate expectations also attracts considerable interest, with some respondents arguing that they should not be covered and others claiming that the proposed approach does not cover them sufficiently. Respondents in several categories consider that further clarifications would be useful or necessary.

Finally, views are also quite divided among different categories of respondents with regard to the inclusion or not of an "umbrella" clause.

*Question 4. Expropriation*

Most of the views expressed in this question are related to indirect expropriation. Some respondents note that not all regulatory measures taken by States should require paying compensation, while others consider that any regulatory measure that has the same effect as an expropriation should be compensatory. This actually reflects the wider division of views among specialists and practitioners in this field, namely the "police powers" doctrine versus the "sole effects" doctrine.

Some respondents also view certain terms as unclear. For instance, it is considered by the majority of citizens as well as some trade unions, academics and think tanks that the reference to the proportionality or legitimacy of certain public measures creates uncertainty as it could give rise to too wide a margin of interpretation.

Certain respondents, for instance among trade unions, consider that the notion of indirect expropriation should be narrowed down significantly, for instance that it should specifically not cover lost profits. Other respondents, mainly from the business side, consider that the proposed approach would lower the protection granted to investors against the biggest risk they face abroad, in particular compared to BITs, because it allows States not to grant compensation for measures taken in certain sectors (e.g. health). This could prejudice investments in these sectors as compared to investments in other sectors.

*Question 5. Ensuring the right to regulate and investment protection*

The vast majority of respondents in virtually all categories agrees with the broad objective of finding an adequate balance between investment protection and the confirmation of the right to regulate in the public interest. However, not as many respondents are positive about the proposed approach; rather, a considerable divergence of views is recorded. For instance, some consider that the proposed approach is not sufficient, others consider it too broad while others contend that there is no conflict between the right to regulate and investment protection.

The proposed approach is viewed by some respondents as too weak (e.g. academics, think tanks), because the reference to the right to regulate is placed in the preamble and could be non-binding. Alternatively it is seen by some as too narrow (e.g. trade unions) because, for instance, the references do not apply to investment protection standards. Other respondents, such as from the business side, reject certain exceptions or

limitations (e.g. on subsidies or public procurement) applicable to investment protection, or in general recommend caution against the use of such limitations.

*Question 6. Transparency in ISDS*

Transparency in ISDS proceedings and access to hearings is a widely-shared objective. However, concerns go in two directions. One group of concerns, mostly expressed by NGOs and trade unions, is that some of the exceptions to the transparency provisions to protect business confidential information could be too widely interpreted and could risk undermining the effectiveness of transparency. There is also concern that the tribunal could have too wide a discretion in deciding under what circumstances public hearings could be closed to the public. Another group of concerns stemming from business organisations and companies is that the provisions in the proposed approach on transparency go further than most national legal systems and that this could entail a risk that genuine confidential information and trade secrets could be disclosed. There is also concern that the access by the public to the hearings could politicise cases brought by companies, with the risk that this could affect the fairness of the proceedings.

*Question 7. Multiple claims and relationship to domestic court*

With regard to the relationship to domestic courts, many respondents make general statements instead of commenting on the specific proposed approach. Hence, for example, many NGOs, including umbrella NGOs, consider that domestic courts should be exclusively used to settle disputes between states and foreign investors. However there are a number of respondents with a more moderate position who either do not exclude ISDS in some cases or provide for more specific comments in case ISDS is introduced. These respondents consider that, as a rule, domestic courts should be preferred as they are better placed to address the disputes between the investors and the state. They thus support the idea to encourage domestic proceedings but many consider that the proposed approach insufficiently encourages domestic remedies. They argue that the draft provisions do not oblige, or provide an incentive for, investors to seek redress in domestic courts. Instead, it is argued, they merely oblige investors to choose between domestic courts and international arbitration to avoid parallel proceedings. Therefore, several of these respondents directly argue for the introduction of the requirement of exhaustion of local remedies before the possibility to go to ISDS, which would become a solution of last resort.

By contrast, nearly all large companies and business association, while understanding the objective of encouraging domestic proceedings, consider that the investor should be free to choose either legal path – domestic or international – and ISDS should not necessarily be the last resort. They consider that there might be challenges that are better dealt with in national courts but on the other hand there might be others for which international arbitration is necessary. Some give the example of discrimination in favour of local companies, which is not prohibited under US law. Others refer to the fact that local courts may be prevented from applying directly the obligations flowing from an international treaty. Others consider that host States may be granted immunity in local

courts, particularly when it comes to public acts. They also recognise that there are claims that cannot be dealt with by international arbitration, such as investigating the constitutionality of a measure. In general all large companies and business associations are against the obligatory requirement to exhaust domestic remedies as it will only create unnecessary delays. The companies (and business associations) are also generally against the so-called fork-in-the-road solution.

The majority of the respondents among NGOs and other organisations that do not take a principled position against ISDS as such support the proposed approach to prevent parallel proceedings and double compensation. Some consider however that the proposed provisions are insufficient to guarantee that there are no parallel proceedings or treaty shopping. On the other hand, some companies and business associations do not agree with the proposal that affiliates of the claimant investor may not pursue ISDS proceedings on their own. They consider that if there is any risk of overlapping compensation, subsequent tribunals will take into account in its decision and the award the outcome of any initial arbitration proceeding if circumstances so require.

Finally, around half of the respondents who make specific comments on mediation (from all categories) support the proposed approach to encourage mediation. They also agree with the suggestion that the recourse to mediation should be possible throughout the domestic and ISDS proceedings. However, some consider that the proposal insufficiently encourages mediation and a few suggested that prior mediation before having recourse to a panel should be compulsory.

*Question 8. Arbitrators' ethics, conduct and qualifications*

Regarding the ethics and conduct of arbitrators, many respondents express the view that rules on independence and sound selection procedures for arbitrators are crucial. Many replies welcome the EU's attempt to address this issue. However, several contributors express doubts on whether the EU's proposed approach will provide sufficient guarantees or argue that it is untested in practice. Several of those contributors feel that the intrinsic characteristics of ISDS makes it impossible to regulate the arbitrators' conduct (NGOs, academia); others argue that the issue of conflicts of arbitrators should not be exaggerated and that existing rules (such as the IBA guidelines, ICSID rules, etc.) sufficiently address the problem (mainly companies, some law firms and academics).

Some replies consider that the required competences of arbitrators are too restrictive with some (mostly NGOs) considering that arbitrators should also have experience in the social or environmental fields, and other contributors (law firms, companies) stressing the need for arbitrators with special (technical) knowledge relevant to the dispute.

Many respondents welcome the EU's proposal for a code of conduct and rules for challenging ISDS arbitrators, though many (NGOs, academia, think tanks, and

governments) fear that it will not be binding in practice (see clarifications in annex III, question 7).

As regards the disqualification of arbitrators, some contributors (think tanks, governments, and academia) argue that the procedure should be extended to cover also a lack of qualifications (not only a lack of independence as in the proposed approach). Certain contributors expressly welcome the idea of entrusting the ICSID Secretary-General with deciding on challenges to arbitrators, while some others mistrust the ICSID Secretary-General as being too US-friendly (NGOs) (see clarifications in annex III, question 7).

Finally, many contributors consider rosters to be a step into the right direction. However, the EU's proposed approach is often criticised as being only a fall-back solution (i.e. only used where disputing parties do not appoint arbitrators or cannot agree on the chairperson)

Other contributors (large companies, law firms, arbitration institutions such as ICC) object to the establishment of rosters which would restrict the choices of the disputing parties. Rosters are also criticised for being biased in favour of states (because investors do not participate in the creation of the lists), for politicising arbitrator appointments and for preventing the appointment of arbitrators with special knowledge relevant for the disputes.

*Question 9. Reducing the risk of frivolous and unfounded cases*

Comments with respect to frivolous and unfounded claims focus on the frivolous claims mechanism, notably on its scope, on its procedural aspects and on the role of arbitrators dealing with such claims.

While looking at the frivolous claims mechanism, a small number of business associations, other organisations and consultancies argue that frivolous and unfounded claims were not a problem in the past and therefore there is no need to address this issue at present. In the same vein, several trade unions and business associations consider that such a mechanism already exists in the ICSID rules for arbitration and creating a new one would not be of any added value.

Commenting on the scope of the principle, a small group of respondents essentially representing trade unions and NGOs believe that the scope of frivolous and unfounded claims as defined in the text will be insufficient to avoid the abuse of the system by investors. They regret that it would not exclude claims which would cause serious public harm. Despite the plea from some respondents from across categories for a better definition of frivolous/unfounded claims, no concrete wording proposals were made.

Respondents also comment extensively on the proposed procedure for dealing with frivolous and unfounded claims. In this context, the national committees of the International Chamber of Commerce express concerns that the combined effect of the two Articles would lead to unnecessary procedural delays. In order to counter the risk of

a state systematically raising objections with the purpose of delaying the procedure, certain NGOs, business associations and law firms suggest that the procedure should deal also with 'frivolous objections'.

When examining the 'loser pays' principle the majority of those commenting opposes its strict application. The scope and the effect of the principle were subject to comments.

In relation to its scope, certain respondents, essentially from the business associations, NGO and others categories, suggest the application of the principle at the stage when the tribunal renders its decision on the existence of a frivolous and unfounded claim. A further suggestion, from NGO and government respondents, aiming to further discourage frivolous claims consists in allowing the tribunal to impose a punitive award in addition to the award for costs of arbitration incurred by the party having introduced a frivolous claim. A small number of NGOs and trade unions also suggest a clearer definition of 'exceptional circumstances' as they believe that this provision could be a source of lengthy debates. Finally, a handful of business associations, companies and other respondents argue that the arbitrators should retain their discretion to adjudicate on costs based on their own assessment.

As to the effects of the principle, a number of contributions from the business associations, NGOs, companies and other groups argue that a blanket application of the 'loser pays' principle could deter SMEs from using the ISDS mechanism: the risk of paying the costs in case of an unsuccessful claim would prevent them from choosing the ISDS path. Another effect of the principle, for a couple of business associations, is that its application could be a disincentive to find an alternative resolution of the disagreement. By contrast, for a number of NGOs a state might be willing to settle in order to avoid paying big fees.

*Question 10. Allowing claims to proceed (filter)*

Many respondents, in particular among business associations, fear that the use of filters in dispute settlement procedures may lead to heavy politicisation of disputes, and recommend that it be avoided. Some consider that a filter mechanism would not enhance a fairer and more equitable arbitration system, while others fear that a filter mechanism as proposed may limit and frustrate access of investors to obtain a neutral and independent decision on their cases/claims.

Conversely, many respondents, in particular among citizens and trade unions, feel that a filter would lack effectiveness in stopping ISDS claims, given its consensual nature.

At the same time, a number of respondents welcome the introduction of the filter, for example some respondents consider that a filter is justified in times of global financial crisis and others support it because they see it as a way to prevent the risk of abusive interpretations by arbitral tribunals.

*Question 11. Guidance by the parties on the interpretation of the agreement*

The large majority of respondents replying to the question is not satisfied with the proposed approach to the control by the Parties on interpretation of the agreement (through binding interpretations and an intervention right for the non-disputing party), but is clearly split when it comes to the reasons for criticism.

One part (mainly NGOs and trade unions) considers that the proposals do not give the Parties enough control over the arbitration proceedings, while the other part argues that the Parties should not intervene with the arbitration tribunals, which should remain free to decide also on issues of interpretation (mainly business associations and companies). This reflects the more fundamental position with regard to ISDS: those arguing against ISDS want more control from the Parties over the arbitration process and consider the proposals still insufficient, while those that are open to arbitration tribunals are reluctant to accept control by the Parties and mechanisms potentially limiting the discretion of tribunals.

Respondents considering that the proposed interpretation mechanisms are insufficient put forward the following arguments. Firstly, binding interpretations require the agreement of both parties. Mainly NGOs consider that the non-disputing party should not have a veto right. Secondly, a number of respondents (mainly NGOs and trade unions) argue that tribunals may in reality not feel bound by "binding" interpretations and that there are no enforcement mechanisms.

Respondents considering that the proposed interpretation mechanisms go too far (business associations and companies) express concern that the proposals provide excessive power to the Parties. They argue that opinions should only be recommendations, and not binding for the arbitration tribunal. The main reasons invoked against binding interpretations include the risk of politicisation of on-going disputes, the risk of undermining the discretion of arbitrators, and concerns about the creation of too rigid a system. The concerns regarding binding interpretations are expressed even more strongly when it comes to their possible application to pending cases. In particular business associations, companies, law firms and chambers of commerce caution against such application arguing that this would be against due process and put at risk legal certainty for investors.

Finally, several respondents also express doubts about the intervention right for the non-disputing party. They consider that it should be exercised with care and in good faith and be accompanied by guarantees to ensure that any submission does not disrupt or unduly burden the arbitral proceedings or unfairly prejudice any disputing party.

*Question 12. Appellate mechanism and consistency of rulings*

The proposal for an appeal mechanism is neither fully opposed nor fully supported.

Many respondents across all categories are in principle in favour of an appellate mechanism or even consider it indispensable. This view is expressed in particular by many NGOs and several business associations, companies, trade unions, umbrella NGOs and government organisations. While they see the advantages of an appeal possibility, they point at the same time to a number of concerns. There is therefore no clear view either in favour or against an appellate mechanism; it would rather depend on the concrete form of the mechanism and the extent to which the concerns can or cannot be addressed.

The main advantage put forward for an appellate mechanism is that it contributes to more consistency and thereby also to legal certainty. The drawback most often raised is that an appellate mechanism causes costs and delays the procedure. Some proposed to introduce binding deadlines in order to limit the delay.

In examining the usefulness of an appellate mechanism, a number of respondents question whether the proposed approach will achieve the objectives (both NGOs and companies). The ICCs and some business associations argue in this respect that an appellate mechanism risks compromising the finality of arbitration, thus undermining the fundamental basis of international arbitration. For that reason, they are in principle against an appellate mechanism. Certain respondents (mainly several national chapters of the ICC) consider that an appellate mechanism is not needed because there are sufficient existing mechanisms that can be used: the control mechanisms available under the ICSID Convention and the New York Convention have proven to be effective and provide a good balance between finality and procedural fairness. Finally, a significant number of respondents in various categories (e.g. business associations, NGOs, think tanks, governmental organisations) state that the Commission services should provide more information about the structure and functioning of an appellate mechanism or claim that they cannot judge the proposal absent detailed information.

Most of the relevant replies are in principle in favour of an appellate mechanism. Nevertheless, they take a rather negative position on the proposal because they prefer a different appellate mechanism than that included in the consultation documents:

- Many business associations and companies, and a few NGOs, other organisations and national chapters of ICC, consider that, if a mechanism is needed, it should be developed at the multilateral level, e.g. in close cooperation with UNCITRAL, ICSID and the ICC.
- Finally a small number of NGOs suggest that, if there is to be an appellate mechanism, it should take the form of an International Court.
- An important concern expressed by a significant number of respondents is that, with the multiplication of BITs, there risks being a high fragmentation of ISDS. Each



BIT may have its own ISDS mechanism and tribunals may come to different interpretations of the same provisions contained in different BIT. These respondents therefore propose the establishment of, what they call a "general Appellate Mechanism" that would apply to all investment treaties.

A number of respondents also plead for additional guarantees. They argue that the appellate mechanism is conditional upon the independence of the arbitrators and propose, for example that it should take the form of a standing body with permanent members.

As regards the possible scope of an appeal, most of the respondents commenting on this issue consider that it should not cover a full review (law and facts), but legal grounds (either exclusively or in addition to procedural issues). This view is taken by a number of NGOs and umbrella NGOs, as well as by a few business associations and companies.

#### *Question 13. General assessment*

The general replies collected under this open question have already been presented in general terms at the beginning of this section. More details are available in the annexes.

#### **4. AREAS FOR FURTHER WORK**

The present report presents the results of the public consultation about the proposed EU approach to investment protection and ISDS negotiations in TTIP. As indicated in the consultation notice, the key issue for the consultation is whether the proposed approach for TTIP, as illustrated by the reference texts presented, achieves the right balance between protecting investors and safeguarding the EU's right and ability to regulate in the public interest.

Broadly speaking, three main categories of statements are identified in the replies:

- i) statements indicating opposition to TTIP in general;
- ii) statements indicating concerns about investment protection / ISDS in TTIP or in general; and
- iii) statements containing specific views on the issues identified for the consultation.

#### *Statements indicating opposition to TTIP in general*

The first category refers to statements indicating opposition to TTIP in general. From its earlier consultation on TTIP, and the public debate in this area, the Commission is aware of different stakeholders' views on TTIP in general. However, the express scope of the present consultation is limited to the proposed approach on investment protection/ISDS for TTIP. While taking note of these views, the further assessment for this consultation has to remain focused on the statements provided in relation to the specific aspects presented under each of the questions posed.

Statements indicating opposition to ISDS in TTIP or in general

The second category of statements indicates concerns about investment protection / ISDS in TTIP or in general. It is recalled that this consultation takes place within the specific circumstances where the Council has unanimously entrusted the Commission to negotiate high standards of investment protection and ISDS within TTIP, provided that the final outcome corresponds to the EU interests. The negotiating directives therefore include an element of conditionality and make clear that a decision on whether or not to include ISDS is to be taken during the final phase of the negotiations.

Therefore, this second category of replies addresses a broader issue than the one that was the subject of this consultation. Accordingly, this wider question should be answered, in light of the ongoing EU efforts to reform substantially the investment protection and ISDS system, and of an assessment of such efforts. .

It is noted that a number of concerns are based on ISDS cases which are not yet adjudicated. The outcome and consequences of these cases are not known. Hence, any conclusions on such basis would appear to be premature. But the Commission services agree that the risks for the right to regulate inherent in these cases must be the object of debate.

Secondly, in many cases, these concerns are based on ISDS litigation under existing investment agreements or the approach taken in existing investment agreements. It should be recalled that the proposed approach to investment protection and ISDS was also developed in light of the experience that the results of arbitration under the many existing agreements have sometimes been controversial. The EU, in exercising a competence provided for by the Lisbon Treaty, has the opportunity to set up a reformed EU wide regime which will replace and phase out the existing treaties of Member States<sup>5</sup> As the proposed approach contrasts quite significantly with the text of existing agreements worldwide, it is difficult to draw definitive conclusions on the merits of the EU's proposed approach based on old texts. In particular, the proposed approach would contain rules to achieve transparency for ISDS proceedings. In EU agreements it would thus not be possible that ISDS tribunals be secret or that stakeholders cannot intervene and submit views. The proposed approach also goes a long way towards addressing concerns with regard to the conduct and ethics of arbitrators, notably by introducing a code of conduct and a predefined list ("roster") from which the parties to the ISDS litigation would choose the arbitrators. The latter will allow avoiding conflicts of interests up front. Thirdly, with regard to the concerns on possible threats to legislation in the public interest, it should be noted that ISDS is strictly an enforcement mechanism of the investment protection provisions. ISDS is not a system giving investors a right to review or change legislation. To bring a claim, investors must be able to demonstrate a

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<sup>5</sup> Reference could be made in this context also to the European Charter of Fundamental Rights, in particular its Article 47.

breach of one of the investment protection standards and a resulting economic damage to the investment of the foreign investor. Moreover, the proposed EU approach aims at further addressing concerns on the need to avoid challenges to legislation or regulation for a public purpose by clarifying the standards of investment protection and avoiding unwarranted interpretation. For example, under the reformed provisions on expropriation or the more precise definition of “fair and equitable treatment” it is no longer possible to envisage a successful claim by an investor against public interest legislation that would merely affect its profits.

However, the balance to be achieved between the right to regulate and investment protection is at the very heart of this consultation and is acknowledged as one of the areas on which further work will continue.

With regard to investors conduct, the proposed approach protects only those investments made in accordance with the applicable law in the host State. This means that investors need to comply with the full range of obligations applicable in the host jurisdiction e.g. in terms of fundamental rights, labour or environmental laws. The host State remains able to define the specific obligations applicable to investors in its territory. In addition, one of the important novelties of the proposed approach is to make mutually supportive in the same agreement investment protection provisions and provisions on sustainable development. The latter include, among others, specific references to international conventions on labour or the environment or a prohibition of lowering labour and environmental levels of protection with a view to attracting investment. They also include references to existing international corporate social responsibility schemes that apply directly to investors’ behaviour.

#### *Statements containing specific views on the issues identified for the consultation*

The third category consists of statements containing specific views on the issues identified for the consultation. They present a considerable level of detail and include very often specific recommendations for the proposed EU approach. Many answers recognise that the proposed approach is a progress compared to existing models.

The emerging picture from these replies offers a more complete and detailed range of replies and is hence an important outcome of this consultation. There are clear divisions among the positions adopted by certain categories of respondents, but there are also areas of possible or actual consensus, in particular with regard to further improvements.

This analysis confirms that the starting point for the reflection on the EU position in TTIP is the approach proposed in the reference text. However, the consultation also shows that more work is required for TTIP. This negotiation may present specific characteristics requiring a further development of the EU position. For example, the EU-US investment relationship is by far the largest and deepest in the world. These circumstances need to be taken into account and that TTIP has broader implications than other agreements negotiated by the EU.

On this basis, without prejudice to any other issues, there are in particular four areas where further improvements should be explored:

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

In the first quarter of 2015, the Commission services therefore intend to further consult the EU stakeholders, the EU Member States and the European Parliament on the above mentioned areas, as part of a wider debate on investment protection and ISDS in TTIP with a view to enabling the Commission to develop concrete proposals for the TTIP negotiations. It should be recalled that no negotiations are currently taking place on this issue. The development of a new approach on investment protection and ISDS fully meeting the EU interest and fully complying with the commitment taken in front of the European Parliament is a key objective of the TTIP negotiations.

## **ANNEXES**

## **Annex I. Methodology and presentation of findings**

The purpose of the consultation was to gather substantive views and suggestions on the approach in relation to the investment protection and ISDS provisions in TTIP. On this basis, it was decided that a list of open questions would be preferable, as it would allow respondents to provide comments in a free and unrestricted manner. Such an approach would typically privilege a qualitative analysis.

However, in the context of an unprecedented level of interest and participation, the consultation has revealed a significant polarisation of views around certain key issues and concepts related to investment protection and ISDS. The Commission services have therefore considered useful to also strive, where possible, to have at least elements of quantitative analysis.

As a result, the analysis of the replies involved a combination of qualitative and quantitative methods and was conducted as follows:

1. Where possible, each reply was assessed based on the overall attitude of the respondent.
2. There was then an identification of key statements and suggestions: each contribution was assigned a number of keywords describing in short the main statements and/or suggestions that it contained.
3. The identified keywords were reviewed and regrouped in order to capture those statements and suggestions that occurred in several or most of the replies.
4. Approximate quantification: each category of "sentiments" as well as the identified recurrent statements and suggestions were counted, with a view of defining broad orders of magnitude.

It should be stated from the outset that such limited quantification can offer no more than an illustration of the major trends but in no circumstances can it serve as basis for a precise assessment. The questions in the consultation were not conceived for strict quantitative purposes.

Indeed, given the nature of the contributions, a precise quantification of the content of the replies would be of limited relevance. At the same time, however, based on the methodology adopted, a broad approximation of the overarching trends was possible, complemented by the results of the qualitative analysis. This is why the present report does not present exact figures, but strives to give an indication of the weight of a given opinion compared to the rest (e.g. "the large majority of", "most of", "around a half", etc.). Furthermore, in order to reflect the content of the replies in a comprehensive manner, the report is not limited to majoritarian views, but strives to include a maximum of relevant views and suggestions (which are referred to as "some", "a significant number of", "a minority", "a few", "certain", etc.). The fact that some replies were submitted collectively or that they contain identical answers did not impact on

their quantification – in other words, each reply from a given citizen or organisation was counted as such.

Apart from the above-mentioned aspects, the relevance of the results should be also assessed against the following:

- ***Non-reclassification***: The respondents chose themselves the category to which they considered they belong (e.g. "NGO", "citizen", "think tank"). The choice of the respondents was fully respected and no re-classification of replies was made. This implies however that the relevance of the categories or respondents is limited and should be regarded as such. Similarly, no reply was re-assigned under a different question, even though in theory it might have been more relevant for another question than the one under which it was submitted.

- ***Factual interpretation***: The replies were interpreted strictly based on the information they contained. This means that the analysis has not been adjusted to take into account whether the respondent understood the question correctly, whether the reply is based on a correct premise, whether the reply is influenced by a given perception, or whether there are correlations across different answers. Such an approach allowed for a maximum number of replies to be counted as relevant for the analysis.

- ***No weighting***: all the replies were analysed and counted individually. There was no attempt to derive elements of representativeness, for example based on the number of adherents to a certain organisation.

In terms of process, the analysis of the replies took place by question (1-12) and by category. The answers to question 13 were analysed, grouped together and reported as the general overview of the results of the consultation.

It should also be mentioned that, apart from the answers submitted based on the online questionnaire, the Commission services have also received more than 150 contributions in the form of position papers, articles and various other types of documents, attached to the consultation replies. In most of the cases, these contributions contained the same statements as those submitted in the online questionnaire. In some cases, however, the answers submitted online referred to the attached document – in such cases, the content of the attached document was taken into account, where relevant, in the assessment of the reply.

As regards the individual contributions from citizens, a preliminary review indicated that most of them were dominated by generic arguments, rather than specific to the issues presented under each question. The most detailed answers are usually provided under question 13 (general assessment) and often state the same arguments as those presented under questions 1-12.

For this reason, it was decided to first analyse the answers to the general assessment question, with a view to identifying the main ideas put forward, and subsequently to verify whether any additional relevant information could be gathered from the answers to questions 1 to 12.

It was also noted that some responses were identical, almost identical or included some identical sentences as part of an answer on the same or different questions. The sources of submission in those cases were not identified. It was therefore assumed that individuals contributing to the public consultations relied on the same sources independently.

Given the predominantly generic nature of the arguments presented in the replies, it was decided to present them altogether under a separate section rather than to divide them by question.



## **Annex II. Presentation of the replies by individual citizens**

There were 3.146 contributions submitted by individuals which cannot be included in other groups of respondents. A majority of these contributions consist of very short or relatively short answers for only some of the questions. As explained in the methodology part, a majority of them do not contain detailed or technical arguments in response to the given question but rather general opinions or ideas; the submissions under the general assessment question (question 13) are the most developed and detailed.

Many respondents are simply opposed to TTIP, ISDS or investment protection in general, without however providing a particular justification or argument in this respect. Some contributors consider however that the approach illustrated in the consultation is adequate to improve the investment protection system.

The main points arising out of the individual citizens' replies are as follows:

For many respondents, the language in the proposed approach is deemed unclear and imprecise. It is perceived as leaving too much room for abusive interpretations by arbitral tribunals and, as such, ineffective in the light of the EU policy goals. This doubt is pointed out mainly in the context of the definition of investment, scope of FET and protection against expropriation.

The threat to the right to regulate is a notable area of concern, in particular in relation to environment protection. It is claimed, for instance, that the activity of multinationals can cause severe environmental damages. In such a context, ISDS is seen as a way of legalising the environmentally harmful conduct of investors.

There is a specific concern expressed on the privatisation of the UK National Health Service. Some respondents fear that TTIP and ISDS could make it impossible to re-nationalise investments in utilities once they have been privatised.

Some perceive investment protection as bringing advantages only for the investors and disadvantages for the citizens (in the form of a threat to public interest legislation, or loss of public money and costs for the tax-payers). Moreover, the US investors and their lawyers are seen as being particularly threatening, while business lobbies in Brussels are also seen as very powerful. Many respondents express fear that the introduction of investment protection in TTIP would unjustifiably give corporations even more power than they already possess. Overall the whole system is perceived as deeply unfair.

Certain respondents note that the investment protection provisions do not impose any obligations on investors. It is suggested to ensure that investors' conduct complies with human rights, Corporate Social Responsibility principles or international labour and environment standards, which should be specifically referred to in TTIP.

Regarding indirect expropriation, many respondents note that human rights protection does not apply to corporations in the same way as to individuals, and that in some cases

property can be expropriated without compensation. Some highlight that indirect expropriation through regulatory measures should not be considered as a form of misconduct from the part of the host State, which should give right to compensation, but it should be treated as part of the normal regulatory activity. Similar considerations are stated with regard to the FET standard.

In addition, the level of protection for IPRs is considered by some individuals as too broad.

Some of the submissions touch upon the issue of market-related risk as an inherent part of each investment process. The respective respondents believe that ISDS would shift the costs and risk of investment to the states and finally to the citizens and taxpayers. In this context, it is stressed that investors should take into account the overall regulatory environment in the State in which they intend to invest and conduct their own risk assessment on this basis.

Regarding ISDS, it is stated that both the US and the EU Member States have stable legal and judicial systems, therefore there should be no need for the establishment of an additional mechanism. It is also claimed that "secret arbitration courts" undermine national courts. Moreover, it is noted that the access of foreign investors to the ISDS would unfairly disadvantage domestic investors.

ISDS is considered by some as undemocratic and lacking legitimacy. It is described as unacceptably constraining the right to regulate of democratically elected decision-makers.

It is also claimed that ISDS is not transparent. The proposed approach aiming to strengthen the principle of transparency during the investment arbitral proceedings is considered as too narrow. It is suggested that there should be no exceptions to transparency rules and investment law should be more transparent towards society.

Some see ISDS as inappropriate to adjudicate investment disputes, suggesting that that an international investment court should be established in order to settle the disputes on independent grounds.

Some respondents believe that the proposed approach does not do enough to counter frivolous or unfounded claims to protect the interest of respondents in ISDS. Some other respondents propose including ISDS filters for human rights or environment protection issues.

Finally, some individuals believe that arbitrators are not independent. Therefore, those contributions support efforts to enhance the level of arbitrators' independence. However, some of them suggest either allowing representatives of citizens to participate in ISDS proceedings or leaving investment disputes only to national courts.

The TTIP negotiation process is seen by some as undemocratic and not transparent enough. The negotiations are referred to as "secret" and as conducted in a manner not engaging stakeholders and European citizens.

Finally, some individuals consider that the consultation was too complicated or too technical, or even that it was intentionally made inaccessible or difficult to follow. Some specifically complain that the questions were designed exclusively for lawyers and investment law specialists; therefore they did not have any possibility to express what they really believe about ISDS and/or TTIP.

## **Annex III. Presentation by question of the replies received**

### **Contents**

1. QUESTION 1: SCOPE OF THE SUBSTANTIVE INVESTMENT PROTECTION PROVISIONS	37
2. QUESTION 2: NON-DISCRIMINATORY TREATMENT FOR INVESTORS	47
3. QUESTION 3: FAIR AND EQUITABLE TREATMENT	55
4. QUESTION 4: EXPROPRIATION	65
5. QUESTION 5: ENSURING THE RIGHT TO REGULATE AND INVESTMENT PROTECTION	72
6. QUESTION 6: TRANSPARENCY IN ISDS	80
7. QUESTION 7: MULTIPLE CLAIMS AND RELATIONSHIP TO DOMESTIC COURTS	89
8. QUESTION 8: ARBITRATOR ETHICS, CONDUCT AND QUALIFICATIONS	101
9. QUESTION 9: REDUCING THE RISK OF FRIVOLOUS AND UNFOUNDED CASES	108
10. QUESTION 10: ALLOWING CLAIMS TO PROCEED (FILTER)	116
11. QUESTION 11: GUIDANCE BY THE PARTIES (THE EU AND THE US) ON THE INTERPRETATION OF THE AGREEMENT	121
12. QUESTION 12: APPELLATE MECHANISM AND CONSISTENCY OF RULINGS	126
13. QUESTION 13: GENERAL ASSESSMENT	132

## 1. QUESTION 1: SCOPE OF THE SUBSTANTIVE INVESTMENT PROTECTION PROVISIONS

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### ***Explanation of the issue***

*The scope of the agreement responds to a key question: What type of investments and investors should be protected? Our response is that investment protection should apply to those investments and to investors that have made an investment in accordance with the laws of the country where they have invested.*

### ***Approach in most investment agreements***

*Many international investment agreements have broad provisions defining "investor" and "investment".*

*In most cases, the definition of "investment" is intentionally broad, as investment is generally a complex operation that may involve a wide range of assets, such as land, buildings, machinery, equipment, intellectual property rights, contracts, licences, shares, bonds, and various financial instruments. At the same time, most bilateral investment agreements refer to "investments made in accordance with applicable law". This reference has worked well and has allowed ISDS tribunals to refuse to grant investment protection to investors who have not respected the law of the host state when making the investment (for example, by structuring the investment in such a way as to circumvent clear prohibitions in the law of the host state, or by procuring an investment fraudulently or through bribery).*

*In many investment agreements, the definition of "investor" simply refers to natural and juridical persons of the other Party to the agreement, without further refinement. This has allowed in some cases so-called "shell" or "mailbox" companies, owned or controlled by nationals or companies not intended to be protected by the agreement and having no real business activities in the country concerned, to make use of an investment agreement to launch claims before an ISDS tribunal.*

### ***The EU's objectives and approach***

*The EU wants to avoid abuse. This is achieved primarily by improving the definition of "investor", thus eliminating so-called "shell" or "mailbox" companies owned by nationals of third countries from the scope: in order to qualify as a legitimate investor of a Party, a juridical person must have substantial business activities in the territory of that Party.*

*At the same time, the EU wants to rely on past treaty practice with a proven track record. The reference to "investments made in accordance with the applicable law" is one such example. Another is the clarification that protection is only granted in situations where investors have already committed substantial resources in the host state - and not when they are simply at the stage where they are planning to do so.*

### ***Question:***

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*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?*

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## **1.1. Submissions**

### **1.1.1. Collective submissions**

Among those who submitted their replies collectively via various online platforms, about 70,000 respondents provided answers to question 1.

Almost all respondents disagree to the objectives and approach proposed. About two thirds of them express moderately negative views, and almost one third express total opposition.

Most of the respondents note that the existing legal framework in the EU (some also mention the US) is sufficient to guarantee the protection of foreign investments in relation to the proposed provisions. Along these lines, some express explicit doubts regarding the need for protection in the given context, or are inclined to consider it unnecessary.

The large majority of the respondents perceive corporations as already enjoying enough, or even too many rights or power, compared for instance to citizens or even States. They would thus have difficulties in understanding the rationale for reinforcing such rights, or fear that such additional protection may shift power in favour of economic elites. Concerns related to the chilling effect on the right to regulate, possibly triggered by investment claims, are present in about one half of the replies.

About one third of the respondents to this question perceive the rights granted to foreign investors as positive discrimination compared to the rights that domestic investors enjoy; a larger number of respondents complain that there is no attempt to balance the rights and obligations of investors in the proposed approach.

The majority of those replying to question 1 are not convinced that the proposed provisions would prevent abuses e.g. by mailbox companies or by speculative investments, in particular through claims against genuine regulatory measures.

A limited number of respondents refer to the requirement that investors have substantive business activities in the territory of their home country, expressing doubts with regard to its application in practice, on grounds that such a requirement can be circumvented for instance through corporate restructuring.

Some respondents call for stronger investor obligations and sanctions against breaches of such obligations, as a means to prevent abuses.

### **1.1.2. Individual submissions from organisations**

A number of 4 out of 5 replies from academics, 10 out of 14 think tanks and 12 out of 15 law firms and consultancies contain answers to question 1. 29 out of 35 trade unions, 38 companies out of 60, 59 out of 64 business associations and 132 NGOs and umbrella NGOs have replied to this question.

About a half of the academics and think tanks express mixed or neutral views. A smaller number of replies are dominated by negative views and only a few replies are positive about the proposed approach. Law firms and consultancies, as well as most trade unions are predominantly negative towards the proposed approach, although only a small number of trade unions indicate full opposition.

By contrast, the majority of the business organisations express predominantly positive views in relation to the approach proposed; full and unconditional support is however expressed only by a small number of respondents, and an equal number of respondents express total opposition. About one third of the contributions from business associations contains mixed or neutral considerations.

More than half of the companies who address the issue of scope do not take a clear position on the approach proposed but make targeted comments on specific issues. More than one fourth state that they are rather in favour of the proposed approach, one tenth have mixed views, and another tenth is rather negative or strongly negative. A majority of NGOs and umbrella NGOs opposes additional investment-related provisions while some explicitly support the suggested approach. The majority of the NGOs and umbrella NGOs considers that local laws and legal court systems already offer sufficient protection for investors.

Of the respondents in the "other organisations" category who specifically address the issues in question 1, the largest group by a small margin is those who are either neutral or undecided followed by those who are partially against.

## **1.2. Main comments**

### **1.2.1. General proposed approach**

Many academics and think tanks tend to believe that the proposed approach is not adequate from the point of view of the interests of the host state, mainly because of too broad definitions (see further below). However, a significant number of respondents in this category appreciate the efforts to bring more clarity to the definitions of investment and investor, including with regard to the "substantive business test" and the characteristics of investment.

A majority of law firms and consultancies considers that the existing legal framework in the EU is sufficient to guarantee the protection of foreign investments. A couple of consultancy firms also believe that the proposed approach would be more in favour of the US than of the EU.

Most trade unions acknowledge the various improvements in the proposed approach, in particular the requirements that investment is made in accordance with the applicable law, that investors have substantial business activities in the home State, and the

objective to exclude mailbox companies from the definition of investors. However, a large majority of trade unions find that the proposed improvements are insufficient, in particular in relation to the coverage of the definition of investment (see further below). In addition, some state that, in their view, the risk of abuse would persist, either because of the ease of corporate restructuring, or because they saw loopholes in the proposed texts. Some complain about the fact that the scope of the agreement does not exclude sensitive sectors such as health, education, environment or financial markets regulation.

On the other hand, more than two thirds of the business associations express support in relation to various features of the proposed approach. There is strong support for a broad scope for investment protection, including a broad asset-based definition of investment. A number acknowledge the need to avoid abuses e.g. by mailbox or shell companies, or express support with regard to the objective of protecting only investment made in accordance with the applicable laws. However, a small number of respondents fear that the proposed approach would be too narrow compared to their expectations. For instance, a couple of business associations are concerned about the exclusion of commercial transactions and contracts.

A few other business associations consider, to the contrary, that the proposed approach might be insufficient with regard to certain defensive considerations. For instance, some warn against the inclusion of sovereign bonds in the definition of investment, considering that this might be dangerous from certain host States. Others fear that the right to regulate in certain sensitive sectors (in particular public services and publishing sector are mentioned), could be threatened.

Despite the prevailing negative view, a small group of NGOs and umbrella NGOs support the proposed approach. However, some argue in favour of the inclusion of mailbox companies and broader definitions of investors and investment than those proposed.

One NGO also points out as a deficiency that the definition of the terms 'investment' and 'investor' does not allow the protection of planned investments. This view is shared by several respondents in the "other" category, in favour of a broad definition. They identify the pre-establishment phase as being an important period in which to provide investor protection, especially given that this may encourage investment in the first place. These respondents note that large resources are generally committed to an investment even before any physical transfer of funds to the host state. SMEs and first-time cross-border investors are highlighted as particular examples requiring protection in the preparation phase prior to actual investment.

Around a third of "other" respondents are concerned that democratic decision-making should prevail over the need for security of investments. Several of these respondents wish to ensure that European values are paramount in investment protection.

### **1.2.2. Definition of investment**

A number of academics and think tanks consider that the proposed definition of investment is too broad because it covers undesirable forms of investment (e.g.



speculative) or because it covers public debt, or because the reference to the characteristics of investment and the open list of assets in the definition may in their view enable too expansive interpretations. A couple of think tanks consider that the reference to the characteristics of the investment is uncertain because the list is illustrative and its elements are alternative. On the other hand, a couple of law firms and consultancies consider that the reference to the characteristics of the investment would risk leaving legitimate investments or investors unprotected.

The risk of expansive interpretations created by the open ended definition covering "every kind of assets" is also underlined by several NGOs. Some NGOs and umbrella NGOs refuse the idea that portfolio investment or speculative investment could enjoy protection under TTIP.

A couple of law firms and consultancies are not convinced that the proposed reference to the characteristics of investment would bring the necessary legal certainty and consider that it would benefit from further clarification, in particular the reference to "duration".

The majority of trade unions are overall of the opinion that the definitions are too broad, mostly because of the inclusion of portfolio investment or speculative investment, or because of the possibility that both foreign shareholders of a company, and the company itself, can submit claims.

Some companies favour a broader definition than the one proposed. They consider that all investments should be protected, irrespective of their nature and sector. Some business associations specifically require that investment should also be protected at the establishment phase, which for certain respondents implies the possibility to have access to ISDS for establishment-related disputes. However, some respondents express concerns on the reference to the characteristics of investments, in particular duration, as the respective respondents fear that this criteria would result into granting protection only to "old" companies as opposed to newly created.

Around a third of respondents in the "other organisations" category are in favour of a broad scope for investment protection. In particular, they highlight the complexity of, and financial innovation within, the investment market. In their view, an overly-restrictive definition now would not only risk providing an incomplete form of protection but would also result in an insufficiently future-proof agreement. These respondents therefore argue that the definition of investment should be sufficiently wide to ensure that investments of different types, and in particular modes of investment that may arise in future, receive protection. While the language used is seen as leaving sufficient space for future evolutions of investments to be recognised within this list, there is some uncertainty as to whether, having fallen outside the itemised list, but still satisfying the broader criteria of the first paragraph of the reference text, an asset remains an "investment".

A number of these respondents consider that the open ended approach could potentially lead to some inconsistent awards on specific facts, but this is outweighed by maintaining an element of adaptability within the agreement.

Some respondents among the "other organisations" query the need for carving out claims for money, the sale of goods and management contracts, particularly noting that the latter two categories have not been excluded in previous treaties. Respondents caution against over-definition in this respect, giving the example that most sale of goods contracts would be unlikely to fit conventional understandings of investments, but where one is used in a manner that does constitute an investment, there is no reason not to protect it as such. In particular, where carve outs have uncertain implications, these respondents feel that they should be avoided as far as possible.

On the other hand, a small number of other respondents expressly favour a narrower definition of investment. In particular, these respondents are concerned about the distinction between investments and assets, the former being more limited than the latter; and direct and portfolio investments, the latter needing to fall outside the scope of TTIP. It is suggested that the idea of sustainable economic links assists in securing this latter distinction.

Several companies mention the necessity to adequately cover all transactions along the supply chain, Intellectual Property rights (IPRs), financial companies and their bond assets are often mentioned. However some NGOs oppose the coverage of IPRs for concerns about affordable access to medicines. In their view this would allow investors to lodge claims against government's health regulations, undermining the enjoyment of their IP-related investments.

A couple of companies argue that the duration element in the definition of investment should be removed, since it could prevent SMEs from benefiting from the scope of the agreement. Another couple insist that immaterial investments such as immaterial computer tools should be protected in accordance with the legislation where these immaterial tools are created or declared.

A group of NGOs criticise what they consider to be vague concepts such as "assumption of risk", "commitment of other resources", "expectation of gain or profit", "certain duration" and "forms that an investment may take". Such standards – in their opinion - would grant excessive discretion in determining whether investment existed.

Other NGOs argue that the definition of investment should be explicitly limited to the commitment of capital or the acquisition of real property.

The regional governments suggest that only sustainable investments should be protected and then only if they are made in accordance with national law.

The reference to the applicable law that investments must comply with, in order to be protected by the agreement, is put into question by some academics and think tanks; some fear that it may be interpreted in a restrictive way by arbitral tribunals, while others consider that it would entail the risk of covering only the legislation applicable at establishment, and not also the need for the investors to comply also with the legislation post-establishment.

Only a couple of companies consider the reference to applicable law to be an improvement. Some express scepticism that it might prevent some companies to abuse

the system, others point out that this term might be misused by States in cases of a small technical flaws in the course of establishment of an investment or in case bribery. A couple of business associations consider that the reference to applicable law is not necessary and it may create confusion because of being too vague. A significant number of respondents in the "other organisations" category call for the application of proportionality in assessing breach: a minor breach of applicable law should not lead to an automatic loss of all investment protection. Some other respondents point out that this qualification is unnecessary as, in the event of gross violations of applicable law by investors, other remedies are available to the host state. Instead, this wording could result in the loss of investor protection on mere technicalities.

### **1.2.3. Definition of investor**

As regards the replies in the "academics" and "think tanks" categories, it is pointed out that the definition covers investors who seek to make an investment. This may lead to some confusion about the scope of the investment protection provisions (pre and post establishment). Some respondents also point to the fact that companies often have multiple nationalities and this may help them easily restructure investments in order to qualify as investors under a given agreement.

Some academics and think tanks consider that the proposed substantive business operations test risks leaving a wide room for interpretation. They fear it would not bring more legal certainty, and would perhaps even continue to allow circumvention of rules through corporate restructuring.

A significant number of business associations also express doubts and concerns with regard to the substantive business operations test, although not necessarily for the same reasons as above. More specifically, it is considered that such a requirement may create uncertainty, including with regard to access to ISDS, either because of its perceived imprecision or for fear that it might exclude legitimate investments.

Companies are divided over the issue of the exclusion of shell and mailbox companies. While certain respondents consider that shell companies should not benefit from protection, other respondents consider shell companies should be covered fully. The exclusion from the scope of protection of financial companies and investments along the supply chain would be an unwarranted side-effect. Within the debate on the exclusion of mailbox companies, there is further division over the substantive business operations requirement. The requirement that an investment be made in accordance with applicable law already seems to exclude a number of companies from the scope of the agreement. Some companies question why an enterprise which is lawfully incorporated in the home state, pays taxes and complies with the laws and regulation of the host state, should not benefit from the protection afforded by the agreement. Several companies fear that the size of a company might play a role in the determination of substantive business operations and this might unduly exclude some SMEs from the scope of the agreement.

Some think that the issue of exclusion of shell companies would be better addressed with a denial of benefits clause as this would give parties more flexibility in excluding certain companies from the scope of the agreement. Several companies oppose the limitations attached to the definition of investor aimed at avoiding treaty-shopping. These respondents argue that there should be no conditions relating to how the investment is made or from where, as long as the investment is made in accordance with the applicable law of a State. One respondent considers that indirect ownership is particularly relevant in complex corporate set-ups such as joint-ventures and that these set-ups should be protected under TTIP. Finally, some of the "other" respondents note the need for a broad definition to ensure non-profit organisations received protection, highlighting the risk that a narrow definition may exclude these types of organisations.

Many NGOs find the clarification of what defines an "investor" useful to avoid the misuse of the treaty by mailbox investors. Some NGOs and umbrella NGOs specifically support the requirement for substantive business activities.

This is shared by certain respondents in the "other organisations" category, who are satisfied that potential abuses are guarded against through a requirement for "substantial business activities" or similar provisions, such as a "denial of benefits" clause.

### **1.3. Specific suggestions**

There are several suggestions for modifications regarding the proposed approach.

The suggestions from academics and think tanks refer to the exclusion of public debt from the definition of investment, or the need to favour investments that are economically significant, for instance by using an enterprise-based definition or by covering only a limited number (closed list) of assets. A couple of think tanks call for the exclusion of cultural activities from the scope of the agreement.

A tiny minority of NGOs call for the exclusion of public services from the scope of the investment protection provisions and some trade unions request the exclusion of certain sensitive sectors (e.g. health, education, environment or financial markets). A minority among business associations also consider that the regulations applying to the organisation or provision of public services, e.g. social services, should not be subject to the investment protection provisions or ISDS; a few others call for the exclusion of various cultural and media services from the scope of TTIP, in particular the press publishing sector, and suggesting, as an alternative to exclusion, the use of a positive list, or clarifications in the general exceptions.

A considerable number of NGOs suggest a narrow definition of investor/investment with denial of benefit and support the exclusion of mailbox companies.

Half of the trade unions suggest a narrower scope. Most propose that the agreement only protects FDI (and not portfolio investment) and that the agreement only gives rights to investors after they establish in the host country (and not also at establishment), that it specifically excludes all cultural sectors (in particular, the publishing sector) or

that it excludes the possibility for investors to receive compensation for the loss of future profits. Some business associations also call for the exclusion of various cultural and media services, in particular the press publishing sector, and suggest, as an alternative to exclusion, the use of a positive list, or clarifications in the general exceptions.

On the other hand, a significant number of business associations consider that exceptions and limitations to the coverage of the agreement should be avoided as much as possible or even be rejected, or at least kept to a minimum, in order to ensure a broad coverage, or even the broadest possible.

A few business associations and companies suggest that the reference to IPRs in the definition should be broadened so to cover all possible forms of IPRs, in particular exclusive market rights. Other suggestions refer to the inclusion of specific contracts among the assets covered by the definition of investment or the inclusion of territorial waters and exclusive economic zones in the definition of territory. For instance, one company argues in favour of the addition of some specific contracts to the non-exhaustive list defining investment such as management and infrastructure contracts, "build-operate-transfer" and "design-build-operate" project contracts in order to capture waste recycling and water production contracts.

Some academics and think tanks call for stronger investor obligations and, as a minimum, the absolute prohibition of any form of bribery and an absolute obligation to respect human rights. Many NGOs also consider that the obligations of investors should be affirmed in a stronger manner as a condition to benefit from investment protection. There is a suggestion to explicitly include the requirement that investors have to respect the law of the host country for the duration of their investments. A further suggestion concerns including an absolute obligation to respect human rights as reflected both in the law of the host country and in international law, together with a prohibition of any form of bribery.

Some trade unions also point to the fact that investors' rights are not matched by their obligations. A significant number of them call for a stronger weight of sustainable development considerations (e.g. to protect investment engaged in sustainable development activities) or for a stronger weight of domestic rules in the investment legal framework, in particular by integrating international rules into the domestic ones or by ensuring their compatibility with the domestic legal system. One NGO suggests that no investment protection should be granted to investors who demonstrably do not comply with Human Rights or Environmental Agreements. Another respondent suggests the inclusion of "due diligence" into TTIP.

Another category of suggestions refers to various additional clarifications or more precise language that could be useful or needed, in the opinion of the respective respondents.

Thus, some NGOs suggest that the reference to applicable law should be rephrased as follows: "made in accordance with the investment admission regime of the host State in force at the time of making the investment." Some academics and think tanks, as well as

a significant number of trade unions, suggest clarifying the reference to the "applicable law", for instance by introducing an explicit reference to fundamental rights such as human rights, or to the anti-corruption regulations. This is supported by certain respondents among the "other organisations" category, who wish to also add environmental, consumer and labour rights.

Some business associations suggest that the conditions of admission should be made public and transparent by each Party for the purposes of the application of the Agreement. Some NGOs defend a similar point of view: the investment admission regime must be published by the host State in a transparent and easily accessible manner and must be notified to the home State or Contracting Party of the investor. For the purposes of TTIP only duly published and notified rules for the admission of investments form part of the admission regime of the host State. It is also suggested that the reference to the applicable law should not be understood or applied so to penalise investors for e.g. minor administrative errors, but it should rather refer to fundamental legislation. Certain respondents in this category refer to OECD's work on base erosion and profit shifting (BEPS) for useful indications of ways to avoid abuses by companies.

Some respondents within the "other organisations" category suggest clarifying the notion of "a certain duration" or "claims to money". Others suggest referring to "sustainable economic links" instead of "substantial business". Some trade unions also suggest a more precise definition of the characteristics of investment, referring in particular to the duration of such investment. Some think tanks as well as trade unions suggest that the requirement of having substantive business activities in the territory of the host State, proposed in the definition of investors, should be defined in more precise terms. A number of business associations recommend using a denial of benefits clause instead of a "substantive business" test.

For the purpose of ensuring that only relevant investors are protected, some business associations suggest imposing conditions on the ownership of companies, rather than on the importance of their activities. Some suggest clarifying the characteristics of investment by taking into account the type of investment, the capital dedicated, the number of employees as well as the assets that the investor owns.

One company seeks clarification that protection of an investment should only be granted in situations where investors have already committed substantial resources in the host state, not when they are only at the stage where they are planning to do so.

One company suggests that protection should only be made available to investments that bring long-term benefits to the host country through long-term capital commitment and employment.

## 2. QUESTION 2: NON-DISCRIMINATORY TREATMENT FOR INVESTORS

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### ***Explanation of the issue***

*Under the standards of non-discriminatory treatment of investors, a state Party to the agreement commits itself to treat foreign investors from the other Party in the same way in which it treats its own investors (national treatment), as well in the same way in which it treats investors from other countries (most-favoured nation treatment). This ensures a level playing field between foreign investors and local investors or investors from other countries. For instance, if a certain chemical substance were to be proven to be toxic to health, and the state took a decision that it should be prohibited, the state should not impose this prohibition only on foreign companies, while allowing domestic ones to continue to produce and sell that substance.*

*Non-discrimination obligations may apply after the foreign investor has made the investment in accordance with the applicable law (post-establishment), but they may also apply to the conditions of access of that investor to the market of the host country (pre-establishment).*

### ***Approach in most existing investment agreements***

*The standards of national treatment and most-favoured nation (MFN) treatment are considered to be key provisions of investment agreements and therefore they have been consistently included in such agreements, although with some variation in substance.*

*Regarding national treatment, many investment agreements do not allow states to discriminate between a domestic and a foreign investor once the latter is already established in a Party's territory. Other agreements, however, allow such discrimination to take place in a limited number of sectors.*

*Regarding MFN, most investment agreements do not clarify whether foreign investors are entitled to take advantage of procedural or substantive provisions contained in other past or future agreements concluded by the host country. Thus, investors may be able to claim that they are entitled to benefit from any provision of another agreement that they consider to be more favourable, which may even permit the application of an entirely new standard of protection that was not found in the original agreement. In practice, this is commonly referred to as "importation of standards".*

### ***The EU's objectives and approach***

*The EU considers that, as a matter of principle, established investors should not be discriminated against after they have established in the territory of the host country, while at the same time recognises that in certain rare cases and in some very specific sectors, discrimination against already established investors may need to be envisaged. The situation is different with regard to the right of establishment, where the Parties may choose whether or not to open certain markets or sectors, as they see fit.*

*On the "importation of standards" issue, the EU seeks to clarify that MFN does not allow procedural or substantive provisions to be imported from other agreements.*

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*The EU also includes exceptions allowing the Parties to take measures relating to the protection of health, the environment, consumers, etc. Additional carve-outs would apply to the audio-visual sector and the granting of subsidies. These are typically included in EU FTAs and also apply to the non-discrimination obligations relating to investment. Such exceptions allow differences in treatment between investors and investments where necessary to achieve public policy objectives.*

***Question:***

***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.***

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## **2.1. Submissions**

### **2.1.1. Collective submissions**

Almost all of those who have replied collectively to this question (i.e. close to 70 000 respondents) disagree with the objectives and approach proposed. About a half of them express strong opposition. The majority of the respondents state that, in their view, discrimination between foreign and domestic investors can be justified in a number of cases, where legitimate public policy goals prevail. At the same time, most of the respondents express a generic concern that the proposed approach would not adequately safeguard the State's right to regulate in areas of general interest.

About one third of the respondents are not convinced that the approach proposed in order to prevent "MFN importation" will be effective in this respect.

Finally, a strong call is made by certain respondents for the protection of the European agriculture sector.

### **2.1.2. Individual submissions by organisations**

A number of 4 out of 5 academics, 11 out of 14 think tanks and 11 out of 14 law firms and consultancies have replied to this question. Thirty out of 35 trade union respondents 135 NGOs and umbrella NGOs, 37 companies out of 43, and 57 out of 64 business associations provide replies.

A large majority of the contributions from academics and think tanks expresses predominantly negative views. The rest of the replies in these categories are equally divided between, on the one hand, mixed (neutral) considerations, and on the other hand support for the proposed approach. The replies from law firms and consultancies are rather negative in relation to the proposed approach, in addition to a few that contain balanced or neutral considerations. Most trade union contributions express negative views against the proposed approach; a small number of them indicate full opposition, while a few indicate a rather positive view of the proposed approach. The majority of business associations express a mix of positive views and doubts or concerns; a significant number of respondents among them are rather favourable to the proposed



approach, and only in a few cases do negative considerations seem to prevail. Among the companies who address the issue of non-discrimination, more than two thirds do not take a definite position on the proposed approach but rather make various comments on specific sub-issues; more than one third of respondents state that they were rather in favour of the proposed approach, more than one third have mixed views on the proposed approach, and one tenth were rather negative or strongly negative on the proposed approach. A majority of the NGOs consider the proposed approach welcome but insufficient, while large minorities either oppose or support the approach. Finally, of the respondents in the "other" category who specifically address the issues in question 2, the largest group is those who are partially against the proposals submitted to consultation; the next biggest group is those who are neutral, followed by those partially in favour.

## **2.2. Main comments**

### **2.2.1. General proposed approach**

The majority of the academics and think tanks express concerns and doubts with regard to the proposed approach, in particular with regard to the wording of the MFN clause and the use of general exceptions. Concerns relating to the same issues are also expressed by some consultancy and law firms. The large majority of the trade unions is unsatisfied with the proposed approach on grounds of various defensive considerations. A small number of trade unions is specifically against the use of a Most Favoured Nation (MFN) clause or against giving foreign investors establishment rights. A few trade unions, however, appreciate the efforts made in the proposed approach regarding the prohibition of "importation" of clauses from other agreements (though the MFN clause) and the formulation of general exceptions. A number of business associations highlight that the balance between investment protection and the right to regulate should be achieved in a way so to avoid disguised protectionism from the part of the States.

Certain respondents in the "other organisations" category feel that small business may suffer from unfair competition as a result of the wording of the proposed approach, pointing out that local businesses and industries that are less mature by default need a period of protection from competitors. One respondent in the same category is concerned that the language of the proposed approach indicates that protection would begin pre-investment; it feels that protection should only apply to the post-investment phase. However, other respondents in this category expressly observe that extending MFN treatment to the pre-establishment phase promotes more transparency, certainty and predictability.

A few respondents among the "other organisations" are of the opinion that the proposed approach does not draw a clear enough line between the principle of non-discrimination and certain aspects related to market access (in particular, the right of establishment). Finally, certain respondents in this category express the view that investors – in order to benefit from non-discriminatory treatment – must in their turn respect the law of the

host State, and suggest that this must be affirmed in a stronger manner, for instance in connection with their (investors') obligations ("code of conduct for investors").

### **2.2.2. Non discrimination**

A couple of consultancies note that discrimination could be justified in a number of cases, in particular if it acts in favour of investors who respect the environment, pay taxes, etc.

A large majority of business associations is favourable to the inclusion of non-discrimination clauses in TTIP and highlights in various forms the importance of the non-discrimination principle for investments. Some specifically mention the importance of non-discrimination at both establishment and after establishment.

Many trade unions oppose the fact that the provisions proposed cover not only de jure, but also de facto discrimination, which they consider too broad.

Companies are divided on the issue of non-discrimination. On one side a small number of companies question the very principle of having a standard of non-discriminatory treatment of investors. They consider that in the wider context of globalisation a State should be able to discriminate in favour of local investors, in particular if it serves a policy of local or national economic development. The same respondents consider that performance requirements should be allowed to boost national economic development. This is all the more important if TTIP ends up being the model for agreements with developing countries which should be allowed to adopt local performance requirements.

On the other side, a number of companies consider that non-discrimination in both the pre-and post-establishment phases is essential to ensure a level playing field between foreign and local investors in the Parties' territories. This is in their view the fundamental purpose of investment protection and a number of companies make the point that all EU investors should be treated the same way in the US. It is further argued and exemplified with concrete examples that discriminatory treatment towards foreign investors is indeed a reality in the US. In particular, one respondent extensively refers to its experience of being affected by Article 211 of the US Omnibus Appropriations Act of US legislation.

Some companies are particularly critical of the fact that the EU considers that discrimination among investors after they have established in the territory of the host country is deemed acceptable in certain rare cases and for some specific sectors. Several respondents call vigorously for a clarification on these "rare cases" and "specific sectors".

A large number of NGOs consider that non-discrimination is already contemplated under national or EU law and thus not necessary to include explicitly in TTIP. The observation is made that the EU should retain the power, under TTIP, to develop future policies or/and to adopt discriminatory measures "where necessary to achieve public policy objectives" or in cases of "general interest".

A few governments that reply suggest that non-discriminatory treatment (MFN and NT) should only apply to established investors. Non-discriminatory treatment should not lead to lowering standards in product safety, consumer protection, data protection, health, environment, animal protection etc.

### **2.2.3. Exceptions and limitations**

A number of think tanks put into question the effectiveness of the general exceptions, in particular from the perspective of safeguarding the right to regulate. In both "law firms" and "consultancy firms" categories, doubts are expressed regarding the application of the general exceptions to investments. However, views are divided: some exceptions are seen as too broad and some as too narrow. A significant number of trade unions believe that the proposed exceptions are not sufficient to prevent abusive use by investors. This is, for instance, because they only cover a limited set of policy goals while leaving outside areas such as employment or public services, or because the general exceptions only apply to non-discrimination and not also to the investment protection provisions.

About one third of the business associations suggest that the exceptions and limitations to the non-discrimination provisions should be avoided as much as possible or even be rejected, or at least kept to a minimum. Some specifically mention that an exclusion of subsidies or certain sectors (e.g. the food sector) should be avoided. Some believe that there should be no exception for post-establishment discrimination. Some indicate that references to the "like circumstances" test should be avoided. However, a number of respondents in this category fear that the proposed provisions might not adequately preserve the right to regulate, in particular for public services, because the sectorial exceptions are perceived as insufficient or vague, or because of the use of negative lists.

Several companies consider that exceptions to the principle of non-discriminatory treatment should be as limited as possible and in any case should be narrowly tailored. Sectorial exceptions for future measures a Party may wish to adopt without being constrained should be kept to a minimum.

Certain companies express scepticism with regard to the inclusion of general exceptions. Some consider that governments might use these exceptions to cover protectionist behaviour and one respondent argues that litigation relating to the use of exceptions would be increased. Several companies fail to see how discriminating against a foreign investor would allow to achieve a public policy objective. Some also refer to the uncertainty surrounding the notion of "public policy objective" and highlight that the meaning of this notion might differ from one State to another. A number of respondents further argue that general exceptions are not necessary given the opportunity for Parties to negotiate measure and sector-specific exceptions to their commitments.

Several respondents in the "other organisations" category also note difficulties in incorporating GATT/GATS general exceptions into the investment chapter. Not least, respondents query whether the intention is to import simply the wording or also the existing jurisprudence associated with this text. If the latter, caution is urged in mixing

two bodies of trade case law and investment case law. While related, both have developed in a sophisticated manner in this area.

Some NGOs and most trade unions consider that a positive list approach would be preferable to a negative one. Several respondents among the other organisations argue for a broader protection regime for non-discriminatory treatment, in particular urging the need to limit general exceptions and instead to adopt a "negative list" approach for any exceptions deemed necessary. However a small group of respondents in the same category suggests that a "positive list" approach in this area may assist the protection of the right to regulate.

One government representative suggests that exceptions from non-discriminatory treatment must be possible when in the public interest. On the other hand, a number of respondents among the "other organisations" argue for a broader protection regime, in particular urging the need to limit general exceptions and instead to adopt a "negative list" approach for any exceptions deemed necessary. On the other hand, just under a third of respondents addressing this point feels that limiting exceptions to those under the GATT is too restrictive, notably, leaving out labour standards, health and social services and cultural areas. A smaller group of respondents instead suggests that a "positive list" approach in this area may assist the protection of the right to regulate.

#### **2.2.4. Most Favoured Nation clause**

A number of business associations make a specific call for a strong MFN clause, including at pre-establishment, or indicate that in their view "importation" of provisions from other agreements can be justified. Some even state that they are against the proposed approach, because they perceive the "non importation clause" to be an unacceptable limitation.

Some academics and think tanks as well as a couple of law firms and consultancies doubt the effectiveness of the approach proposed in order to avoid "MFN importation". Some are even persuaded that MFN importation would still be possible, in particular because of the reference to the application of broadly defined measures. Many trade unions also criticise the approach on the MFN clause, which in their view fails to impede "importation" of more favourable substantive standards from other agreements.

A large minority of business associations expresses support for the efforts made under the proposed approach to avoid importation of standards from other agreements, through the MFN clause ("MFN importation"), although a few of them also signal caution in this respect.

The many respondent companies who take a position on the issue expressed concern that the MFN clause might become too limited if the importation of procedural and substantive provisions from other agreements is not allowed.

Most NGOs and Umbrella NGOs consider MFN problematic and oppose it. A large number regard MFN as not necessary as it might privilege foreign investors. Those respondents are concerned about the importing of foreign standards through the application of the MFN clause. A smaller group of NGOs considers insufficient the

proposed clarification to the MFN clause that would prevent the importation of procedural standards via MFN in this respect. By contrast, governmental organisations consider the proposed approach as fit to avoid the importing of foreign standards through the application of the MFN clause.

A significant number of respondents in the "other organisations" category view MFN as a fundamental element of international investment agreements. MFN already exists in agreements between EU Member States and the US. Therefore concerns are expressed that MFN may not be considered. Instead it is suggested that MFN should also extend to the right of the investor to access ISDS and MFN should apply to pre-establishment as well. Some of these respondents argue that in certain rare cases and in some very specific sectors, discrimination against already established investors may need to be envisaged.

A significant number of respondents in the same category express serious concerns that the MFN principle is rendered almost meaningless by the proposed approach. These respondents caution against throwing away this protection. One respondent observes that limiting the application of most-favoured nation status is short sighted. It is the fundamental purpose of investment negotiations to liberalise and foster an increasingly open climate that welcomes foreign direct investment. In any event, respondents point out that the MFN clause as currently drafted does not appear to achieve the stated objective of the proposed EU approach as the drafting appears to exclude only dispute resolution and in fact allows substantive measures to be taken into consideration, thus undermining the efforts made under the proposed approach.

### **2.3. Specific suggestions**

Respondents from both academics and think tanks suggest that the provisions prohibiting the importation of substantive standards through MFN should be further clarified so to make sure that such a prohibition is effective in practice. Some respondents in the "business associations" category also suggest more clarity and precision in order to effectively avoid "MFN importation". One think tank suggests that the "like circumstances" test should be subject to a precise definition, while a couple of business associations doubt the usefulness of such a test.

A large number of replies from trade unions contain suggestions for further narrowing the scope of the proposed provisions. Most of the respondents believe that the list of applicable exceptions should be extended, either to cover other areas (such as subsidies, procurement, public services, taxation, employment, education, or in general measures designed for legitimate public welfare purposes), or to apply also to the investment protection provisions. More than one third of the respondents suggest that the non-discrimination commitments should only cover de jure and not de facto discrimination.

Similarly, a couple of suggestions from consultancies are made in the direction of strengthening the defensive considerations, such as to cover only de jure and not de facto discrimination, or to list more explicitly certain aspects, such as health or consumer protection, as general exceptions. The insertion of an exception for cultural

activities (in particular for the publishing sector) is proposed by one trade union and several business associations representing this sector. Other limitations to the non-discrimination provision proposed by some business associations refer to the exclusion of public services or the exclusion of pre-establishment commitments.

Some business associations suggest providing guidance with regard to the meaning and interpretation of WTO concepts (such as the proposed general exceptions to non-discrimination) to investment, to envisage a better definition and justification for the policy space needed by host States to discriminate in certain areas; to make a clearer distinction between the rights and obligations applying pre- and post-establishment.

One respondent among the "other organisations" requests that the investment protection chapter states explicitly that investors make their investments in full recognition of the fact that regulatory interventions may be implemented and that such interventions may fall harder on foreign investors where there is an evidence-based justification.

Some NGOs suggest that, if an investor is discriminated against by a national public health measure that inadvertently impacts his activity, that investor should not be allowed to pursue a claim on grounds of discrimination. Some groups of NGOs suggest that the national treatment text should be explicitly limited to instances in which a measure is enacted for a primarily discriminatory purpose, to avoid claims against unintended de facto discrimination.

### 3. QUESTION 3: FAIR AND EQUITABLE TREATMENT

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#### ***Explanation of the issue***

*The obligation to grant foreign investors fair and equitable treatment (FET) is one of the key investment protection standards. It ensures that investors and investments are protected against treatment by the host country which, even if not expropriatory or discriminatory, is still unacceptable because it is arbitrary, unfair, abusive, etc.*

#### ***Approach in most investment agreements***

*The FET standard is present in most international investment agreements. However, in many cases the standard is not defined, and it is usually not limited or clarified. Inevitably, this has given arbitral tribunals significant room for interpretation, and the interpretations adopted by arbitral tribunals have varied from very narrow to very broad, leading to much controversy about the precise meaning of the standard. This lack of clarity has fuelled a large number of ISDS claims by investors, some of which have raised concern with regard to the states' right to regulate. In particular, in some cases, the standard has been understood to encompass the protection of the legitimate expectations of investors in a very broad way, including the expectation of a stable general legislative framework.*

*Certain investment agreements have narrowed down the content of the FET standard by linking it to concepts that are considered to be part of customary international law, such as the minimum standard of treatment that countries must respect in relation to the treatment accorded to foreigners. However, this has also resulted in a wide range of differing arbitral tribunal decisions on what is or is not covered by customary international law, and has not brought the desired greater clarity to the definition of the standard.*

*An issue sometimes linked to the FET standard is the respect by the host country of its legal obligations towards the foreign investors and their investments (sometimes referred to as an "umbrella clause"), e.g. when the host country has entered into a contract with the foreign investor. Investment agreements may have specific provisions to this effect, which have sometimes been interpreted broadly as implying that every breach of e.g. a contractual obligation could constitute a breach of the investment agreement.*

#### ***EU objectives and approach***

*The main objective of the EU is to clarify the standard, in particular by incorporating key lessons learned from case-law. This would eliminate uncertainty for both states and investors.*

*Under this approach, a state could be held responsible for a breach of the fair and equitable treatment obligation only for breaches of a limited set of basic rights, namely: the denial of justice; the disregard of the fundamental principles of due process; manifest arbitrariness; targeted discrimination based on gender, race or religious belief; and abusive treatment, such as coercion, duress or harassment. This list may be*

*extended only where the Parties (the EU and the US) specifically agree to add such elements to the content of the standard, for instance where there is evidence that new elements of the standard have emerged from international law.*

*The "legitimate expectations" of the investor may be taken into account in the interpretation of the standard. However, this is possible only where clear, specific representations have been made by a Party to the agreement in order to convince the investor to make or maintain the investment and upon which the investor relied, and that were subsequently not respected by that Party. The intention is to make it clear that an investor cannot legitimately expect that the general regulatory and legal regime will not change. Thus the EU intends to ensure that the standard is not understood to be a "stabilisation obligation", in other words a guarantee that the legislation of the host state will not change in a way that might negatively affect investors.*

*In line with the general objective of clarifying the content of the standard, the EU shall also strive, where necessary, to provide protection to foreign investors in situations in which the host state uses its sovereign powers to avoid contractual obligations towards foreign investors or their investments, without however covering ordinary contractual breaches like the non-payment of an invoice.*

***Question:***

***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? Q3: What is your opinion of the approach to fair and equitable treatment of investors and their investments in relation to the TTIP?***

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### **3.1. Submissions**

#### **3.1.1. Collective submissions**

The large majority of the respondents who submitted collectively their answers to this question expresses negative views with regard to the proposed approach. About one third expresses total opposition, while the rest adopt a balanced or neutral position.

The majority of respondents states, in various forms, its disapproval with regard to any "non-stabilisation" commitment. Many state that the risks triggered by the changes in general legislation should be born exclusively by investors, as part of the risk inherent to their activities.

Most of the respondents consider that protection such as envisaged under the FET standard is not necessary or is already available in the EU. At the same time, a number of respondents point to the fact that, in their view, some of the basic rights protected in the EU and covered by the FET standard, are not fully respected or enforced in the US.

About one third of the respondents considers that the proposed approach is not sufficient to prevent abuses, mostly because the closed list of elements is combined with



what these respondents perceive to be open-ended and vague formulations, and in particular because of the possibility that the definition might be expanded in the future.

Most of the respondents call in various ways for additional responsibility to be placed on the side of investors. Some call for more control over the activity of multinationals, considering that companies should be prevented from circumventing domestic rules through investing abroad. Others recall that the fundamental rights are for all citizens regardless of their economic situation, and such rights should prevail over investors' rights.

### **3.1.2. Individual submissions from organisations**

A number of 4 out of 5 academics, 9 out of 14 think tanks and 9 out of 15 law firms and consultancies replied to this question. A number of 30 out of 35 replies from trade unions are recorded, as well as 58 out of 64 business associations and 107 NGOs or umbrella NGOs.

More than one third of the views from academics and think tanks are mixed or neutral, and an equal number of them are predominantly negative. Most of the law firms and consultancies have balanced or neutral considerations, while the rest are rather negative in relation to the proposed approach. Most trade unions are not satisfied with the proposed approach; a few signal strong negative views in this respect, but a few others are inclined towards positive considerations. Most of the replies from business associations are balanced between various positive and negative considerations; apart from those, a significant number of replies indicate support to the proposed approach, and only a few replies are negative about it. Among the companies who address the issue of Fair and Equitable Treatment (FET), approximately half of the respondents do not take a definite position on the proposed approach but rather make various comments on specific issues. Almost one third express mixed views, a bit less than one fifth are rather negative or strongly negative on the proposed approach and about one tenth states that they are rather in favour of the proposed approach. NGOs and umbrella NGOs are divided, with more than half expressing negative opinions and a large minority supporting the proposed approach. Overall, governmental organisations take the view that the proposed approach goes in the right direction. Finally, other respondents are evenly spread between support and opposition to the proposed approach. Equal numbers of the respondents in the "Other organisations" category who specifically address the issues in this question respond either fully or partially positively; neutral; or fully or partially negatively.

## **3.2. Main comments**

### **3.2.1. General proposed approach**

Most of the academics and think tanks consider that the proposed approach does not provide sufficient legal certainty, mainly because it is uncertain, in their view, how the arbitral tribunals would interpret and apply the proposed provisions, in practice.

A few academics and think tanks appreciate the usefulness of the Commission services' efforts to bring clarity to the FET standard. The views are however equally divided with regard to the adequacy of the proposed approach in light of offensive versus defensive considerations. Among academics, some note that the proposed approach could lead to lower protection compared to other approaches. This view is shared by both law firms who provided answers to this question: they point to the fact that the proposed approach narrows the protection offered to investors and investments, compared to other approaches, for instance compared to Member States BITs.

A couple of respondents from law firms and consultancies specifically welcome the proposed clarifications, namely the definition of the FET standard based on a closed list of elements. At the same time, they point to a certain degree of uncertainty surrounding the proposed provisions,

Most of the trade unions respondents acknowledge the improvements proposed in order to clarify the meaning of the FET standard. Some specifically subscribe to the concerns illustrated by the Commission services in the explanation of the proposed approach, or reiterate them in various forms.

However, the majority of trade unions consider that the proposed improvements are insufficient to prevent abuses, because for instance the proposed FET standard is not strictly limited to customary law, or because it contains a reference to legitimate expectations, or because it allows the Parties to extend its coverage at a later stage, by common agreement. Some believe that the clause still risks acting as a "stabilisation" clause, or in general, risks creating uncertainty through inconsistent interpretations. A few state that they are against a FET standard in the agreement. A number of business associations subscribe to the statement that FET should not be understood as a "stabilisation" commitment.

About half of the business associations highlight the importance of the FET standard for the protection of investment. Some specifically mention that the FET standard is by no means inimical or antagonistic to the State's right to regulate, but it is a necessary corollary of that right in a rule of law State.

Almost half of the replies from business associations contain specific statements supporting the efforts of bringing more clarity to the FET standard. Some companies express support as well. However, a comparable number of business associations are against what they perceive as undesirable limitations to the FET standard. More precisely, they are concerned about the use of a closed list of elements or about various requirements, e.g. that arbitrariness is "manifest", or that discrimination is "targeted". These requirements establish, in these respondents' view, too high a threshold or the need to prove bad faith, which is normally not required by FET. For instance, some are dissatisfied because in their view the formulation of the standard lacked core elements, such as the right to be compensated in case of either wrongful regulation or an excessive burden imposed by bona fide regulation.

A number of companies express scepticism and concerns on the proposed approach which in their opinion narrows down the standard excessively. Some state that this

approach will undermine the treaty's core object and purpose. Moreover these companies consider that the limitative list of elements is not justified. In their view, differences in interpretation of the FET obligation are not as significant as presented by the Commission services in their presentation of the issue. Some are also of the opinion that the listed elements will give rise to even more uncertainty and varying interpretation of the standard. Some other companies foresee that the narrowing of the standard will impact on companies' decisions to invest abroad.

A small number of business associations consider that the proposed approach would not adequately protect the interests of the host State. For instance, some fear that the right to regulate in certain sensitive areas, such as public services, would not be sufficiently preserved.

Several companies stress the importance of having a strong FET clause in TTIP.

On the issue of whether the list of elements constitutive of FET should be open or closed companies' views are equally divided. Smaller companies tend to favour a closed list approach as in the proposed approach. Larger companies would prefer no list of elements at all. To some, the assessment of whether a measure constitutes a breach of the FET obligation should be assessed on a case-by-case basis only. Some fear that a State would be able to adjust its behaviour to avoid being caught by an element of the list.

One respondent company insists on the importance of cases where there is a denial of justice in criminal, civil or administrative proceedings constituting a breach of the Fair and Equitable obligation in TTIP. This would offer a useful means of redress with regard to some difficulties currently encountered by this respondent in the US. Another respondent company considers that breach of another provision of an international agreement such as the TRIPS agreement should influence a determination of a breach of the fair and equitable treatment obligation in TTIP, or at least play as an aggravating circumstance. Several companies seek clarification on the meaning of manifest arbitrariness.

A large minority of the NGOs and umbrella NGOs highlights the increasing abuse of the FET clause in recent ISDS proceedings and agrees with the suggestion to reduce the scope of the clause via a closed list or reducing the items in the closed list. However, others consider that the proposed language remains too vague, especially with regard to manifest arbitrariness and legitimate expectations. It is feared that these terms might lead to exposure to claims against policy reforms in the public interest.

Some NGOs consider the fair and equitable treatment (FET) provision to be "one of the most dangerous features of the ISDS mechanism" because of possible abuse and the lack of guidance on how "manifest arbitrariness" should be interpreted.

Other NGOs argue that "manifest arbitrariness" is not clear enough and thus contains an interpretation risk in ISDS tribunals. In this context there is a feeling that FET clarifications are good but too much room is left for interpretation, especially for ISDS arbitrators. This is countered by the argument of another respondent that the violation of

a standard of "manifest arbitrariness" in reality would be hard to prove (unless e.g. an offending State was to leave a paper trail of self-confessed arbitrariness). One respondent argues that "manifest" arbitrariness, "fundamental" breaches of due process and transparency and "targeted" discrimination would imply too high a threshold of misconduct, tantamount to bad faith, in order to establish a breach of the right to FET. The consensus as regards FET so far has been that there is no requirement for an investor to prove bad faith in order to establish a violation by the state with this obligation of FET

Some groups of NGOs are concerned that tribunals might interpret the text as a prohibition of regulatory actions resulting in de facto discrimination.

Some NGOs criticise the application of FET standards on treaty parties without providing also for concrete obligations on investors to abide by standards of corporate social responsibility conduct. One respondent suggests that the investor's conduct – for example, with regard to the environment or social impact of their investments – be a determining factor in the assessment of whether the FET provision has been breached.

Some respondents among the "other NGOs" underline that FET and the umbrella clause are the most important protection provisions and that the EU should not lower the existing standards. Those respondents have the view that the affirmation of the right to regulate in TTIP would be sufficient to rule out concerns as presented by other groups.

Within the category of "other organisations", some respondents favour a broad definition of FET on the grounds that a closed list would set too low a standard in this key area. These respondents suggest that any definition should be offered as guidance, not an exhaustive list. Respondents note that the proposed approach lists blunt actions, whereas states have more subtle ways of acting to prejudice investors.

Some respondents in the same category note that the proposed "limited set of basic rights" is a collection of protections other than FET itself. Those protections are separate rights under existing treaties and model BITs both of the US and European States, as well as in general EU and ECHR law. These respondents feel that the core content of the right to FET – the right to be compensated in case of wrongful regulation or for an excessive burden imposed by bona fide regulation – is not included in the proposed approach.

Several of the International Chambers of Commerce chapters in this category observe that tribunals, as collective decision-making bodies, tend to converge to a finding of a violation that may be perceived by the losing party as "less offensive". This leads to a finding of a violation of FET rather than a finding of an illegal expropriation, even though the facts support a finding of expropriation. Thus, FET has replaced the prohibition on indirect expropriation in many if not most situations and the perceived "growth" of FET is correlated to a weakening of expropriation findings. To avoid a gap in what was previously protected by expropriation, these respondents argue that protection of legitimate expectations must be preserved.

Other respondents in this category hold that differences in interpretation of the FET obligation are not nearly as significant as the Commission services seem to suggest. They do not believe that adding new terms will resolve the concern. A few respondents object to the absence of an umbrella clause. They suggest that this leaves a "gap" in the EU-US relationship, depriving investors of a treaty-based remedy for a State's breaches of contractual and other undertakings.

### **3.2.2. "legitimate expectations"**

Among think tanks, some respondents are worried that the coverage of legitimate expectations could be too broad as it may allow abusive interpretations of the FET standard such as by covering bona fide regulations. A majority of the trade unions expresses similar concerns with regard to the inclusion of the legitimate expectations of the investors among the elements of the FET standard: it highlights in various forms that this concept has been subject to broad interpretations, in arbitral practice.

However, only a small number of respondents from business associations consider that the reference to legitimate expectations could introduce legal uncertainty, e.g. by putting into question the objective of avoiding non-stabilisation commitments, or even that it is formulated in a too broad manner, open to abusive interpretations. Other business associations consider, to the contrary, that the formulation of the legitimate expectations is too narrow, or that investors should be protected against changes in general legislation, in particular changes in the investment incentives regime.

It should be noted that companies are divided on this issue. Smaller companies consider that legitimate expectations should not be taken into account at all by arbitral tribunals. Some larger companies consider legitimate expectations should be an element constitutive of the FET obligation.

One NGO argues critically that legitimate expectations has not yet been solved in a satisfactory manner, as foreign investors should not be able to shift economic risk to the state easily. This view is shared by governmental organisations. They also underline that investors cannot expect that the laws or the whole law system at the time when the investment is initially made will be frozen, not allowing for future law changes which might affect the investor.

Over a third of respondents in the "other organisations" category addresses the concept of "legitimate expectations", although within that group is a wide range of views. Around a fifth of respondents addressing this area in the "Other" category support the narrow definition of legitimate expectation. These respondents feel that the proposed approach seems sensible, and that, while it goes beyond existing international law in providing an attempt at defining this concept, the text would not lead to undue uncertainty after an initial period of interpretation. In particular, respondents highlight terms such as "fundamental breach", "manifest arbitrariness", "targeted", "abusive treatment" as likely to provoke juridical debate.

Certain respondents in the same category feel that legitimate expectations should be analysed on a case-by-case basis in light of the specific facts surrounding a particular

investment; excluding them "per se" would be a significant departure from current practice. These respondents observe that current practice on legitimate expectations is a balanced one which has been used by ISDS tribunals both in favour of foreign investors but also in favour of States, where tribunals have found that such legitimate expectations did not exist or are not breached in specific cases. They state that, in their view, the stable legal framework that any investor requires is not a framework within which no new law or measure is adopted, but rather one to ensure that those which are adopted are non-discriminatory, non-abusive, non-arbitrary, and are carried out in good faith, affording protection against regulatory opportunism.

### **3.2.3. Umbrella clause**

Among academics and think tanks, concerns are expressed with regard to the various risks triggered by the possible inclusion of an umbrella clause, in particular if such a clause would allow investors to circumvent the contract forum.

An important number of business associations highlight the importance of the "umbrella clause" for investment protection. A couple of respondents in this category are also particularly unsatisfied by the limitation applied to the protection of contractual rights, i.e. because only breaches by States acting in sovereign capacity would be covered.

The umbrella clause is also strongly supported by several companies. They vigorously claim that the inclusion of such clause is fundamental to provide the necessary legal certainty to investors. Some companies recall that umbrella clauses are also beneficial to host states since they make investments more attractive in these countries. One company also argues that an umbrella clause should not impose any excessive burden on a host state as it is the simple observance of a State's contractual obligations in which it is free to enter or not in the first place.

### **3.3. Specific suggestions**

On the one hand, the replies from business associations contain various calls for a strong (or stronger) FET standard, in particular through a broader, open (illustrative) list of elements, which would allow more discretion to arbitral tribunals in determining on a case by case basis what is unfair or inequitable. For instance, some respondents take the view that limitations to the FET standard should be avoided as much as possible. It is suggested, for instance, to avoid narrowing down the FET standard to what is covered by customary international law, which would be less precise and would offer less protection; or to ensure that breaches of other provisions or agreements are not excluded from the application of FET.

On the other hand, some academics and think tanks suggest a narrower coverage of the proposed provisions, such as the exclusion of an umbrella clause, the exclusion of the protection of the legitimate expectations of the investor, or, alternatively, a FET standard defined as equivalent to the minimum standard of protection of aliens in customary law. About half of the trade unions suggest various ways of narrowing the scope of the proposed provisions, in particular by excluding the possibility of extending the list of FET elements in the future by the Parties. Companies suggest mentioning the

time periods when the FET list should be updated. A couple of suggestions regarding the strengthening of defensive considerations are made by certain business associations, namely to exclude any umbrella clause from the agreement, as well as to exclude all cultural services.

Respondents in virtually all categories request clarification of the notion of legitimate expectations of the investor. A large number of trade unions recommend covering only formal representations, as opposed to mere promises. These should be issued by competent authorities and based on existing law. Alternatively, they recommend excluding prejudgements by investors on how the domestic law would be formulated or applied. Some business associations, in their turn, suggest that legitimate expectations are only based on written commitments or that they do not cover mere administrative changes, while some specifically mention the need to preserve a broad definition of legitimate expectations. Suggestions for further clarification of the notion of legitimate expectations of the investor are also made by some think tanks and law firms, who recommend a more precise definition of the specific representations of the host state. Some companies argue that legitimate expectations should relate only to specific and public undertakings made publicly by a statutory body following a democratic process. This is also the view of some NGOs. Some companies advise clarifying whether specific representations are intended to include oral statements made to investors or consider clarifying that tax and other regulatory incentives should give rise to legitimate expectations. Finally, some respondents among the "other organisations" suggest that the tribunal should be obliged ("should" rather than "may") to take specific representations into account in deciding whether a legitimate expectation is created.

Some companies suggest considering the introduction of a FET obligation exception in cases of good faith, the pursuit of a public policy goal, and non-discriminatory treatment by a State.

Some business associations suggest the inclusion of contractual breaches as fundamental breaches of FET. A few respondents in this category also specify the various elements to be covered, in their view, by such a clause (such as public procurement contracts), or express their preference for a broad umbrella clause, which would ensure that all contractual obligations between an investor and the host State are elevated to Treaty obligations. Other business associations, however, call for caution in respect to a possible umbrella clause, considering that such a clause should be used in limited pre-defined cases.

More than half of the replies from academics and think tanks contain various suggestions for further clarification of the proposed provisions. These include, notably, a clarification that FET does not entail an obligation from the host country not to change its legislation. This is also specifically suggested by some trade unions. Some companies requested further clarification on the question of legal stabilisation. Overall, a number of NGOs and umbrella NGOs suggest that investors should have no legitimate expectations that the legislation of the host state will not change, whether through amending existing legislation or introducing new legislation. The same is held by some in the "other organisations" category.

Other suggestions for clarification, as regards academics and think tanks, refer to the standard of full protection and security (that is, more precision in terms of level of damages and liability) or a mechanism by virtue of which the proposed provisions are reviewed regularly, and then suspended or updated if necessary.

One suggestion for clarification from law firms refers to the concepts of due process (an Anglo-American concept which, in their view, would deserve clarification in the context of the European legal tradition) and of full protection and security (which would need to be defined in more specific terms, in order to avoid overlaps with the FET standard).



#### 4. QUESTION 4: EXPROPRIATION

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##### ***Explanation of the issue***

*The right to property is a human right, enshrined in the European Convention of Human Rights, in the European Charter of Fundamental Rights as well as in the legal tradition of EU Member States. This right is crucial to investors and investments. Indeed, the greatest risk that investors may incur in a foreign country is the risk of having their investment expropriated without compensation. This is why the guarantees against expropriation are placed at the core of any international investment agreement.*

*Direct expropriations, which entail the outright seizure of a property right, do not occur often nowadays and usually do not generate controversy in arbitral practice. However, arbitral tribunals are confronted with a much more difficult task when it comes to assessing whether a regulatory measure of a state, which does not entail the direct transfer of the property right, might be considered equivalent to expropriation (indirect expropriation).*

##### ***Approach in most investment agreements***

*In investment agreements, expropriations are permitted if they are for a public purpose, non-discriminatory, resulting from the due process of law and are accompanied by prompt and effective compensation. This applies to both direct expropriation (such as nationalisation) and indirect expropriation (a measure having an effect equivalent to expropriation).*

*Indirect expropriation has been a source of concern in certain cases where regulatory measures taken for legitimate purposes have been subject to investor claims for compensation, on the grounds that such measures were equivalent to expropriation because of their significant negative impact on investment. Most investment agreements do not provide details or guidance in this respect, which has inevitably left arbitral tribunals with significant room for interpretation.*

##### ***The EU's objectives and approach***

*The objective of the EU is to clarify the provisions on expropriation and to provide interpretative guidance with regard to indirect expropriation in order to avoid claims against legitimate public policy measures. The EU wants to make it clear that non-discriminatory measures taken for legitimate public purposes, such as to protect health or the environment cannot be considered equivalent to an expropriation, unless they are manifestly excessive in light of their purpose. The EU also wants to clarify that the simple fact that a measure has an impact on the economic value of the investment does not justify a claim that an indirect expropriation has occurred.*

##### ***Question:***

***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. Q4: What is your opinion of the approach to dealing with expropriation in relation to the TTIP? Please explain.***

## **4.1. Submissions**

### **4.1.1. Collective submissions**

Almost all of those who replied collectively to this question (i.e. close to 70,000) disagree with the objectives and approach proposed by the EU. About two thirds of them express moderately negative views, and almost one third express total opposition.

The majority of the respondents is not convinced that the proposed provisions would be necessary in the given context. Some specifically recall that the European and the American legal systems already provide for compensation in the event of direct and, under certain circumstances, indirect expropriation.

A very large majority of respondents strongly rejects the idea that the legitimacy or proportionality of certain public welfare measures (i.e. those referred to in the annex on indirect expropriation) could be examined or decided by arbitral tribunals. Some imply that such a scenario would be undemocratic, while others consider that it should only be for the citizens, their Constitutions or democratically elected representatives to assess whether a public measure is proportional to its objectives.

About one third of the respondents fear that the proposed approach on indirect expropriation would enable foreign companies to attack a wide range of regulatory measures in the public interest before international arbitration tribunals, who are bound only by the provisions of the investment agreement and thus enjoy a too wide margin of discretion.

A number of respondents point out that expropriations can be legitimate in a number of cases, as provided by the applicable legislation in the EU and its Member States.

### **4.1.2. Individual submissions by organisations**

This question was answered by 4 out of 5 academics, 8 out of 14 think tanks, 14 out of 15 law firms and consultancies, 30 out of 35 trade unions, 39 out of 60 companies, 55 out of 64 business organisations, 126 NGOs and umbrella NGOs.

About half of the academics and think tanks have rather negative views about the proposed approach, while the rest are mostly mixed or neutral. Most law firms and consultancies are rather negative in relation to the proposed approach, in addition to several contributions that contain balanced or neutral considerations.

The large majority of trade unions signals predominantly negative considerations. By contrast, about half of the business organisations have mixed or neutral views, while more than one third seem to be favourable to the proposed approach. More than one third of the companies responding to the question do not take a definite position on the proposed approach but make various comments on specific sub-issues. More than one fourth express mixed views on the proposed approach, less than one fourth are rather in favour of the proposed approach; more than one tenth are rather negative or strongly

negative on the proposed approach. A majority of NGOs and umbrella NGOs see no need for a provision on expropriation or oppose the proposed approach, while some are supportive.

Finally, there is a slight negative leaning among respondents in the "other organisations" category specifically addressing this question, with a larger group feeling partially against the proposals than partially in favour. The biggest group is however those who felt neutral or undecided on the proposals.

## **4.2. Main comments**

### **4.2.1. General proposed approach**

The majority of academics and think tanks expresses concerns and doubts with regard to the language proposed. For instance, it is considered that the proposed provisions with regard to the calculation of damages do not bring enough clarity. A couple of respondents consider that the proposed approach would make it more difficult to protect EU investors abroad.

As regards law firms and consultancies, while a couple of respondents consider that the proposed clarifications in the proposed approach are useful, a couple of others find that the approach is too broad, either because it allows an arbitral tribunal to decide if a given measure is of legitimate interest, or because it is not limited to measures that favour the State to the detriment of the investor.

About one third of the trade unions acknowledge that the proposed approach brings clarification to the concept of expropriation, mentioning in particular the rejection of the "sole effect" doctrine (an understanding of indirect expropriation which is only based on the effects of the measure) and the intention to ensure that measures for public welfare objectives do not constitute indirect expropriation.

However, a large majority of the trade unions considers that the proposed improvements are insufficient to prevent abuses or to properly safeguard the right to regulate. Many consider that the coverage of the clause is still too broad, or that the chosen formulations would still allow abusive interpretations. This is shared by several NGOs. A few trade unions are not convinced that the proposed approach would sufficiently protect the right to regulate, on grounds that it would still not prevent high amounts of compensation from being granted to investors.

Many business associations highlight in various forms the importance of the provisions on expropriation, in particular of the compensation in case of expropriation, for the encouragement and protection of investment. Some specifically refer to property rights as a human right, others to the fact that SMEs are more vulnerable to expropriation measures than other types of companies. A similar stance is observed for companies, where several firmly state that the right to property, enshrined in Article 17 of the EU Charter of fundamental rights, is "crucial to investors and investments" and that, consequently, the obligation related to expropriation should be at the core of TTIP. It should not be weakened. Some also claim that expropriation without compensation is

one of the greatest risks faced by EU investors abroad. Several companies consider that strong protections against arbitrary expropriation encourage host States' regulators to pursue rational, evidence-based measures consistent with procedural fairness and other fundamental rights.

About one third of the business associations specifically express their support to the aim of providing more clarity to the provisions on expropriation and to avoid abusive claims against measures taken for legitimate public purposes. A comparable number of business associations, however, express dissatisfaction with regard to the proposed approach, mainly because of the perceived insufficient level of protection that it offers. Only a small number of business associations consider that the coverage of the proposed provisions should be narrower, in particular that indirect expropriation measures should not be subject to ISDS, or that measures in the area of public services, or in the cultural sector, should not be covered.

Several companies support the proposed approach to provide clear definitions for indirect expropriation. Others reject the distinction between direct and indirect expropriation, as they consider that they are not sufficiently different in nature to justify entirely different standards of protection. Some other companies state that adequate protection against indirect expropriation is the most important given that nations rarely take action as blunt and forceful so as to constitute direct expropriation. Rather, it is more common to find cases when less blatant host state actions, either individually or together, operate to deprive an investor of its investments. When such action constitutes an expropriation of property, any agreement that meaningfully protects investments should provide for compensation. A number of respondents recall that the main claimants for compensation for indirect expropriations are EU companies. Several companies consider that the proposed approach would not sufficiently protect IP rights.

Instead, several NGOs and umbrella NGOs feel that States should have the right to expropriate in the public interest – even without paying compensation. A large group of NGOs and umbrella NGOs feel the notion of indirect expropriation is vague and limits the right of governments to adopt or maintain regulatory measures. Yet other respondents in the same group consider the clarification of indirect expropriation to be useful.

Governmental organisations support the approach suggested. They stress that national parliaments must have the regulatory right to intervene in the public interest. However, some respondents reject compensatory rights of investors against such measures from the outset. The majority of respondents from Governmental organisations feels that new laws must not be seen as indirect expropriation.

Respondents among the "other organisations" are broadly split into two camps, between those fearing that the proposed approach largely undermines protection against indirect expropriation; and those who feel that existing national laws already provide sufficient protection to investors. In the first broad group, respondents also feel that there is some uncertainty regarding who decides on manifestly excessive. Other respondents disagree

with the suggestion of providing a list of limitations, feeling that this amounts to a general exemption.

Of the respondents concerned about limiting expropriation rights, a number of respondents are concerned that the wording would not curtail the ability of a corporation to bring a claim under ISDS, the threat of which will in turn influence legislators. These respondents suggest that including further guidance as to interpretation may lessen this chill effect.

Of the respondents discussing the chill effect, most are also concerned by the perceived democratic deficit in using arbitrators to interpret what constitutes "manifestly excessive" or to decide whether a measure serves the protection of legitimate public welfare objectives.

#### **4.2.2. Clarifications and limitations regarding indirect expropriation**

Some respondents among academics and think tanks express doubts about the application of the proportionality test in case of indirect expropriations. These respondents consider that such a test would invite arbitrators to engage in even more discretionary analysis, thus opening the way for abusive interpretations.

Law firms and consultancies also express certain doubts in relation to the reference to investment-backed expectations, as well as with regard to the reference to measures for legitimate public policy objectives, which are seen as unclear or questionable. Trade unions also express a significant number of concerns with regard to the way in which arbitral tribunals could assess whether a public purpose measure is legitimate or not, or whether it is proportionate or not. The respondents fear that this may lead to abusive interpretations of the provisions on expropriation, or that the application of the precautionary principle might be threatened.

Certain business organisations also express concerns in relation to the reference to measures taken by host states for legitimate public purposes, however from a different point of view; the respective respondents consider that such a reference would create confusion and uncertainty as compared to the traditional approach on which investors have been relying for decades. For instance, it is stated by some that the proposed approach offers less protection than the traditional (BIT) approach, as it allows States not to grant compensation for measures falling under certain categories (e.g. health, environment) or fulfilling certain conditions (e.g. not manifestly excessive). Furthermore, some respondents highlight that this would put at disadvantage investments from industries that are typically affected by such measures, while others consider that this would open the door for protectionist measures. A couple of respondents in this category consider that the criteria used to define indirect expropriation are narrow (e.g. duration of the measure, character, economic impact) and this may raise doubts with regard to their application in practice.

Several companies are very critical with regard to the "manifestly excessive" requirement in relation to public purposes measures. They consider that this goes too far and undermines core elements of property rights, whereas a number of other companies support it.

A number of respondents, including the national committees of the International Chamber of Commerce in the category, have concerns about the use of the term "legitimate public purpose". They note that this term is very similar to "public interest" and highlight the potential confusion between the two terms. Furthermore, the use of this exclusion is said to be irrelevant, with respondents emphasising that arbitral decisions taken under ISDS do not prevent the State from taking measures nor do they result in the invalidity of such measures. The arbitral tribunals merely decide whether the foreign investor is entitled or not to indemnification, and on the amount of such indemnification. These respondents feel that the proposal could even lead to a broader control of State decisions by the arbitrators, in particular with respect to the legitimacy of the public purpose followed by such measures. "Legitimate public interest", being very vague, if adopted, would grant the arbitral tribunal the authority of assessing whether the public interest protected by the disputed measure is "legitimate" or not. It is suggested that this extension is questionable in terms of sovereignty.

### **4.3. Specific suggestions**

There are several suggestions made by the various groups of respondents.

A notable number of respondents from several categories suggest greater clarifications to the concept of indirect expropriation, to the notion of "investment-backed expectations" or that of legitimate public policy measures or with regard to the criteria based on which some measures could be considered or not manifestly excessive. A number of business organisations suggest that a more detailed and precise list of factors should be taken into account in establishing whether a measure constitutes or not expropriation; some specifically refer to the duration of the measures, or suggest the introduction of the criteria of proportionality and subsidiarity.

Some respondents note the need to ensure consistency between the fact that expropriation is compensable even when it is "for a public purpose" and the stated objective of avoiding claims against legitimate public policy measures.

As guidance to interpretation some suggest that international treaties, published strategies, declarations, action plans and recommendations and similar, need to be taken into account, on a case-by-case basis, to determine if a decision is 'manifestly excessive' and consequently constitutes indirect expropriation. A clarification is suggested that 'indirect expropriation' cannot occur when companies of the host country that are likewise hit by a measure are not compensated for, on the basis of national legislation.

There are also suggestions with regard to the methods that can be used to calculate the damages resulting from expropriation. For instance, certain academic and think tanks

call for more accurate and specific criteria in this respect. Some companies suggest that these methods should in all cases cover the interest accrued in the period between the expropriation and the payment.

There are contradictory suggestions with regard to the scope of expropriation. Some NGOs suggest defining expropriation to clarify that indirect expropriation would occur 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 or profitability of an investment. However, some companies suggest introducing the notion of State harassment, which should be understood as all measures taken by the expropriating State before the formal declaration of expropriation, causing or intended to cause a reduction or change in the value of the expropriated asset, or which prevent the legitimate owner from exercising its rights.

One NGO suggests that health measures should never be seen as "manifestly excessive in light of their purpose" and should be excluded in general from expropriation. Other NGOs suggest that consumer protection measures should not be understood as indirect expropriation. One NGO sees exceptions necessary for social welfare, social security, health, labour protection, social services.

It is further suggested that the "expropriating effect" should not be valid for democratically-made decisions in which the national Parliament has already considered the investors' interest.

By contrast, others suggest broader, more open provisions on expropriation. For instance, some business organisations suggest that the concept of indirect expropriation should be interpreted in light of a list of factors, instead of being subject to exclusions. Instead, several respondents from NGOs suggest including a wider public interest exceptions list in the Annex, notably addressing the healthcare sector. Some consider the notion of legitimate public welfare objectives to be too narrow and propose including health, security and environment.

A number of business organisations suggest that only the effect of a measure, not its purpose, should be used in assessing if a measure constitutes or not expropriation, while some specifically call for the inclusion of IPR under the coverage of the expropriation clause. A couple of business organisations suggest that the Commission services should rather align the provisions on expropriation with the general exceptions inspired from WTO practice, instead of introducing additional limitations to the concept of indirect expropriation.

The majority of the trade unions indicates a preference for narrower provisions on expropriation. For instance, it is stated that the prohibition of expropriation should be limited to cases when the transfer of property is made for the use of the State or of a third party, or it should exclude requirements contained in general regulatory or administrative acts, or it should not cover lost profits. A few state that not only investors, but also citizens should be protected, and it should be made clear that investment protection, including compensation for expropriation, should be subordinated to the general interests of the citizens.

## 5. QUESTION 5: ENSURING THE RIGHT TO REGULATE AND INVESTMENT PROTECTION

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### ***Explanation of the issue***

*In democratic societies, the right to regulate of states is subject to principles and rules contained in both domestic legislation and in international law. For instance, in the European Convention on Human Rights, the Contracting States commit themselves to guarantee a number of civil and political rights. In the EU, the Constitutions of the Member States, as well as EU law, ensure that the actions of the state cannot go against fundamental rights of the citizens. Hence, public regulation must be based on a legitimate purpose and be necessary in a democratic society.*

*Investment agreements reflect this perspective. Nevertheless, wherever such agreements contain provisions that appear to be very broad or ambiguous, there is always a risk that the arbitral tribunals interpret them in a manner which may be perceived as a threat to the state's right to regulate. In the end, the decisions of arbitral tribunals are only as good as the provisions that they have to interpret and apply.*

### ***Approach in most investment agreements***

*Most agreements that are focused on investment protection are silent about how public policy issues, such as public health, environmental protection, consumer protection or prudential regulation might interact with investment. Consequently, the relationship between the protection of investments and the right to regulate in such areas, as envisaged by the contracting Parties to such agreements, is not clear and this creates uncertainty.*

*In more recent agreements, however, this concern is increasingly addressed through, on the one hand, clarification of the key investment protection provisions that have proved to be controversial in the past and, on the other hand, carefully drafted exceptions to certain commitments. In complex agreements such as free trade agreements with provisions on investment, or regional integration agreements, the inclusion of such safeguards is the usual practice.*

### ***The EU's objectives and approach***

*The objective of the EU is to achieve a solid balance between the protection of investors and the Parties' right to regulate.*

*First of all, the EU wants to make sure that the Parties' right to regulate is confirmed as a basic underlying principle. This is important, as arbitral tribunals will have to take this principle into account when assessing any dispute settlement case.*

*Secondly, the EU will introduce clear and innovative provisions with regard to investment protection standards that have raised concern in the past (for instance, the standard of fair and equitable treatment is defined based on a closed list of basic rights; the annex on expropriation clarifies that non-discriminatory measures for legitimate public policy objectives do not constitute indirect expropriation). These improvements*



*will ensure that investment protection standards cannot be interpreted by arbitral tribunals in a way that is detrimental to the right to regulate.*

*Third, the EU will ensure that all the necessary safeguards and exceptions are in place. For instance, foreign investors should be able to establish in the EU only under the terms and conditions defined by the EU. A list of horizontal exceptions will apply to non-discrimination obligations, in relation to measures such as those taken in the field of environmental protection, consumer protection or health (see question 2 for details). Additional carve-outs would apply to the audio-visual sector and the granting of subsidies. Decisions on competition matters will not be subject to investor-to-state dispute settlement (ISDS). Furthermore, in line with other EU agreements, nothing in the agreement would prevent a Party from taking measures for prudential reasons, including measures for the protection of depositors or measures to ensure the integrity and stability of its financial system. In addition, EU agreements contain general exceptions applying in situations of crisis, such as in circumstances of serious difficulties for the operation of the exchange rate policy or monetary policy, balance of payments or external financial difficulties, or threat thereof.*

*In terms of the procedural aspects relating to ISDS, the objective of the EU is to build a system capable of adapting to the states' right to regulate. Wherever greater clarity and precision proves necessary in order to protect the right to regulate, the Parties will have the possibility to adopt interpretations of the investment protection provisions which will be binding on arbitral tribunals. This will allow the Parties to oversee how the agreement is interpreted in practice and, where necessary, to influence the interpretation.*

*The procedural improvements proposed by the EU will also make it clear that an arbitral tribunal will not be able to order the repeal of a measure, but only compensation for the investor.*

*Furthermore, frivolous claims will be prevented and investors who bring claims unsuccessfully will pay the costs of the government concerned (see question 9).*

***Question:***

***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?***

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## **5.1. Submissions**

### **5.1.1. Collective submissions**

The large majority of the 70 000 respondents who submitted their replies collectively to this question expresses strong negative views about the proposed approach.

About one third of the respondents consider that the proposed approach on the right to regulate is insufficient, because the right to regulate is stated only in the preamble as

non-binding, or because the exceptions are too narrowly defined and do not encompass, for example, workers' rights, human rights or financial market regulation.

Some respondents are concerned that the proposed approach would not allow for the application of the precautionary principle. Others fear that the proposed approach on the right to regulate would be neutralised in practice due to the possible chilling effect triggered by the high amounts of compensation granted to investors. They also fear that the 6 months delay envisaged for safeguard measures may be insufficient, especially in circumstances of severe crisis.

### **5.1.2. Individual submissions by organisations**

The question was answered by 4 out of 5 academics and 10 out of 14 think tanks, 10 out of 15 law firms and consultancies, 30 out of 35 trade unions, 39 out of 43 companies, 55 out of 64 business organisations and 120 NGOs and umbrella NGOs.

The large majority of academics and think tanks expresses mixed or neutral views, while a smaller number of contributions are dominated by negative views. Most of law firms, consultancies and trade unions are predominantly negative, while a few others make neutral or balanced statements. Only a few replies from trade unions contain slightly positive views. At the same time, more than half of the business organisations express support to the objectives and approach proposed, while about one third present mixed or neutral views. Half of the responding companies did not take a definite position but rather made various comments on specific sub-issues. More than one fourth are rather negative or strongly negative, less than one fifth expressed mixed views and less than one fifth are in favour of the proposed approach.

The majority of Government organisations who responded supports the suggested approach. Finally, the largest group of respondents in the "other category" feels partially against the proposals submitted to consultation, with only a small minority feeling partially or fully in favour.

### **5.2. Main comments**

More than one third of the academics and think tanks believe that the proposed approach is insufficient to safeguard the States' right to regulate, in particular because it is stated only in the preamble. In addition, it is noted that the obligations of investors are soft obligations, in contrast with the full legal obligations of the States.

A few respondents refer to some improvements that they find useful (e.g. safeguard exceptions, prudential carve-out, or certain clarifications proposed).

A couple of law firms and consultancies express doubts with regard to the way in which the right to regulate is mentioned in the text – referring for instance to the link between the preamble and the clarifications regarding FET and expropriation. They consider the reference to be controversial and doubt the usefulness of the preamble or specifically put into question the idea that arbitral tribunals rule on whether a State has the right to regulate in a certain area.

Certain trade unions specifically express appreciation with regard to the proposed approach, in particular with regard to the clarification of the investment protection standards, the provisions allowing safeguard measures in various circumstances of economic crisis, as well as the prudential carve-out.

However, a vast majority of trade unions consider the proposed approach to be insufficient to meet their concerns. Most of them consider that the proposed exceptions are insufficient, either because they only apply to the non-discrimination provisions or because the list of measures allowed under these exceptions is considered insufficient. Almost half of the trade unions state that they are against the use of negative list in relation to the commitments on non-discrimination. Certain respondents use generic arguments such as the chilling effect on the right to regulate that investment disputes may trigger, in their view, because of the high amounts of compensation that investors can obtain. Some specifically refer to the fact that the right to regulate should be placed above the rights of investors, who should be under a clear and strong obligation to respect host State law.

The majority of the business associations expresses support in relation to various features of the proposed approach. Many acknowledge in various forms that host States have the sovereign right to regulate for public welfare objectives, although some highlight that such a right should not be seen as unlimited or unconditional. A significant number state that, in their view, investment protection provisions are not a threat to State's right to regulate, because they do not prohibit a State from imposing certain measures, but only require compensation to be paid to investors. A small minority is unhappy with the proposed approach, rejecting certain limitations (e.g. subsidies or public procurement). At the same time, the possibility for the Parties to issue binding interpretations, as well as the application of the "loser pays" principle, gathers a relatively equal number of negative and positive views among business associations. Thus, while some express support for having binding interpretations by the Parties, others express concerns in this respect. This is mainly for fear that this may open the way to political interference or legal uncertainty. Similarly, while some openly support the introduction of the "loser pays" principle, others specifically reject it and consider that it would affect SMEs in priority.

Most business associations recommend caution with regard to the various limitations proposed in order to protect the host States' right to regulate. Some consider that the right to regulate should not go against the possibility for investors to obtain compensation for the revocation of some of their essential rights, such as property rights, or in general that it should be consistent with the various obligations of the host States under the agreement. Some note that the right to regulate should not be misused so to allow for instance States to withdraw or breach commitments made to investors, or to impose disguised protectionism. Finally, some consider that there is no need to specifically mention the right to regulate, and if the Parties choose to do so, it should be mentioned in the preamble and subject to conditions such as the principles of proportionality, transparency and the protection of individual rights.

However, a small number of business associations consider that the proposed approach does not sufficiently safeguard the right to regulate, in particular because of various concerns with regard to the compensation of investors or perceived lack of clarity in the formulation of some investment protection provisions. Along these lines, some would like the right to regulate to be affirmed and preserved in a stronger manner, in particular in the cultural sector.

A number of companies are sceptical with regard to the EU's ability to sufficiently protect a State's right to regulate. They consider that foreign investors will be creative in finding ways to use ISDS to challenge States. They also consider that TTIP could have a chilling effect on government policies. One respondent considers that by prohibiting domestic content requirements, the proposed approach will introduce new limits to States' rights to regulate. This type of strategy has been used effectively by developing countries in the past. If TTIP becomes the world 'gold standard' several developing countries seeking economic transformation will be barred from successful pathways.

Several companies express concerns that the proposed approach decreases too much the level of protection that should be afforded to foreign investors in the US and more generally in the world. A number of respondents among the companies strongly question or reject the very idea of a possible contradiction between a State's ability to regulate and investment protection. Some argue that there does not appear to be a single instance of over-broad interpretation of an investment treaty constraining the right of a State to regulate in the public interest. The risk on which the EU's approach is predicated therefore appears to be theoretical. Practice suggests that there is no need to reinforce the balance between investment protection and the right to regulate.

Some respondents in this category argue that investment protection provisions have multiple advantages for host states. International investment agreements help governments in implementing sound public policies and in adopting good regulatory practices, they give States a broader choice in selecting operators, foreign investors bring value to a country as they bring skills and high level know-how to a foreign country.

Further, some consider that the EU's efforts to protect the right to regulate in TTIP could undermine the objectives of investment agreements by allowing abuses and disguised protectionist practices from host States worldwide.

One respondent expresses the opinion that empowering States to take measures that affect investments for "reasons of caution" cancels out the intended objectives of the investor protection system and sets a dangerous precedent for the State-investor balance.

Most NGOs consider that the right to regulate should be affirmed in a clearer and firmer manner, e.g. it should be given a stronger legal weight. These NGOs claim a stronger right to regulate (considering the preambular language to be merely hortatory and not carrying the same legal weight as the substantive investor rights) and express doubts on the value of binding interpretations. Another group of NGOs believes that the essential features and the mere existence of the ISDS mechanism might endanger the right to

regulate and claims that the sheer mention of the right to regulate in the preamble is not enough to safeguard it. Yet, one NGO considers that the open statement on the states' right to legislation is welcome. It considers that the reference in the preamble meant that the parties to the agreement acknowledge that environmental protection, social rights, health and occupational safety perspectives and the related international conventions take priority.

However, another group of NGOs is concerned as to whether the proposed approach would interfere with ISDS cases, reduce existing investment protection and open the door to allegedly possible abuse by States.

The government organisations consider that the right to set standards for public common interest should neither be reduced nor subject to ISDS. Some respondents question the need to balance the right to regulate with investment protection as, in their view, the stable legal systems in the EU and the USA already guarantee such stability. Non-discriminatory treatment is suggested between foreigners and nationals as regards regulatory rights. One respondent suggests explicitly protecting the precautionary principle.

Around a third of those responding specifically on this issue in the "other organisations" category express concern that this new text would upset the existing balance.

These respondents suggest that nothing in existing US or EU Member State investment treaties limit the right to adopt or maintain legitimate, non-discriminatory regulation in the public interest, including promoting health, environmental, safety and public welfare objectives.

They feel that investment protections, such as "fair and equitable treatment" and protection from expropriation are not inconsistent with this objective. They observe that both the right to regulate and protection of investors are longstanding principles of domestic European and US legal systems as well as international law.

These respondents observe that investors' rights to be treated fairly and equitably as well as the rules governing expropriation are the result and direct consequence of the fact that the State has a right to regulate. They are "the other side of the coin". Respondents state that these protections are necessary to ensure that the State will make use of its right to regulate only in such a manner that is compatible with the rule of law and has due respect for the rights of the individual (be it a natural or juridical person).

The concern is that the concept has not been fully developed and there would need to be clarification as to the interplay with investor protections including the guarantee of FET and the right to protection against indirect expropriation. If it is to be confined to the current understanding as an aspect of customary international law, then these respondents feel that the specific inclusion is probably unnecessary and may merely give rise to additional uncertainty.

In particular, it is noted that the right to regulate must have due regard to the principle of proportionality and the protection of individual rights in other treaties concluded by the Contracting Parties as well as in this Treaty including the right of the investor to be

treated fairly and equitably and not be burdened with an excessive burden without compensation.

Several respondents in the "other organisations" category are unhappy with the right to regulate for other reasons.

In particular, certain suggest that it sets too high a threshold as a required justification for regulation and legislation for healthcare services provision.

Others feel that the public welfare objectives quoted by the Commission services are too narrowly defined and do not, for example, include workers' rights, social rights, human rights, education, care, financial market regulation, regional and industrial policy or tax policy.

A number of respondents are concerned about the binding force of a right to regulate if only in the Preamble.

Many NGOs argue that general welfare objectives should prevail over investment protection which can be sought via national courts on the basis of national laws applicable. Some consider that the Prudential carve out should be broader. A number of respondents in this category call for an approach that would allow for the application of the precautionary principle.

A number of trade unions express specific concerns with regard to the requirement that the safeguard measures envisaged for situations of economic crisis should be strictly necessary, for fear that such a requirement could be interpreted in an extensive manner by arbitrators.

### **5.3. Specific suggestions**

Academics and think tanks suggest a stronger reference to the right to regulate, for example in the body of the agreement and not in the preamble, or by excluding from ISDS certain measures for public welfare objectives, such as in the cultural and audio-visual sector, or by avoiding time-limits in the application of the safeguard measures for circumstances of economic crisis.

Law firms and consultancies suggest recalling key principles that the Parties should comply with or promote, by making it clear that no Party should use its investment policy in a way that would contradict its commitments on sustainable development; ensuring stronger safeguards for times of crisis in order to prevent any abuses, preferably by excluding such measures from the entire scope of the agreement; making a link between the horizontal exceptions and the legitimate measures allowed under the provisions on expropriation, for instance by listing such measures as exceptions, in a non-exhaustive manner.

The large majority of trade unions makes suggestions aimed at ensuring a stronger right to regulate, in some cases indicating concrete areas of concern, such as financial markets or employment. Most of them consider that general exceptions should be extended to cover e.g. fundamental rights, protection of public health, security, financial market regulation, industrial policy, tax policy and environmental protection and cover

the whole scope of the investment protection chapter. A strong call is made for the exclusion of public services and in particular for cultural services. More than one third of the respondents state that the agreement should not contain any "umbrella clause", and that the FET standard should not be interpreted as entailing stabilisation commitments. A couple of respondents specifically call for the use of positive lists instead of negative lists to cover the requisite exceptions to non-discrimination.

A few business associations consider that a general exceptions clause (GATT XX) can be applied *mutatis mutandis* in order to cover the right to take legitimate measures for public welfare, on condition that such measures are not a means of arbitrary or unjustified discrimination. Some replies from business associations contain references to various standards and practices at the multilateral level, in particular the OECD Guidelines for Multinational Enterprises, which are mainly seen as a useful example of balancing private and public interests. Finally, a couple of respondents in this category suggest that the strengthening of the right to regulate should go hand in hand with the encouragement of good regulatory practices. Other suggestions for further clarification from business associations concern the notion of "frivolous claims" or certain carve-outs (e.g. prudential measures, subsidies, public procurement).

Some companies suggest making an explicit reference to other relevant international treaties that should take priority in case of conflict to help arbitral tribunals ensure as much as possible harmonious interpretation of international investment agreements provisions. They also suggest including the United Nations' Guiding Principles on Business and Human Rights and conditioning the protection and right to launch ISDS proceedings with the investor's compliance to these principles.

One NGO suggests making a reference to the right to regulate in the ISDS section, while a number of other NGOs suggest that a human rights impact assessment be carried out prior to undertaking commitments on investment liberalisation. Some NGOs suggest making explicit that any included transfers provision does not apply to financial transaction taxes or capital controls.

## 6. QUESTION 6: TRANSPARENCY IN ISDS

### ***Explanation of the issue***

*In most ISDS cases, no or little information is made available to the public, hearings are not open and third parties are not allowed to intervene in the proceedings. This makes it difficult for the public to know the basic facts and to evaluate the claims being brought by either side. This lack of openness has given rise to concern and confusion with regard to the causes and potential outcomes of ISDS disputes. Transparency is essential to ensure the legitimacy and accountability of the system. It enables stakeholders interested in a dispute to be informed and contribute to the proceedings. It fosters accountability in arbitrators, as their decisions are open to scrutiny. It contributes to consistency and predictability as it helps create a body of cases and information that can be relied on by investors, stakeholders, states and ISDS tribunals.*

### ***Approach in most existing investment agreements***

*Under the rules that apply in most existing agreements, both the responding state and the investor need to agree to permit the publication of submissions. If either the investor or the responding state does not agree to publication, documents cannot be made public. As a result, most ISDS cases take place behind closed doors and no or a limited number of documents are made available to the public.*

### ***The EU's objectives and approach***

*The EU's aim is to ensure transparency and openness in the ISDS system under TTIP. The EU will include provisions to guarantee that hearings are open and that all documents are available to the public. In ISDS cases brought under TTIP, all documents will be publicly available (subject only to the protection of confidential information and business secrets) and hearings will be open to the public. Interested parties from civil society will be able to file submissions to make their views and arguments known to the ISDS tribunal. The EU took a leading role in establishing new United Nations rules on transparency in ISDS. The objective of transparency will be achieved by incorporating these rules into TTIP.*

### ***Question***

***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.***

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## **6.1. Submissions**

### **6.1.1. Collective submissions**

All of the collective submissions commented on question 6. Three of the collective submissions are broadly positive about the proposals on transparency. A couple of the



collective submissions think that transparency is indispensable. One suggests that transparency should be compulsory.

Almost half of the collective submissions are concerned that the exceptions made from the transparency rules for protection of confidential business information and trade secrets may be abused by companies to restrict access to information. They consider that this reduces the strength of the transparency provisions.

There are mixed views on the incorporation of the UNCITRAL rules into the text. One submission considers that this issue is better tackled entirely on the multilateral level. Another submission feels that the simple reference by the Commission services to the UNCITRAL transparency rules does not improve the transparency of ISDS.

The majority of the mass submission responses does not address the specific consultation questions on transparency, with around half doubting expressly whether transparency can increase substantially the legitimacy of ISDS system.

### **6.1.2. Individual submissions by organisations**

Overall, around a third of respondents do not specifically address the question on the draft text on transparency for ISDS. The proportion is even higher for the categories Academics, NGOs, Think tanks, Consultancies and Other respondents where between a third and a half of the replies did not respond to the question posed. Those respondents either do not make any comment or make comments that are more general in nature either on the principle of ISDS, the supremacy of national courts or on the TTIP negotiations.

By contrast, the proportion of replies specifically addressing the question is higher than that average in the case of Trade Unions, Umbrella NGOs, Business associations, Companies and Law firms.

Generally, amongst the respondents that provide specific comments, there is an overall positive reaction towards the proposals to make ISDS proceedings transparent and the hearings open to the public. Around half of the relevant replies are fully or partially supportive of the EU's proposals on transparency. In contrast only around a quarter of the respondents are fully or partially critical of the extent of the reforms envisaged.

The strongest support of the reforms comes from the categories of Business associations, Trade unions and Umbrella NGOs and law firms. There is a roughly even spread of support and criticism within the NGO, Other respondents, government and companies categories. There are more negative views amongst Consultancies and think tanks.

## **6.2. Main comments**

The Commission services' proposals in this question rest on two main suggestions:

- a) All documents should be publically available/application of UNCITRAL rules on transparency.

- b) Hearings should be open to the public and civil society should be able to file submissions.

The reference text then provided respondents with the Commission services' concrete proposal for addressing these policy areas.

The next section considers responses thematically in the order presented, followed by a review of other comments and suggestions, whether specific observations on the reference text, or more general points.

#### **6.2.1. All documents publically available/application of UNCITRAL rules on transparency**

As mentioned above, this proposal is generally viewed positively across all categories of respondents. A number of NGOs, Trade unions and governments comment that transparency is indispensable as a principle. A few respondents from the Trade unions and NGOs also specifically comment that this new openness would help address the deficit of public trust in international investment arbitration.

Many respondents including trade unions, umbrella NGOs and governments consider it a step forward that the proposed approach is integrating the new UNCITRAL rules on transparency. A number of respondents from the categories Law firms and business associations but also a few respondents from trade unions and NGOs also comment that transparency is likely to improve the quality of arbitral awards and case law would enhance predictability.

However, a number of respondents (around a quarter of the respondents), are more critical of the proposals. In particular NGOs, Umbrella NGOs and Trade unions thought that the transparency proposals, although a step in the right direction, do not go far enough. Conversely, other respondents notably companies and business associations are concerned that the proposals go too far, potentially putting at risk business confidential information.

#### **6.2.2. Reform proposals considered insufficient**

The criticism of the proposal mainly centres on the clause on the protection of confidential information and trade secrets. Many respondents, the large majority in the NGO category as well as many in the categories umbrella NGOs and Trade unions, are concerned that the proposed exceptions could be abused by companies and by tribunals to restrict access to information. In their view, this reduces the strength of the transparency provisions. Several NGOs (a fifth of those responding) consider that Article 7.2(a) of the UNCITRAL Rules on Transparency contain loopholes.

Concerns are also expressed that tribunals would have too much discretion in deciding what constitutes confidential information. Around a fifth of the respondents in the NGO category and many from the Umbrella organisations, consider that Article 7.7 of the UNCITRAL rules still leave an unreasonably wide discretion to the ISDS tribunal. For instance one umbrella organisation raises specific concerns about the list of exceptions that tribunals can use under the current UNCITRAL rules in order to restrict

information, in particular through the use the expression "or in comparably exceptional circumstances" contained in Article 7.7.

Many respondents consider that a more precise definition of confidential information should be provided in the proposed approach and that the circumstances in which information can be withhold should also be specified. This point is also made by a number of governments and trade unions.

A small number of respondents, principally from the Government and NGO categories, consider that the reference by the Commission services to the UNCITRAL transparency rules does not actually improve the transparency of ISDS. A number of NGOs claim that a significant weakness of the UNCITRAL transparency rules is that they will not apply to cases that are already ongoing.

In addition, a few NGOs stress that the transparency rules only apply to the proceedings. They argue that they should also apply to the way arbitrators are appointed.

Several respondents, including a few from each of NGOs and Companies, consider that while reforms on transparency for ISDS are necessary, these should be implemented at the multilateral, rather than bilateral level.

### **6.2.3. Reform proposals are too wide**

Conversely, a significant number of respondents, notably amongst business associations, companies and some law firms, are concerned that the reform proposals on transparency go too far. Although they share the view that increased transparency is necessary and beneficial, they also caution that trade secrets and business confidential information must remain protected and that transparency should not harm companies.

One of the arguments that is frequently made by companies and business associations is that the proposed transparency rules would go further than what is the current practice in Member States own domestic commercial arbitration.

The national committees of the International Chamber of Commerce outline several concerns shared by other respondents regarding making publically available any written submissions and all exhibits. They highlight the following:

- the level of transparency contemplated by Article 3.2 of the Rules is wider than national courts, where often only the judgment is made public. This includes the Court of Justice of the European Union or in all or part of Member States' administrative Courts;
- there is no legitimate purpose for demanding that increased demands on transparency be made for investor-state disputes;
- publication of parties' submissions, including witness testimony and expert reports, and exhibits would not only significantly slow down the arbitral proceedings and potentially increase its cost by creating an opportunity to dispute with the tribunal and the other party what should or should not be

made public, but also will greatly increase the risk that sensitive commercial information is shared with the public;

- the publication and the measures necessary in order to protect confidential business information may increase the costs of proceedings. This results, in part, from potential disputes as regards the scope of what constitutes confidential information.

One company also notes the potentially different approaches across international litigation that would result if the current proposal on full transparency and access to hearings is implemented. In particular, this respondent points out that a similar approach on transparency does not apply to WTO litigation, and suggests that these should be aligned more carefully.

A couple of respondents (a business association and an NGO) raise concerns about the costs of wider transparency and also highlight that the proposal frontloads the time and costs associated with identifying and redacting confidential information from a potentially large number of documents. These respondents suggest that it is preferable for a request for disclosure be considered by the tribunal on a case by case basis.

Respondents concerned about overly wide transparency in particular suggest that the Commission services should consider some safeguards to protect both the State and investor parties from the possible ensuing increase in costs. The majority of those holding this view are from the business associations and other respondents categories. Alternatively, the proposals should provide further guidance to the Tribunal as to how these costs should be dealt with. These respondents also claim that the extra costs from increased transparency could be very significant, discouraging especially SMEs from making use of ISDS.

Furthermore, these respondents caution against taking transparency so far as to risk making the cost of the process so potentially prohibitive as to dissuade investors from pursuing legitimate claims or even investing in the first place.

Many of the national committees of the International Chamber of Commerce while in general supportive of the transparency proposals also highlight that excess transparency could potentially lead to public pressure on the arbitrators but also on witnesses and experts involved in the arbitration. They stress the need to protect witnesses and experts, particularly regarding access to their personal data.

One business association suggests that the proposed approach should define a precise procedure for withholding documents that contain confidential information from the public. One respondent from the Government category suggests using the definition of business secrets as laid down in the Commission Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (COM 2013(813) of 28 November 2013).

#### **6.2.4. Settlement agreements**

Several respondents from the academics and the business associations' categories query whether the transparency rules would also apply to agreements reached between the disputing parties to solve their dispute as opposed to a decision by the Arbitration tribunal decision. They specifically raise the publication of agreements to mediate and settlement agreements. Some respondents among the Business associations observe that matters relating to efforts by the parties to settle the dispute prior to the commencement of arbitration should not be subject to the same transparency rules, given that, in the view of these respondents, such discussions are challenging enough without them taking place in public. This view is held by respondents from the Business associations, Companies Law firms, NGOs, Other respondents and Umbrella NGO categories, and includes several national committees of the International Chamber of Commerce. Other respondents, for example in the academic grouping, argue in favour of the publication of settlement agreements.

One respondent from the consultancies category suggests that states should have the power to approve or veto the publication of hearings and documents.

#### **6.2.5. Hearings open to the public**

Many respondents across categories in particular NGOs and Trade unions approve of the proposals to make the hearings open to the public. However, one general concern expressed is that tribunals may have too much power in deciding under what circumstances hearings could be closed to the public.

A number of trade unions although in general supportive of the reform proposals raise specific concerns on Article 6 (3) of the UNCITRAL rules that a tribunal "may decide to hold all or part of hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible". These respondents suggest that this should be made clearer in the proposed approach.

Several respondents from the business associations and other respondents' category urge caution in this area and stress the logistical issues involved in granting wide access to public hearings, making case management challenging and increasing costs of the proceedings.

Those in favour of public hearings are keen to stress a full multimedia approach. This includes several respondents from Business associations, NGOs and Other respondents, one from each of Companies and Think tanks and almost half the Trade unions who addressed this question. These respondents want to ensure full internet streaming access and video, as well as a full mobility approach (that is, facilities for deaf and/or blind users). One of these respondents suggests that availability could be achieved by establishing an online database for documents to be easily accessible and distributed among relevant parties. Another respondent suggests a mailing list allowing those interested to receive notifications on developments ISDS cases.

### 6.2.6. Filing of Submissions by civil society

Respondents also view positively the proposal that civil society could make submissions to ISDS tribunals.

One NGO respondent feels that transparency includes participation, and that all parties with an interest should have full access to documents and full participation.

However, elsewhere notably amongst business associations and companies there is some concern about the consequences of granting wide participation rights. These concerns relate both to the procedural and substantive aspects.

It is stressed that the possibility for civil society to file submissions should not hamper or unduly delay the final outcome of the proceedings. On the substantive side, emphasis is put on the risk that access by the public to hearings could increase the risk of politicisation of the case and that this could affect the impartiality of the proceedings.

Specifically almost half of business associations, several companies and a significant number of others ask for more information regarding what will be the weight of the input from interested parties including issues such as

- whether the process will be open for all civil society organisations;
- whether the contribution will input into the merits of the case; and
- what would be the impact within the ISDS process.

The request for more clarity on the role and weight of input from civil society groups in the proceedings such as *amicus curiae* is also shared by a number of NGOs and academics.

In particular, some academics suggest that the text could usefully clarify the nature of a tribunal's obligations under Article 3(4) of the UNCITRAL Rules: that provision instructs tribunals to take into account a) whether the *amicus* has a 'significant interest' in the proceedings and b) whether the *amicus* would be able to assist the tribunal by bringing a particular and different perspective when 'deciding to allow' third-party submission.' What form this 'decision' should take, and the extent to which it should be reasoned, is, it is argued, left open. At the very least, it is suggested, the proposed Treaty should demand tribunals to provide a written account of their reasoning under this provision.

Several companies and business associations believe it is also important that the extent of civil society's participation in this process take into account the parties' right to a fair and efficient resolution of the dispute between them. These respondents caution against politicisation of the process, particularly as there is no guarantee that the most potentially interested persons or organisations will have the means to participate in this process.

On procedure, some respondents (from business associations, companies, law firms, NGOs and Umbrella NGOs) note that the proposal is that "Interested parties from civil society will be able to file submissions to make their views and arguments known to the

ISDS tribunal." These respondents state that this is mentioned in the explanatory material as a right, but that this is not reflected in Article 4.1 of the UNCITRAL Rules on Transparency, which merely provides for the tribunal to exercise discretion to admit such submissions.

One respondent from the other respondents' category feels that the more legitimate way forward is for each party to incorporate amicus briefs into their official filings ahead of the arbitration process as they see fit. This might be after a period of public consultation to collect third party views and it would then be up to the parties individually to decide which submissions to accept and file.

A couple of respondents (one NGO and one business association) also consider that the task to be informed about ISDS cases will be heavy, in terms of cost and time, for NGOs and trade unions who would need to divert their resources to defend their viewpoints in ISDS cases.

### **6.3. Clarification of the text submitted for consultation**

*> Many comments, in particular from the NGO respondents, but also business associations and companies relate to the business confidentiality clause under the UNCITRAL rules.*

Under the proposal contained in the text subject to consultation the UNCITRAL Transparency Rules would be applied. These provide in Article 7(2) for the following classifications of information which will not be made public

"Confidential or protected information consists of:

- (a) Confidential business information;
- (b) Information that is protected against being made available to the public under the treaty;
- (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or
- (d) Information the disclosure of which would impede law enforcement."

"Confidential business information" is information the release of which would damage the operations of the business concerned, for example, information on costs which could be used by a competitor or the recipe for a foodstuff. It will be a decision for the tribunal in each case whether the information in question should be regarded as confidential. Comparable exercises take place in domestic courts where information could potentially be released. The fact that certain pieces of information could be consider as confidential does not mean that key information relating to the case, for example, the measures challenged, the arguments made about the measure, the amount of damages claimed, could be withheld.

**> *Some comments relate to Article 7.7 of the UNCITRAL Transparency Rules and argue that it could be open to abuse***

Article 7(7) states:

7. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardise the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances.

The phrase at the end ("or in comparably exceptional circumstances") is inserted to carefully limit the circumstances in which this exception could be used. It makes it clear that the other unidentified circumstances must be exceptional, and comparable to the specific examples cited – of intimidation or hampering the collection of information.

**> *Another comment relates to the application of UNCITRAL Transparency Rules to on-going cases***

The UNCITRAL rules became effective from 1 April 2014 and will automatically apply to all new bilateral investment treaties signed after that date which contain a reference to the UNCITRAL. They (or comparable rules) will apply to all cases started under EU agreements.

However the new UNCITRAL transparency rules do not apply automatically to existing treaties. The European Commission has, at international level, been pushing for general reform of the ISDS system, including for the Energy Charter Treaty to which all EU MS are party. This is with the aim of achieving greater transparency in proceedings that are initiated under existing treaties.

The Commission has represented the EU in negotiations on a convention which would facilitate the application of the rules to existing treaties such as the Energy Charter Treaty but also treaties signed by EU Member States with third countries. Negotiations on that convention were completed on 9 July 2014 and, after endorsement by the UN General Assembly in December 2014, the agreement will be open for signature in early 2015. The EU should as soon as possible adhere to this Convention.

In addition, the EU will also be the main funder of a repository for documents produced in ISDS cases (a system by which documents are made publicly available on the internet <http://www.uncitral.org/transparency-registry/registry/index.jsp>).



## 7. QUESTION 7: MULTIPLE CLAIMS AND RELATIONSHIP TO DOMESTIC COURTS

### *Explanation of the issue*

*Investors who consider that they have grounds to complain about action taken by the authorities (e.g. discrimination or lack of compensation after expropriation) often have different options. They may be able to go to domestic courts and seek redress there. They or any related companies may be able to go to other international tribunals under other international investment treaties.*

*It is often the case that protection offered in investment agreements **cannot be invoked before domestic courts** and the applicable **legal rules are different**. For example, discrimination in favour of local companies is not prohibited under US law but is prohibited in investment agreements. There are also concerns that, in some cases domestic courts may **favour the local government** over the foreign investor e.g. when assessing a claim for compensation for expropriation or may deny due process rights such as the effective possibility to appeal. Governments may have **immunity from being sued**. In addition, the remedies are often different. In some cases government measures can be reversed by domestic courts, for example if they are illegal or unconstitutional. ISDS tribunals **cannot order governments to reverse measures**.*

*These different possibilities raise important and complex issues. It is important to make sure that a government **does not pay more** than the correct compensation. It is also important to ensure **consistency between rulings**.*

### *Approach in most existing investment agreements*

*Existing investment agreements **generally do not regulate or address** the relationship with domestic courts or other ISDS tribunals. Some agreements require that the investor chooses between domestic courts and ISDS tribunals. This is often referred to as "**fork in the road**" clause.*

### *The EU's objectives and approach*

*As a matter of principle, the EU's approach **favours domestic courts**. The EU aims to provide incentives for investors to pursue claims in domestic courts or to seek **amicable solutions** – such as mediation. The EU will suggest different instruments to do this. One is to prolong the relevant time limits if an investor goes to domestic courts or mediation on the same matter, so as not to discourage an investor from pursuing these avenues. Another important element is to make sure that investors **cannot bring claims on the same matter at the same time in front of an ISDS tribunal and domestic courts**. The EU will also ensure that companies **affiliated with the investor cannot bring claims in front of an ISDS tribunal and domestic courts on the same matter and at the same time**. If there are other relevant or related cases, ISDS tribunals must take these into account. This is done to **avoid any risk that the investor is over-compensated** and helps to **ensure consistency** by excluding the possibility for parallel claims.*

***Question:***

***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***

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## **7.1. Submissions**

### **7.1.1. Collective submissions**

The large majority of the 70,000 who submitted collectively answers to this question considers that domestic courts should be exclusively used to settle disputes between states and foreign investors. A considerable number of them consider that EU and the US have solid legal systems capable to sufficiently secure the non-discrimination of foreigners and protecting their property. They also consider that the court within the EU and the US ensure due process and have not been arbitrary, unfair and offensive against foreign investors. One third of these respondents think that the proposed approach does not encourage sufficiently the use of domestic courts.

None of the collective submissions makes specific comments regarding the question of parallel claims mainly due to the fact that most consider that domestic courts should be exclusively used to settle disputes between states and foreign investors.

One third of the 70,000 who submitted answers collectively refer to mediation and consider that the proposed approach does not encourage mediation sufficiently as there is no obligation to have recourse to mediation.

### **7.1.2. Individual submissions by organisations**

Overall, around a fourth of the organisations do not specifically comment on the issues referred to in question 7.

Taking into account the total number of replies by category of respondents and the number of relevant replies, there is a good turnout from NGO, business associations, other, and to a lesser extent companies, trade unions and umbrella NGOs. By contrast, relatively few relevant replies have been received from consultancy, academics, governments, law firms and think tanks.

Of the relevant replies, a majority of respondents takes a negative position or expresses doubts towards the approach. A small minority of the relevant replies takes a neutral or balanced position or provides a reply that does not allow a conclusion of either support or opposition. A large minority takes a positive or moderately supportive stance.

## **7.2. Main comments**

As the question 7 concerns three distinct issues, the comments received on these issues are presented below separately.

### **7.2.1. Relationship with domestic courts**

Almost a half of the respondents who make specific comments on question 7 express their opposition to ISDS and/or stress that they consider that domestic courts should be exclusively used to settle disputes between states and foreign investors. This is particularly the case for NGOs, some umbrella NGOs, trade unions, some companies, some respondents from the others category and some governmental organisations.

Several respondents refer in this context to the legitimacy of domestic courts and proceedings subject to laws adopted by democratically elected national parliaments and supremacy of the national constitution. These respondents consider that domestic proceedings ensure that the principle of equality in front of the law is safeguarded in contrast with ISDS which they argue confers an unjustified privilege for investors and undermines the rule of law by bypassing regular courts.

A significant number of these respondents argue that the EU and/or the US have solid legal systems which they consider are capable of sufficiently preventing discrimination against foreigners and protecting their property. They consider that fundamental rights such as the right to due process or protection against arbitrariness, discrimination and harassment are firmly anchored in the legal systems of the EU Member States and/or the United States. These respondents therefore argue that in general there is no risk of biased courts pronouncing arbitrary or unfair judgments against foreign investors in the EU and/or the US.

One company argues in this context that the ISDS route offers no greater assurance of a lack of bias for EU investors as compared to State level courts within the US as in fact the US have never lost an ISDS case, despite a number of claims against it.

A few respondents consider that if the domestic court system is inadequate to deliver justice to the investors, then the content of the treaty should relate to reforms to that system of the domestic laws of the contracting parties (EU and US). European-wide and other trade unions and a small number of NGOs suggest that international investment law should be integrated into domestic legal systems and support the development and maintenance of an impartial and functioning judicial system which is compatible with international human rights standards.

A significant number of NGOs and some trade unions suggest that the state-to-state mechanism should be enough to settle investment disputes as it has proven to be an effective enforcement mechanism in fora such as the World Trade Organisation. One NGO suggested that a system equivalent to WTO should be established.

However, some respondents (including a number of NGOs and trade unions) either do not entirely reject ISDS, or provide for more specific comments in the event that ISDS is included in TTIP. These respondents consider that, as a rule, the domestic courts

should be preferred as they are better placed to address disputes between the investors and the state. Therefore, they express their support for the idea to encourage domestic proceedings.

However, many of them argue that the proposed approach insufficiently or ineffectively encourages domestic remedies. Some argue that the proposed provisions do not oblige nor provide a genuine incentive for investors to seek redress in domestic courts, but merely oblige an investor to choose between domestic courts and international arbitration to avoid parallel proceedings. Some claim that foreign investors have always been reluctant to resort to the domestic courts of the host State to have their investment disputes adjudicated so it is not an easy task to convince foreign investors to submit their investment claims mainly to the courts of justice of the respondent State. A number of respondents also criticise in this context the fact that an ISDS arbitrators can review (and, they argue, overturn) any and all national court decisions, including those of supreme courts and human rights courts.

A significant number of respondents (mainly NGOs and trade unions) argue for the introduction of the requirement of exhaustion of local remedies before the possibility to go to ISDS, which would become a solution of last resort.

Some refer in this context to the example of such a requirement for human rights violations under the European Convention on Human Rights (ECHR). For example, one NGO argues that exhaustion is required for other international judicial mechanisms, including cases brought by individuals under human rights treaties such as the ECHR. Some other respondents (trade unions, some umbrella NGOs) propose introducing a requirement that the investor needs to exhaust domestic remedies within the host state before being able to file a claim under ISDS unless futility is demonstrated. In order to determine "futility", the investor would need to demonstrate that local remedies are not available or effective by proving that the investor cannot expect effective remedies from the domestic legal system, because these remedies are not available to him or her and may not offer effective remedies or cause undue delay.

A few NGOs raise questions about the role of the Court of Justice of the European Union in the protection of investors. Some suggest that if the proceedings at the national level are not satisfactory, the investor should be able to appeal to the Court of Justice of the European Union. A suggestion is made that the agreement should include provisions that lead to the removal of possible discrimination and in case of a breach of the EU, a MS or the US, an action before the International Court of Justice should be possible.

Some trade unions propose that an alternative option to ISDS would be to include chapters on judicial reform and the rule of law in international trade and investment agreements which should offer cooperation and support for countries which are struggling with these issues. However, in the view of these respondents the trade agreement with the US does not need such a chapter, because in its view, the US legal system offers sufficient protection for economic actors including foreign investors.

By contrast, nearly all large companies and business associations which responded and the national committees of the International Chamber of Commerce argue in favour of

ISDS being available in addition to recourse to domestic court. These respondents, whilst they understand why the Commission services would like to encourage domestic proceedings, consider that the investor should be free to choose either legal path – domestic or international – and ISDS should not necessarily be the last resort. They consider that there might be challenges that are better dealt with in national courts but on the other hand there might be ones for which international arbitration is necessary. Some give the example of discrimination in favour of local companies, which is not prohibited under US law. Others refer to the fact that local courts may be prevented from applying directly the obligations flowing from an international treaty. Others consider that host States may get immunity in local courts, particularly when it comes to public acts. They also recognise that there are claims that cannot be dealt with in international arbitration, such as investigating the constitutionality of a measure.

Some say that it should be possible for the investor to base its decision to opt for one or the other not only on objective grounds (the purpose or nature of the claim) but also on subjective issues, such as the reliability or independence of the local justice system. Some consider that even if the national courts of the US nor EU Member States do not suffer from either a lack of transparency or undue political influence, each legal system is based on a specific culture. This in itself may give rise to an impression of bias from the point of view of a foreign investor involved in a major dispute with the host state. It is pointed out also that investment agreements are not just about the direct expropriation of property rights – investment is a much broader concept with many other ways in which foreign investors can be discriminated against – and the reality is that international investment agreements exist precisely because there are not provisions in domestic law that ensure foreign investors are afforded the same protection as a domestic company. Providing for a neutral dispute resolution mechanism is necessary to avoid cases in which momentary political pressures could harm long term relationships between a host State and a company and the country of its nationality.

In general, all larger companies and business associations which responded are against a requirement of exhaustion of recourse to domestic remedies as an obligatory requirement. They consider that this would add an additional layer of costs which would make ISDS inaccessible for SME investors. They argue that the situation (also for bigger investors) is often aggravated by the fact that their cash reserves have been depleted as a consequence of the allegedly illegal act of the State. Some also argue that if the case brought is not about an infringement of national law but about an infringement of international law, i.e. the bilateral treaty, the recourse to domestic course might be deemed to be inefficient from the beginning as local courts might be prevented from directly applying international law.

Several also consider that an investor should have the ability to abandon at any time a domestic court proceeding and go to ISDS, if the investor no longer feels that a fair process can be secured.

One company suggests that if there is a requirement of exhaustion of local remedies, it should be subject to the demonstrable suitability of this channel for resolving the dispute in the period set out in the treaty. If the local jurisdiction cannot be relied upon

to reach a decision within the set period, the exhaustion of this remedy should not be a previous requirement before resorting to ISDS.

Some companies and business associations are also generally against a strict fork-in-the-road solution and judged that it would only have the opposite intended effect of encouraging ISDS. They argue that experience shows that investors are much more likely to attempt to resolve their dispute in the domestic forum if they retain the ability to commence international dispute settlement should the national proceedings turn out to be ineffective or unfair. By contrast, in legal regimes where the investor has to make a choice whether to seek redress in the domestic courts or go to ISDS, the investor is more likely to choose ISDS and not to try the domestic courts. One respondent argued that in these circumstances the number of ISDS cases is likely to rise and that having both options available to investors increases pressure on the State to ensure the effectiveness of its court system.

### **7.2.2. Mechanism to avoid parallel proceedings**

The majority of the respondents who favour the possibility of ISDS being available in addition to the domestic courts or who do not take a principled position against ISDS as such support the proposed approach to prevent parallel proceedings and double compensation. This view is expressed throughout all the categories and especially stressed by the NGOs, business associations, trade unions and governmental organisations. They consider that there should not be parallel claims (by subsidiaries) because they engage the governments in multiple costly proceedings. Support is also expressed for the wording of the proposed provision as it does not require the parties or the claim to be identical (a requirement which is often difficult to meet).

Some respondents, in particular NGOs and trade unions consider however that the proposed provisions are insufficient to guarantee that there are no parallel proceedings or treaty shopping or express doubts as regards the scope of the parallel claims prohibition. Some are uncertain whether it will prevent the proceedings initiated by the parent company or its shareholders on the one side and the local subsidiary on the other. Others stress that because many domestic remedies against the State are non-monetary in nature, in contrast to arbitration, where the primary remedy is monetary, parallel proceedings in domestic courts and international arbitral tribunals will continue to be possible.

One think tank indicates that as the draft CETA Article x-23 provides that, if another claim is brought under another BIT, "the tribunal shall stay its proceedings or otherwise ensure that proceedings under the other BIT are taken into account" they are uncertain whether it implies that there is in fact an obligation to stay proceedings. A business association and an Umbrella NGO suggest clarifying what is expected of tribunals to 'otherwise ensure' that parallel proceedings are 'taken into account' as well as clarifying on how to "take into account other relevant or related cases" (what constitutes a parallel claim). A question is raised as well regarding how the validity of the declaration by the investor will be checked if the mechanism relies only on this declaration.

One think tank says that, in the light of investment tribunals' history of expansive approaches to jurisdiction, it is not excluded that an arbitral tribunal will find it is competent even where another domestic or international process for compensation has been initiated over a dispute relating to the same measure alleged to constitute a breach. One company draws attention to two recent examples in which tribunals accepted that the BIT required investors to use domestic courts before arbitration and that this precondition had not been met. They subsequently found that it would have been futile to submit to domestic court or that because the host state had failed in a (previously unwritten) corresponding obligation to provide a suitable remedy in efficient terms, exceptions to the domestic court requirement could be made.

A couple of respondents (1 regional government and 1 other organisation) suggest sanctions for disregarding the rules on parallel claims.

On the other hand, some companies and business associations do not agree with the proposed approach or find it too restrictive. An academic organisation considers that it is not necessary for an arbitral tribunal under TTIP to "stay its proceedings", as indicated in article x-23 of the text in case of multiple claims. On the contrary, it would be enough for the arbitral tribunal to "ensure that proceedings pursuant to another international agreement are taken into account in its decision, order or award", for example reducing compensation by an amount proportional to that granted in any previous award, to avoid double recovery of damages. Some business associations indicate that it is generally recognised by ISDS tribunals that compensation should not be awarded more than once and tribunals have developed sophisticated means to make sure that this does not happen.

Some business organisations oppose the principle if it is intended to instruct a tribunal to stay its findings to wait for the outcome of a proceeding under another international agreement, if that other proceeding is not between the same two parties.

A number of respondents among business organisations and companies disagree with the principle that companies affiliated with the investor may not pursue ISDS proceedings on their own on the same matter and at the same time. Some consider that it may happen that the affiliates have individualised claims against the respondent State which could be different to and independent from those of their parent company and that could even benefit shareholders other than their parent company. This is claimed to be particularly problematic in the case of joint-ventures, where the parent company sometimes does not have the same interests as the joint-venture. Some others indicate that it is possible that the locally-established enterprise would suffer a different type of damage from the damage suffered by the investor as a result of the same measures constituting a breach of the agreement.

Some business organisations stress the time issue in this context and say that in these circumstances, an investor may wait for years to receive a final judgment or award before being able to initiate investment treaty arbitration – and even then will be subject to 9-month waiting period assuming the time limit for initiating a claim under the treaty has not run out.

### 7.2.3. Mediation

Around one fourth of the respondents refer specifically to the Commission services' proposal on mediation. Around half of those who mention mediation express support for the proposed approach to encourage mediation (mainly business associations, some NGOs, some companies and a number of respondents from the other category and a couple of think tanks). Some of these respondents mention that they agree with the proposed approach that the recourse to mediation should be possible throughout the domestic and ISDS proceedings. Several of these respondents consider that mediation is efficient alternative dispute settlement prior to recourse to international arbitration. A few of these respondents stress the benefits of mediation which can generate more satisfactory outcomes for the disputes and resolve them expeditiously, avoiding the substantial costs and delays of arbitration which is especially significant for SMEs.

For example, some respondents, some business organisations and some respondents falling into the others category consider that mediation presents a credible and compelling alternative or complement option to arbitration for both investors and States. One of these respondents refers to statistics which indicate that between 30 and 40 percent of the ISDS disputes are resolved by agreement between the parties. One international organisation falling under the "others" category refers to its experience that 36% of all registered cases are settled or otherwise discontinued prior to an award and states that, while disputes can be resolved at any stage of the process, the likelihood of a negotiated resolution is greatest before the dispute is formally commenced or in the early phases of the dispute. One respondent further considers that a mediated resolution is more likely to be implemented (than an award) because it is a product of both parties' agreement as mediation allows the parties to control the outcome, rather than placing its resolution in the hands of a tribunal. Mediation encourages parties to move potential disputes away from a strictly legal interpretation of investment treaty provisions in an adversarial setting and facilitate solutions that are less costly and more effective than the award of monetary compensation.

A small number of respondents (a few companies and business associations) stress that the recourse to mediation should be optional for investors. They consider that if mediation is set out as a compulsory prerequisite to allow an investor to later resort to investment arbitration, mediation will likely fail.

On the other hand, a significant number of respondents among NGOs, trade unions and think tanks raise doubts as regards the efficiency of mediation as a means of settling disputes between an investor and a state. Some state that in essence the proposed approach does not bring anything new as amicable dispute resolution by mediation is always an alternative available to the parties of a dispute.

The main concerns expressed as regards the efficiency of mediation are the following:

- Some consider that as mediation is voluntary it is not a genuine alternative to the arbitration.



- A few respondents mostly among NGOs mention that while in normal circumstances routes to mediation might be welcomed, there can be no meaningful place for mediation between parties to an investment dispute where the investor has the right to go to ISDS at any time at his disposal. The imbalance this creates between states and foreign investors inevitably alters the balance of power in any negotiations, to the extent that such negotiations are rendered effectively meaningless.
- One think tank mentions that amicable solutions with the threat of ISDS in the background may not always be adequate, especially if legitimate policy measures are adapted to accommodate the investor, or if compensation is paid out of the public purse when domestic law does not foresee compensation.
- A law firm considers that there may be a legal impediment for the governments to mediating the dispute for fear of spending public funds inappropriately or unlawfully – and in turn bringing upon themselves fiscal or other administrative responsibility. One law firm stresses that where state responsibility becomes the focus of a formal arbitral claim, the onus is on the state not only to defend public property, but to ensure that as strong a defence as possible is put forward.
- One NGO expresses concern at use of mediation as a compromise process in disputes without access to transparent and expert evidence, particularly of public health impact, but also at such an international level that it could exclude cultural sensitivities.

A few NGOs consider that the proposal insufficiently encourages mediation. A couple of NGOs and of governmental organisations suggest that prior mediation before having recourse to a panel should be compulsory.

### **7.3. Specific suggestions**

A number of respondents make specific comments or suggestions on the proposed approach or the provided reference text:

- One company considers that the proposed approach is not clear enough on the relationship of ISDS with domestic courts and does not understand whether domestic courts should always be the first avenue for hearing complaints.
- A number of companies agree with a general requirement to attempt to resolve a dispute through consultations before going to arbitration but are concerned about a requirement demanding the fulfilment of specific formalities before going to arbitration. A significant number of business organisations consider that the proposed 180-day cooling off period is excessively long, with one cautioning that this might contradict the goal of fast and effective conflict resolution. It is argued that the stipulated cooling-down period ignores the fact that cases usually have a long history and that no company files an ISDS complaint without hesitating.

- Some companies and business organisations consider that a condition that an investor may "not identify measures in its claim to arbitration that are not identified in its request for consultations" is only acceptable to the extent the non-identified measures existed when the request for consultations is made. However, it is argued that the provision would be problematic to the extent that it would preclude an investor from including in its request for arbitration a measure that came into existence after it submitted its request for consultations and that is related to the subject matter of the dispute. If such newly-introduced measures would have to be the subject of a new round of consultations, a State theoretically could stave off arbitration indefinitely.
- One company suggests that the EU should also consider language providing that the investor may initiate arbitration if the domestic courts do not issue a final judgment within a reasonable period from the filing of the domestic law claim.
- A think tank suggests that a 'limitations' clause should be introduced whereby claims must be brought within a specified period from the date on which investor knew, or ought to have known, of the alleged breach. Should an exhaustion of domestic remedies requirement be introduced, the duration of the limitations clause would need to be calibrated accordingly.
- One government respondent suggests that in order to encourage using domestic court one could provide that a different standard would apply (broader for domestic courts than for ISDS tribunals).

A number of respondents make other specific suggestions on how mediation could be strengthened or the proposed approach clarified or improved:

- To strengthen mediation, it is suggested by some business organisations that the text should provide clear incentives for Parties to go to mediation, such as through extended time limits as already proposed by the EU, but also through fiscal incentives, legal aid or the refund of fees. A think tank considers such an incentive could be efficient by taking into account unreasonable refusals to engage in mediation when allocating costs. A law firm suggests that if the parties to a dispute do resort to mediation, the provisions should clarify that the parties must give sympathetic consideration to the mediator's report and may not just dismiss it without reviewing it. Any decision by the parties to the dispute to endorse the content of a mediator's report needs to be recorded by a TTIP arbitral tribunal in the form of a final settlement award, which the parties may request the tribunal to make confidential. Such an award could not be appealed except to the extent that a party's consent to the mediator's report is based significantly on the other party's misrepresentation or in case the mediator committed a misuse of power or acts of corruption in the exercise of his/her mission.
- Some business organisations suggest that the agreement should provide for the detailed mediation rules or incorporate a reference to specific mediation rules

(for example ICC mediation rules, ICSID Mediation Rules or IBA Investor-State Mediation Rules)

- As regards the mediators, some business organisations propose supporting the development of standards related to mediator skills and consequently facilitate the mutual recognition of mediators. One arbitral institution recommends that the mediators on the Commission's proposed list ideally should have expertise in alternative dispute resolution techniques, paired with expertise in international investment law and public international law.
- Several respondents put forward ideas to promote mediation as experience shows that parties do not tend to use mediation because they are unfamiliar with the mediation process. This could be done for example through the involvement of Chambers of Commerce and Industry which have accumulated significant expertise in this area (one business organisations), economic departments at embassies (one company) or a mediation information website.

Other detailed suggestions:

- One company suggests that in order to ensure an independent and fair mediation process the mediator should not be paid on a commission basis.
- One law firm suggests that the proposed ISDS provisions under TTIP should extend the mediator's role to include a fact-finding role, which typically falls within the scope of a conciliation procedure.
- One respondent suggests creating an option for co-mediation: Co-mediation is where instead of a single mediator, there are two mediators that work in tandem to assist the parties in resolving their dispute. Co-mediation can facilitate a mediation that bridges the cultural, language and other divisions between the parties.
- One respondent proposes a mediation management conference. The text of the treaty or relevant rules should require that a mediation management conference be held before the parties take their final decision to go along with mediation or stop it. This mediation management conference will allow the parties to address essential issues such as the actual power to negotiate and mediate, the schedule, venue, language, scope of the mediator's role and a number of other ground rules that will allow the mediation to proceed and avoid deadlock. A mediation management conference also provides a forum for addressing a critical issue in mediation involving investors and States: identifying who has the authority to make decisions on participation in a mediation process itself and on the outcome at various stages. It is argued that for the mediation to succeed there must be participants with sufficient authority on both sides.

#### **7.4. Clarification of the text submitted for consultation**

***> A significant number of business organisations consider that the proposed 180-day cooling off period is excessively long, with one cautioning that this might contradict the goal of fast and effective conflict resolution:***

The period of 180 days is fairly common practice in international economic treaties, and in investment treaties. In fact, here the 180 day period is broken down into 90 days for consultations and another 90 days for a determination of the respondent, if the European Union or a Member States is challenged.

***> One think tank suggests that a 'limitations' clause should be introduced whereby claims must be brought within a specified period from the date on which investor knew, or ought to have known, of the alleged breach.***

This is already provided for in EU Agreements, but is not included in the text subject to consultation. It appears, for example, in Article X.18 (5) of the ISDS section of the CETA text.

***> Some state that in essence the proposed approach does not bring anything new as amicable dispute resolution by mediation is always an alternative available to the parties of a dispute.***

It is true that mediation is generally available, also for investment disputes. However, the text subject to consultation includes an important number of innovations. Most importantly, it clarifies that the various deadlines in the agreement for different steps of the procedure are suspended pending the briefing. This means that, in contrast to the situation where mediation is generally available, the pressure which would normally be exercised by upcoming deadlines, and which often mitigates against mediation are removed.

## 8. QUESTION 8: ARBITRATOR ETHICS, CONDUCT AND QUALIFICATIONS

### ***Explanation of the issue***

*There is concern that arbitrators on ISDS tribunals do not always act in an independent and impartial manner. Because the individuals in question may not only act as arbitrators, but also as lawyers for companies or governments, concerns have been expressed as to potential bias or conflicts of interest.*

*Some have also expressed concerns about the qualifications of arbitrators and that they may not have the necessary qualifications on matters of public interest or on matters that require a balancing between investment protection and e.g. environment, health or consumer protection.*

### ***Approach in existing investment agreements***

*Most existing investment agreements do not address the issue of the conduct or behaviour of arbitrators. International rules on arbitration address the issue by allowing the responding government or the investor to challenge the choice of arbitrator because of concerns of suitability.*

*Most agreements allow the investor and the responding state to select arbitrators but do not establish rules on the qualifications or a list of approved, qualified arbitrators to draw from.*

### ***The EU's objective and approach***

*The EU aims to establish clear rules to ensure that arbitrators are independent and act ethically. The EU will introduce specific requirements in TTIP on the ethical conduct of arbitrators, including a code of conduct. This code of conduct will be binding on arbitrators in ISDS tribunals set up under TTIP. The code of conduct also establishes procedures to identify and deal with any conflicts of interest. Failure to abide by these ethical rules will result in the removal of the arbitrator from the tribunal. For example, if a responding state considers that the arbitrator chosen by the investor does not have the necessary qualifications or that he has a conflict of interest, the responding state can challenge the appointment. If the arbitrator is in breach of the Code of Conduct, he/she will be removed from the tribunal. In case the ISDS tribunal has already rendered its award and a breach of the code of conduct is found, the responding state or the investor can request a reversal of that ISDS finding.*

*In the text provided as reference (the draft EU-Canada Agreement), the Parties (i.e. the EU and Canada) have agreed for the first time in an investment agreement to include rules on the conduct of arbitrators, and have included the possibility to improve them further if necessary.*

*In the context of TTIP these would be directly included in the agreement. As regards the qualifications of ISDS arbitrators, the EU aims to set down detailed requirements for the arbitrators who act in ISDS tribunals under TTIP. They must be independent and*

*impartial, with expertise in international law and international investment law and, if possible, experience in international trade law and international dispute resolution.*

*Among those best qualified and who have undertaken such tasks will be retired judges, who generally have experience in ruling on issues that touch upon both trade and investment and on societal and public policy issues. The EU also aims to set up a roster, i.e. a list of qualified individuals from which the Chairperson for the ISDS tribunal is drawn, if the investor or the responding state cannot otherwise agree to a Chairperson. The purpose of such a roster is to ensure that the EU and the US have agreed to and vetted the arbitrators to ensure their abilities and independence. In this way the responding state chooses one arbitrator and has vetted the third arbitrator.*

***Question:***

***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?***

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## **8.1. Submissions**

### **8.1.1. Collective submissions**

Among those submissions which have been submitted collectively, most respondents specifically address the issue of arbitrators' ethics and conduct. Of these, around one fifth are overall positive about the proposed approach; around one third express balanced views and the remaining are overall negative.

Around a fifth of the collective submissions consider that it is crucial to set up rules on independence of the arbitrators; certain submissions specifically insist on the importance of the selection procedures for arbitrators; and a small number consider that a code of conduct should be compulsory. In raising concerns about independence, a small number of the collective submissions question who would decide on the independence of arbitrators and possible violations of the code of conduct.

Around half of those responding express serious concerns relating to conflicts of interest and the independence of the arbitrators at ISDS tribunals. They fear that the arbitrators will tend to be biased to investors.

The large majority of those expressing a negative view of the proposals raises doubts whether the approach will insure the independence of the arbitrators at ISDS tribunals.

Almost half the collective submissions argue that the concerns on independence do not arise in the domestic courts which should therefore be preferred. Around a third of respondents argue that the remuneration system in arbitration gives the wrong

incentives and risks putting into question the independence of arbitrators. Some submissions discuss the idea of a permanent court in response to this question, suggesting that this could provide a more legitimate legal basis for dispute resolution rather than what the submission described as the current "tribal system".

Almost a fifth of the submissions consider that there should also be a wider requirement for the arbitrators to have competences in more public interest areas of law (for example social or environmental law). Otherwise these respondents feel the arbitrators could be biased towards investors.

### **8.1.2. Individual submissions by organisations**

Overall, around one third of the organisations do not specifically comment on the issues referred to in question 8. Among those organisations which provide specific comments, a small majority expresses doubts about or is opposed to the proposed approach to arbitrator ethics, conduct and qualification. However, a significant number of respondents also support the EU's proposals for improving the existing system. A small minority of respondents takes a neutral or balanced position or provides a reply that does not allow a conclusion of either support or opposition to the proposed approach.

The results are overall not strikingly different depending on the category of respondents, although replies from governments, business associations and umbrella NGOs tend to be more supportive of the EU's approach than replies from trade unions or companies.

## **8.2. Main comments**

A significant number of all categories of respondent organisations which have commented on question 8 consider that independence rules and sound selection procedures for arbitrators are crucial or important.

Around a half of responding NGOs criticise the existing ISDS system or express strong concerns about conflicts of interests or the independence of arbitrators. This view is shared by a majority of think tanks, a significant number of governments and several trade unions, but only by a few of the replying business associations, companies, law firms and consultancies.

A number of NGOs, umbrella NGOs and trade unions consider that the very nature of the existing investment arbitration system makes it impossible to adequately regulate arbitrators' ethics and conduct. About one third of the replying NGOs, a significant number of trade unions and respectively one submission from academia and one from think tanks point to the remuneration system of arbitrators. These respondents feel this system provides for incentives to rule in favour of the parties which appoint the arbitrators and hence puts into question their independence. The possibility to act both as legal counsel in investment disputes and as arbitrator in other cases is also criticised by several NGOs, umbrella NGOs and trade unions. Only a few of the responding companies, law firms, business associations and governments express similar concerns.

A significant number of responding NGOs, umbrella NGOs, trade unions, governments and academics raise doubts on whether the EU's proposals will effectively ensure the independence of arbitrators sitting in ISDS tribunals. A small minority of companies, NGOs, trade unions and other respondents argue that investment disputes should exclusively be adjudicated before domestic courts where concerns about lack of independence and financial incentives would not arise. A few respondents from the same categories however also consider that rules on arbitrators' ethics and conduct should be elaborated at the multilateral level. A small minority of those respondents also argues in favour of addressing the issue through the creation of a standing international court.

On a different note, a number of companies, certain NGOs (mostly ICCs), as well as several other respondents consider that the current ISDS system does not raise any concerns as regards the ethics and conduct of arbitrators. Three national branches of the ICC and one academic also consider that acting as legal counsel in some cases and as arbitrator or judge in other cases does not raise major issues. A small number of NGOs (mostly national committees of the International Chamber of Commerce), companies, business associations and other respondents express doubts on whether the proposals for addressing arbitrators' ethics and conduct are necessary, especially in the context of other existing guidelines and legal instruments.

### **8.2.1. Qualifications of arbitrators**

The text subject to consultation sets down detailed qualification requirements for arbitrators who will sit in ISDS tribunals under TTIP. Arbitrators are notably required to have "expertise in international law and international investment law and, if possible, experience in international trade law and international dispute resolution".

A number of NGOs and umbrella NGOs, but also a few business associations and one law firm who have commented on this proposal consider those requirements as being too restrictive. Certain replies, mostly from NGOs, propose enlarging the required qualifications of ISDS arbitrators also to encompass social and environmental competences. One law firm, a few NGOs and a handful of other respondents also express the view that the requirements may prevent appointing arbitrators which are not experts in international investment law, but nevertheless possess valuable other qualifications which may be helpful for the resolution of a particular case.

The suggestion to resort to arbitrators with experience as domestic judges is welcomed by several trade unions and a few other respondents who commented on question 8. However, certain other replies submitted notably by companies and business associations express doubts on whether domestic judges will have sufficient knowledge of international (investment) law or of the specific topics subject to investment disputes.



### **8.2.2. Code of conduct**

The proposal for a code of conduct for ISDS arbitrators is welcomed by a majority of responding umbrella NGOs, a significant number of NGOs and several trade unions, business associations, companies and consultancies. However, a significant number of trade unions and umbrella NGOs, as well as several other respondents fear that the proposed code of conduct would remain a non-binding recommendation or argue that it must be binding. A majority of academics and a large minority of NGOs, trade unions, governments, umbrella NGOs, as well as some other respondents also express the view that more concrete information as to the detailed content of the suggested code of conduct is necessary and more detailed rules on arbitrator ethics and conduct should have been published for comment. A few umbrella NGOs and consultancies also fear that the code of conduct would only be adopted by the TTIP Committee after the conclusion of the negotiations.

A number of business associations and some other organisations encourage the Commission services to take into account existing instruments on arbitrator ethics and conduct, such as the IBA Guidelines on Conflict of Interests in arbitration, when setting up specific rules on conflicts of interests for ISDS arbitrators in TTIP. However, a significant number of responding governments, as well as some academics, NGOs, business associations and other organisations criticise such existing instruments as being insufficient or acts of self-regulation of the arbitration community.

### **8.2.3. Disqualification of arbitrators**

As regards the suggestion to include provisions on the disqualification of ISDS arbitrators into TTIP, several replies, mostly from non-governmental organisations, stress the importance of entrusting an independent person with the decision on arbitrators' challenges. A few replies from NGOs and academia insist on the necessity to have a transparent disqualification procedure or suggest entrusting judicial officials with rendering such decisions. Several NGOs insist on the necessity also to allow challenges based on a lack of qualifications of arbitrators (in addition to challenges based on conflicts of interest), while one company explicitly warns against such an enlarged scope of the disqualification procedures. The same company, as well as two other respondents, also warns against allowing reversals of awards in case of challenges which would occur after an arbitral award has been rendered.

One think tank welcomes the proposal to entrust the Secretary General of ICSID with deciding on arbitrators' challenges which is considered an improvement as compared to entrusting the co-arbitrators with ruling on possible conflicts of their peer. However, several NGOs and one company also express doubts about the independence of the ICSID Secretary General which is perceived as being biased in favour of the US.

### **8.2.4. Lists of arbitrators (rosters)**

The proposal to set up lists of arbitrators (rosters) from which the Chairperson for the ISDS tribunal is drawn if the investor or the responding state cannot otherwise agree is considered as being a positive step by several of the responding organisations across different categories (non-governmental organisations, trade unions, business associations, companies). A significant number of umbrella NGOs, as well as several trade unions, NGOs and business associations regret however that the proposed roster is not mandatory and still allows the disputing parties to appoint arbitrators from outside the list. A few umbrella NGOs consider that arbitrators should be chosen randomly from the roster instead of through nominations made by the disputing parties in order to prevent conflicts of interests.

On another note, several replies submitted by business associations and NGOs (mostly ICCs) criticise the proposed roster as being too small or restrictive. For some of those respondents, the proposed list may prevent the appointment of experts emanating from associations, universities, law firms, or other institutions which could have a positive impact in terms of sound decision making. For others, in particular business associations, relying on a limited number of pre-agreed arbitrators could make the appointment of chairpersons more difficult due to potential conflicts which may arise from prior affiliations. Several business associations and companies also fear that a pre-agreed list of arbitrators could prevent appointing arbitrators who possess special knowledge relevant for the dispute in question. A few replies from NGOs, one company and a couple of other respondents also consider that rosters would favour the respondent States as compared to the investor, because the respondent State will have had a role in agreeing on the roster, while the claimant in an eventual arbitration will not have had such a role. In addition, a couple of respondents also fear that the proposal of lists of arbitrators may "politicise" the selection process of ISDS arbitrators. As a result, several companies, business associations and other respondents argue in favour of sticking to existing rules for arbitrator selection, by which each disputing party freely appoints an arbitrator and both disputing parties then agree on the Chairperson of the tribunal.

Finally, some of the respondent NGOs and business associations consider that the idea of a roster of arbitrators is not new, pointing to existing arbitrator lists such as those administered by the ICSID Secretariat. A few replies from business associations and other respondents also argue in favour of giving parliaments a greater role in the arbitrator selection process, either by approving the individuals whose names will be inscribed in the roster, or by validating arbitrator appointments in individual ISDS cases.

### **8.3. Clarification of the text submitted for consultation**

*> A significant number of trade unions and umbrella NGOs, as well as several other respondents fear that the proposed code of conduct would not be binding:*

As explained in the public consultation document published by the Commission services, the proposed approach would include a binding code of conduct into any EU ISDS text proposal for TTIP which will be binding on all arbitrators who sit in ISDS

tribunals. The text will contain procedures for identifying and dealing with any conflicts of interest. If an arbitrator is to disregard the requirements set out in the text (including the code of conduct), he or she can be removed from the tribunal, either by a decision of the disputing parties, or by a decision of an independent authority (the Secretary General of ICSID).

**> A few umbrella NGOs and consultancies also fear that the code of conduct would only be adopted by the TTIP Committee after the conclusion of the negotiations:**

It is the intention to include the code of conduct directly into agreements.

The text which is used as an illustration for possible approaches to question 8 foresees that a Committee will adopt a specific code of conduct no later than the entry into force of the agreement and in any event no later than two years after the entry into force of the agreement. Until the adoption of the code of conduct, ISDS arbitrators must comply with the International Bar Association (IBA) Guidelines for International Arbitration which are also binding upon the arbitrators, i.e. arbitrators which would not comply with the IBA Guidelines or with the code of conduct once adopted can be removed from the tribunal, either by a decision of the disputing parties, or by a decision of an independent authority (the Secretary General of ICSID). Substantively, the IBA Guidelines and the Code of Conduct cover the same issues. The intention under the proposed approach would be to include a code of conduct directly into agreement before the negotiations are concluded.

**> Several NGOs and one company also express doubts about the independence of the ICSID Secretary General which is perceived as being biased in favour of the US:**

In ICSID, the Secretary General is nominated by the President of the World Bank (ICSID being a subsidiary organisation of the World Bank). He or she needs to be elected by two thirds of the Members of the Administrative Council made up of countries which have ratified the ICSID Convention. There are 150 such countries. The requirement to be elected by a two thirds majority therefore ensures the independence of the Secretary General.

The ability of the Secretary General to decide on cases of conflict is in fact a major innovation introduced in EU investment agreements. It requires that whatever arbitration rules are used it is the Secretary General, rather than the other arbitrators, who decide on whether a conflict arises. The Secretary General is more independent than the other arbitrators, who may find it more difficult to reject an arbitrator where they too might find themselves in a similar situation in a future case.

## 9. QUESTION 9: REDUCING THE RISK OF FRIVOLOUS AND UNFOUNDED CASES

### ***Explanation of the issue***

*As in all legal systems, cases are brought that have little or no chance of succeeding (so-called "frivolous claims"). Despite eventually being rejected by the tribunals, such cases take up time and money for the responding state. There have been concerns that protracted and frequent litigation in ISDS could have an effect on the policy choices made by states. This is why it is important to ensure that there are mechanisms in place to weed out frivolous disputes as early as possible.*

*Another issue is the cost of ISDS proceedings. In many ISDS cases, even if the responding state is successful in defending its measures in front of the ISDS tribunal, it may have to pay substantial amounts to cover its own defence.*

### ***The EU's objectives and approach***

*The EU would like to introduce several instruments in TTIP to quickly dismiss frivolous claims.*

*ISDS tribunals will be required to dismiss claims that are obviously without legal merit or legally unfounded. This provides an early and effective filtering mechanism for frivolous claims thereby avoiding a lengthy litigation process.*

*To further discourage unfounded claims, the EU is proposing that the losing party should bear all costs of the proceedings.*

### ***Question***

***Taking into account the above explanation and the text provided in annex as reference, please provide your views on these mechanisms for the avoidance of frivolous or unfounded claims and the removal of incentives in relation to TTIP Agreement. Please indicate any other means to limit frivolous claims.***

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## **9.1. Submissions**

### **9.1.1. Collective submissions**

More than half of the collective submissions do not provide relevant comments on question 9. The large majority of all the others takes a negative position or expresses strong doubts on the proposed approach for various reasons.

For the large majority of the relevant collective submissions the proposed mechanisms are not tested in practice and there is a question whether such an approach would be useful in achieving the desired goals. For a few, the approach bears the risk that

unpopular, but legitimate actions are deprived of a substantive decision. In addition, the same group of respondents considers that the procedures in ordinary courts are clear, transparent and objective.

Some suggest that the introduction of the desired outcome should be achieved at a multilateral level.

Finally, a small minority of the respondents in the collective submissions believes that the proposed approach is indispensable and that the loser pays principle is not a sufficient disincentive. In order to further deter frivolous claims they propose having further penalties.

### **9.1.2. Individual submissions by organisations**

Overall, more than a third of the organisations do not comment on question 9 or do not provide answers which responded to the question. The proportion is even higher for "think tanks" and "consultancies" where more than half of the replies do not respond to the question.

Taking into account the total number of replies per category of respondents and the number of non-relevant replies, there is a good turnout of replies commenting on the text subject to consultation from NGOs, business associations, trade unions, companies and other.

Overall, a significant number of respondents expressed either a full or partial approval of the proposed approach. On the other hand, a little less than a half of the respondents declare themselves either in total opposition or have a rather negative opinion of the proposed approach. In between these two ends of the spectrum, a fourth of the respondents have a neutral or balanced opinion.

## **9.2. Main comments**

### **9.2.1. General proposed approach**

Question 9 contains two parts: one on frivolous and unfounded claims and one on 'loser pays' principle. Respondents have commented either on both elements or on one or other of them.

With respect to the 'frivolous and unfounded' claims part of Question 9, respondents have made four types of comments. These could be summarised as comments relating to: a) the ISDS system/frivolous claims mechanism; b) the scope of frivolous and unfounded claims; c) the procedure foreseen for dealing with such claims and d) the role of arbitrators when addressing such claims.

Overall, the majority of those commenting on the 'loser pays' principle, as enshrined in the text subject to comments, have opposed its strict application.

The submitted comments and suggestions relate can be divided in two types. These relate to: a) the scope of the principle and b) to the effect of the principle.

### **9.2.2. ISDS system/frivolous claims mechanism**

The first set of comments is on the existence of the ISDS system and/or the frivolous claims mechanism as such.

For a handful of NGOs, Trade unions, companies, governments and other respondents, these respondents consider that the usefulness of having ISDS tribunals at all is limited, because national courts and/or already existing international structures would be better placed to deal with frivolous and unfounded claims. As to the question of frivolous claims in ISDS, a couple of companies and NGOs as well as one Trade union suggest that the matter has to be addressed through multilateral reform. Further, a slightly larger number of replies, the majority of which come from the Trade unions category, with the same concern being voiced by certain respondents in the business associations and other groups, consider that the proposed mechanism dealing with frivolous claims in the text subject to consultation is already foreseen in the ICSID rules for arbitration and that the proposed text does not bring any added value. Finally, under this first set of issues, for a small number of respondents in the business associations, others and consultancies groups, frivolous and unfounded claims have not been a problem in the past and hence there is no need to address this issue at present.

### **9.2.3. Scope of frivolous and unfounded claims**

The second set of comments made by respondents relates to the scope of 'frivolous' and 'unfounded' claims as established by the text subject to consultation.

Under this set of comments, a small group of respondents essentially representing trade unions and NGOs, believe that the scope of frivolous and unfounded claims as defined in the text subject to consultation will not be sufficient to avoid the abuse of the system by the investors. They regret that it would not exclude claims which would cause serious public harm. For these respondents, the categories of 'frivolous' and 'unfounded' would not catch many of the claims about which they are concerned. Often, to illustrate the type of claims that they claim would continue to be processed in the system, they refer to the cases involving Philip Morris and the Australian government or Lone Pine and the Canadian government. Their opinion on the scope of frivolous and unfounded claims most of the time is associated with an overall negative perception of the existence of ISDS and its inclusion in bilateral investment agreements.

Some respondents, primarily from the NGO sector, find that the proposed mechanism will be beneficial only in reducing the costs of arbitration and not the scope of any other decisions that would be made on jurisdiction or on the merits. Several respondents, mainly from the NGOs category, question the utility of the mechanism on frivolous and unfounded claims because in their view the provisions of investment agreements and

investors rights enshrined therein are too wide. For them, the proposed provisions on frivolous claims do not address this concern.

For a significant minority of those commenting on the provisions, including from the NGOs, consultancies business associations, companies and other categories, frivolous and unfounded claims should be better defined and/or clarified. In various responses, arguments for a better definition/clarification are put forward, such as: frivolous and unfounded are notions that could be subject to many legal interpretations; no precise legal definitions of the terms exist; the qualification of the claim as a 'legally unfounded' one as foreseen in the consultation text would be a difficult task in the first stage of the proceedings; defining a claim as frivolous might be fact-intensive requiring presentation of evidence. The plea for a better definition/clarification is not followed by concrete proposals for wording.

For a few respondents from academia, NGOs and business association categories, the differentiation between a claim 'manifestly without legal merit' and 'unfounded as a matter of law' is not useful. It is argued that there is an overlap between the two. These NGO and business association respondents argue that the submission of a claim 'manifestly without legal merit' may exclude examination by the tribunal of the claim 'unfounded as a matter of law' They suggest, instead of distinguishing between the two types of claims, providing a list of situations where a claim is to be regarded as unfounded. For these respondents, such mechanisms preventing frivolous claims are regarded as a procedural question and could be included in the rules of procedure and not in the treaty provisions.

A respondent from the NGO category puts forward the idea that it will be difficult for tribunals to assess whether a claim is 'manifestly without legal merit', without reaching at the same time a conclusion on the facts. Further, another NGO respondent suggests that claims and objections need to be reviewed in an impartial and independent way not surmising the accuracy of the facts, unless sufficiently proven. Finally, a NGO and a law firm consider it likely that the facts will be a subject of controversy between the parties in front of the tribunal and that this might make it difficult for the provisions to operate.

#### **9.2.4. Procedure**

The third set of comments made by respondents relates to the mechanics of the procedure dealing with frivolous and unfounded claims established in the text subject to consultation.

In this context, a handful of respondents believe that the procedure resulting from the two articles under consultation would be a heavier one. In particular, in this regard the majority of national committees of the International Chamber of Commerce expressed concerns that the combined effect of these two Articles would lead to unnecessary procedural delays. They argue that a State will always have the option to raise objections under both articles. In addition, they argue that the opportunity offered by the

article on unfounded claims, whereby a respondent might raise objections at any appropriate time, offers another possibility for states to delay the procedure. The majority of ICCs also argue that the requirement resulting from the text under consultation for a tribunal to bifurcate, while such a bifurcation system, foreseen by ICSID rules, was abolished in 2006, because it was abused by respondent States. On the bifurcation element of the procedure, one company claims that it shall not be mandatory, but at the discretion of arbitrators.

Respondents have also voiced concern with respect to the potential risk of having the state systematically raising objections questioning the nature of the claim. Therefore, for certain respondents, essentially NGOs, business associations and law firms, the procedure of frivolous and unfounded claims should address not only such claims submitted by an investor, but also deal with so called 'frivolous objection' introduced by states with the only purpose of delaying the procedure. These respondents have suggested the establishment of safeguards preventing the state from systemically raising 'frivolous' objections: according to some, this could be the imposition of costs for raising unfounded objections.

In this context, an idea raised by several trade unions and some NGOs would be the establishment of a system whereby the tribunal by its own motion, without the necessity for a state to submit an objection would declare whether a claim is to be qualified as frivolous/unfounded or not.

Finally, in relation to the procedure dealing with frivolous claims, a government, an NGO and a business association also supported the idea of designing an appeal procedure on the decision of a tribunal whether a claim has been declared as being a frivolous or unfounded.

#### **9.2.5. Role of arbitrators when addressing such claims**

The behaviour and role of arbitrators sitting on panels dealing with frivolous and unfounded claims has also received certain attention from respondents, which are the fourth set of comments.

First, a number of respondents (NGOs) believe that the arbitrators sitting on arbitration panels and deciding on whether a claim is a frivolous or unfounded one are in a situation of a conflict of interest. Those respondents argue that the arbitrators have a personal financial interest in not dismissing claims right away as a full arbitration procedure would be more profitable for them: the longer the procedure, the higher their fees.

Second, several of the respondents essentially from the NGO category argue that arbitrators sitting on arbitration panels dispose of a large discretion while interpreting investment agreements and that the proposed provisions do not address this concern.



Several further concerns/suggestions are expressed in relation to frivolous and unfounded claims:

- For an NGO, a think tank and a business association, there is a risk that a claim might be dismissed without an in-depth legal examination.
- Similarly, for a respondent from each of the company and NGO categories, regulations to reduce frivolous claims should not be phrased in such a way as to block justified claims from reaching arbitration.
- One respondent from the academic category suggests setting up a fast-track procedure to adjudicate claims submitted by investors which are manifestly with legal merit, such as in cases of direct expropriations without payment of compensation.

#### **9.2.6. Loser pays principle – scope**

In relation to the first set of comments on the scope of the principle:

First, for certain respondents, essentially from the business associations, NGOs and others categories, the loser pays principle should be applied at the stage when the tribunal renders its decision to the existence of a frivolous or unfounded claim. In this context, a number of respondents, from the same groups, argue that if a decision on the costs is taken only at the end of the procedure, States may be encouraged to use the possibility of objections hoping that a small or medium sized enterprise as claimant will run out of funds on the way.

As a suggestion aiming to further discourage frivolous claims, a number of respondents essentially from the NGO group, but also a government respondent as well as a company respondent, suggest that the Tribunal should order the losing party to pay a punitive award in addition to the award for costs of arbitration incurred by the other party for introducing a frivolous claim.

Second, a small number of respondents, essentially NGOs and Trade unions, suggest a clearer definition of what 'exceptional circumstances' could be. As a reminder, the text subject to consultation foresees that '*in exceptional circumstances, a tribunal may apportion costs between the disputing parties*'. For these respondents, the lack of definition or examples in this regard creates a potential source of lengthy debate.

Third, a handful of business associations, companies and other respondents suggest that instead of applying the "loser pays" principle, arbitrators should have the discretion to adjudicate on costs depending on their own assessment. Such a flexible approach would allow the tribunal to decide on the allocation of costs and in case of abuse to impose them on the losing party.

Fourth, respondents mainly from the same categories suggest that in order to avoid abuses, recoverable costs should be limited to the reasonable ones. Such a rule would discourage both parties from excessive procedural tactics.

### **9.2.7. Loser pays principle – effect of the principle**

In relation to the second set of comments on the effect of the principle:

First, with respect to the effect the 'loser pays' principle might have on companies' behaviour, there is a number of opinions from the business associations, NGOs, companies and Other groups arguing that a blanket application of the 'loser pays' principle could deter small and medium enterprises from using the ISDS mechanism. The high-level of risk of paying the costs in case of an unsuccessful claim would prevent them from choosing the ISDS path. On the other end of the spectrum, for a small number of commentators essentially from the 'other' group of respondents, the 'loser pays' principle will not deter big companies from introducing a claim. States incur significantly lower legal costs and multinational companies would certainly not put endanger their finances by paying the expenses of a procedure.

Second, the 'loser pays' principle might also impact the willingness of states/investors to find an amicable solution or resort to mediation. For a couple of business associations, the principle might be a disincentive for finding an alternative resolution of the disagreement and this even if the case is of low value – pursuing the case instead of settling would result in a higher sum being collected from the defendant. By contrast, for a number of NGOs, and this seen from State's perspective, in light of the 'loser pays' principle, a state might be willing to settle in order to avoid paying a big amount of fees.

Third, several respondents commented on the impact the 'loser pays principle' might have on the state. In this context, a law firm and a NGO pointed to the fact that the principle does not take into consideration the domestic legal obligations for a number of states, which mandate the state to defend vigorously all claims. In the case of unsuccessful defence, such a situation might add- to the State's legal bill. Further, for a couple of business associations, the 'loser pays' principle could make host countries reluctant to defend cases that they deem important but that are uncertain. In the same vein, a comment is made that the principle 'loser pays' might put too much financial strain on a poorer state or a state in financial difficulties.

### **9.3. Clarification of the text submitted for consultation**

*> Finally, under this first set of issues, for a small number of respondents in the business associations, others and consultancies groups, frivolous and unfounded claims have not been a problem in the past and hence there is no need to address this issue at present.*

Similar provisions were introduced by ICSID only in 2006 – since then, several cases have been rejected as being frivolous/unfounded. This has permitted the dismissal of

cases at an early stage, saving time and money for both the respondent and ultimately the investor

***> Further, a slightly larger number of replies, the majority of which come from the trade unions category, with the same concern being voiced by certain respondents in the business associations and other groups, consider that the proposed mechanism dealing with frivolous claims in the text subject to consultation is already foreseen in the ICSID rules for Arbitration and that the proposed text does not bring any added value.***

ICSID rules apply only with respect to arbitration conducted under the ICSID rules. The proposed rules go beyond that and would allow the possibility to deal effectively with frivolous and unfounded claims also in non-ICSID arbitrations. In addition, ICSID contains only rules applying to claims manifestly without legal merit, while the text under consultation offers another layer of protection for respondents with the introduction of Article X-30 - Claims Unfounded as a Matter of Law

***> For a few respondents from the academia, NGO and business association categories, the differentiation between a claim 'manifestly without legal merit' (Article X-29) and 'unfounded as a matter of law' (Article X-30) is not useful, as it is argued that there is an overlap between the two***

There is no overlap between the two: paragraph 2 of Article X- 29 precludes the submission of an objection under Article X-29 if an objection is submitted under Article X-30. A similar safeguard is also foreseen in Article X-30 (3) – if an objection is submitted under Article X-29, the Tribunal may decide not to take into account an objection pursuant to Article X-30. Also the standard to be met (manifestly without legal merit") is higher than under Article X-29.

***> Respondents suggest that in order to avoid abuses, recoverable costs should be limited to the reasonable ones. Such a rule would discourage both parties from excessive procedural tactics.***

The text subject to consultation already makes clear that the costs which are recoverable need to be "reasonable" (see Article X-36(5)). That is, it needs to be determined whether the fees which are claimed on the basis of the loser pays principle are in fact "reasonable".

## 10. QUESTION 10: ALLOWING CLAIMS TO PROCEED (FILTER)

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### ***Explanation of the issue***

*Recently, concerns have been expressed in relation to several ISDS claims brought by investors under existing investment agreements, relating to measures taken by states affecting the financial sector, notably those taken in times of crisis in order to protect consumers or to maintain the stability and integrity of the financial system.*

*To address these concerns, some investment agreements have introduced mechanisms which grant the regulators of the Parties to the agreement the possibility to intervene (through a so-called "filter" to ISDS) in particular ISDS cases that involve measures ostensibly taken for prudential reasons. The mechanism enables the Parties to decide whether a measure is indeed taken for prudential reasons, and thus if the impact on the investor concerned is justified. On this basis, the Parties may therefore agree that a claim should not proceed.*

### ***Approach in most existing investment agreements***

*The majority of existing investment agreements privilege the original intention of such agreements, which was to avoid the politicisation of disputes, and therefore do not contain provisions or mechanisms which allow the Parties the possibility to intervene under particular circumstances in ISDS cases.*

### ***The EU's objectives and approach***

*The EU like many other states considers it important to protect the right to regulate in the financial sector and, more broadly, the overriding need to maintain the overall stability and integrity of the financial system, while also recognising the speed needed for government action in case of financial crisis.*

### ***Question:***

***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? Q10: 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?***

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## **10.1. Submissions**

### **10.1.1. Collective submissions**

The large majority of the 70,000 who submitted collectively answers to this question disagrees with the proposed approach, while the rest express moderate or neutral views.

Most of the respondents express doubts with regard to the effectiveness of such a filter, given that one Party needs the consent of the other Party in order to prevent a particular ISDS claim. Some believe that public policy measures should be decided democratically and not, for example, upon agreement with another State.

About one third of the respondents are worried by the way in which financial services are dealt with under the proposed provisions, which they see as a threat to financial stability in light of recent claims by investors, for example, against Greece and Cyprus.

Along the same lines, a number of respondents consider that the financial sector should be subject to stricter regulation and suggested various ways to limit the coverage of financial services, in particular that they should not be subject to ISDS claims. Some consider, in addition, that not only prudential measures, but also other policy areas should be taken into account when envisaging additional safeguards for the right to regulate.

### **10.1.2. Individual submissions from organisations**

This question was answered by 6 respondents among academics and think tanks, 9 among 15 law firms and consultancies, 28 out of 35 trade unions, half of the business organisations (i.e. 32 respondents), 28 out of 43 companies and 110 NGOs and Umbrella NGOs. It is the only question which a majority in the "other organisations" category does not directly address, either choosing not to, or expressing a feeling that they do not feel competent to opine on financial matters.

Among the organisations that replied to the question, academics, think tanks, law firms and consultancies have a slight inclination towards negative considerations. Most trade unions' replies reflect mixed or neutral considerations, while a few of them express rather negative views. About half of the business associations are predominantly negative in relation to the proposed approach; the other half is equally divided between mixed views and rather positive considerations about the proposed approach. Among the companies, more than one third do not take a definite position on the proposed approach. One third is rather negative or strongly negative while almost one fifth is rather in favour of the proposed approach. Half of the NGOs and umbrella NGOs are opposed or see no need for a filter. Finally, of those that responded, the largest group among the "other" category feel strongly opposed to the suggestion.

## 10.2. Main comments

While a number of respondents among think tanks and academia welcome the introduction of the filter, others consider that the proposed approach lowers the level of protection granted to investors, because it limits the power of the arbitral tribunal in favour of the States and it politicises disputes. The risk of politicisation is also the main concern of law firms and consultancies, as well as about a quarter of the other organisations. Similarly, a number of business associations fear that the political interference induced by filters may introduce an element of uncertainty.

### 10.2.1. Effectiveness of the filter

A significant number of trade unions and organisations representing trade unions believe that the proposed filter constitutes a useful procedural step. However a majority expresses doubts and concerns with regard to the way in which such a filter would work in practice. In particular, they indicate the difficulty of agreeing on what constitutes a prudential measure, given the lack of clarity (definition) in international law in this respect, and note that in case of disagreement between States the matter will be referred back to ISDS. This latter consideration is shared by some companies and by a couple of respondents among other organisations.

A number of respondents in the "other organisations" category doubt the likely effectiveness of the proposal. However, a few among the other respondents support the idea, recognising the ambition of attempting to regulate the financial industry in TTIP.

Some trade unions fear the risk of abusive interpretation by arbitral tribunals and saw this fear confirmed by the existing claims against Greece and Cyprus.

By contrast, a number of business associations are against the use of any filter. Some specifically mentioned the possibility that prudential measures are used as a disguised restriction to investment. Several companies express concerns that a filter mechanism would legitimise arbitrary, discriminatory or disproportionate actions by the States, moved by interests unrelated to the disputes in question.

Around a quarter of the other organisations responding object on rule of law grounds. These respondents call the idea a "clear interference of politics with the administration of law" and against the "principle of separation of powers". Where the filter is applied, these respondents are clear that the processes should not exclude any investor and must protect against the possibility of political intervention and pressure.

### 10.2.2. Application to the financial sector

A couple of companies consider that a filter **is justified** in times of global financial crisis and sovereign debts restructuring. One respondent refers to the concerns expressed by the International Monetary Fund in this respect.

In general, NGOs and umbrella NGOs believe that a filter mechanism will not enhance a fairer or more equitable arbitration system, while about half respondents in the same category suggest a broader filter not only applying to financial services but also to public policy objectives (e.g. consumer protection, environment). This view is shared by a small minority of companies and by a number of respondents among other organisations.

A smaller group of NGOs consider the filter an improvement and suggested that an ex ante presentation of claim to the Parties would be even preferable. The Parties could use such a filter, for example, to examine cases in which the general exception is invoked as a defence for challenged environmental, consumer protection, health, safety and other public interest measures.

However, some other among the NGOs fear that a filter mechanism as proposed may limit and frustrate access of investors to obtain a neutral and independent decision on their cases/claims. They oppose the proposed approach to subject financial services investors to a different ISDS process and prevent them from participating in the constitution of the arbitration tribunal in the same way as other investors. One respondent believes that the proposed filter would be usurping the arbitral process and considers the introduction of a filter to be a significant step backwards for ISDS.

A significant number of respondents in the "other" category feel that the proposal does not strike a fair balance between the protection offered to investors and the ability of states to regulate financial markets in times of crisis. Furthermore, prudential measures should not be taken for the purpose of circumventing the obligations under an investment agreement. Such actions, feel these respondents, would by definition not be in the interest of the integrity or stability of financial markets but rather explicitly for discriminatory purposes. Therefore, it is important that any reservations or clarifications made with regard to prudential measures not foreclose protections afforded under the agreement. For example, the right to make transfers should still remain.

### **10.3. Specific suggestions**

Only a few concrete suggestions are made with regard to the proposed approach, apart from general indications that respondents would like to see the filter included in – or excluded from – the agreement.

Many business associations call for caution or restraint in the use of the filter: for instance, it is suggested that the filter is used only in well-founded emergency situations, or under the final control of an ISDS tribunal, or a time-limit should be imposed, to avoid excessive delays. A number of respondents suggest that the provisions related to financial services in TTIP are kept in line with the financial services regulation in the EU.

In order to maintain the integrity of the arbitral process and avoid the politicisation of disputes, one respondent among NGOs suggests instead of a proposed filter that the EU

and the US could agree that the non-host State intervene as a party in the arbitration. This would give the EU and the US the opportunity to present a joint position before the arbitrators regarding the measure in question. Another possibility would be for the non-host State to be able to present an *amicus curiae* brief.

One NGO suggests developing an ex-ante regulatory and diplomatic screening process for all ISDS claims in place of the proposed filter mechanism. Finally, it is suggested to clarify the notion of prudential measures.



## 11. QUESTION 11: GUIDANCE BY THE PARTIES (THE EU AND THE US) ON THE INTERPRETATION OF THE AGREEMENT

### ***Explanation of the Issue***

*When countries negotiate an agreement, they have a common understanding of what they want the agreement to mean. However, there is a risk that any tribunal, including ISDS tribunals interprets the agreement in a different way, upsetting the balance that the countries in question had achieved in negotiations – for example, between investment protection and the right to regulate. This is the case if the agreement leaves room for interpretation. It is therefore necessary to have mechanisms which will allow the Parties (the EU and the US) to clarify their intentions on how the agreement should be interpreted.*

### ***Approach in existing investment agreements***

*Most existing investment agreements do not permit the countries who signed the agreement in question to take part in proceedings nor to give directions to the ISDS tribunal on issues of interpretation.*

### ***The EU's objectives and approach***

*The EU will make it possible for the non-disputing Party (i.e. the EU or the US) to intervene in ISDS proceedings between an investor and the other Party. This means that in each case, the Parties can explain to the arbitrators and to the Appellate Body how they would want the relevant provisions to be interpreted. Where both Parties agree on the interpretation, such interpretation is a very powerful statement, which ISDS tribunals would have to respect.*

*The EU would also provide for the Parties (i.e. the EU and the US) to adopt binding interpretations on issues of law, so as to correct or avoid interpretations by tribunals which might be considered to be against the common intentions of the EU and the US. Given the EU's intention to give clarity and precision to the investment protection obligations of the agreement, the scope for undesirable interpretations by ISDS tribunals is very limited. However, this provision is an additional safety-valve for the Parties.*

### ***Question:***

***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?***

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### **11.1. Submissions**

### **11.1.1. Collective submissions**

The proposal and associated text in Question 11 of the consultation is intended to provide the Parties with some degree of control over the interpretation of the Agreement. It consists of two aspects: (1) an intervention right for the non-disputing Party and (2) a possibility for the Parties to adopt binding interpretations on issues of law.

All the collective submissions commented on question 11 and all take a negative position or express strong doubts on the proposed approach.

On substance, the views expressed in the collective submissions go in the same direction as the replies from many NGOs (see below).

Although a number of the collective submissions agree that it is desirable to avoid interpretation errors, the large majority of them questions the usefulness of the proposals or considers them insufficient. Around half of those respondents argue in this respect that the proposed mechanisms have not been tested in practice, so that it is questionable whether they can achieve the desired objectives. Among the other respondents questioning the usefulness of the proposals a significant number doubt whether interpretations by the Parties will in practice be able to bind arbitration tribunals, while another significant part has strong concerns because a binding interpretation requires the agreement of both Parties, thus giving the non-disputing Party a veto-right.

Finally, a small minority of the mass submissions argues that what is required to ensure a consistent and predictable interpretation of the Agreement is clear formulation of the substantive standards.

### **11.2. Individual submissions by organisations**

Overall, around a third of the respondents did not comment on question 11 or did not provide answers relevant to the question. The proportion is even higher for "governments" and "other respondents", where about half of the replies are not relevant, and especially for "think thanks" and consultancies where the large majority did not provide relevant replies. The number of non-relevant replies is lower than the average in the other categories for law firms, trade unions and umbrella NGOs.

Taking into account the total number of replies by category of respondents and the number of non-relevant replies, there is a good turnout for: NGOs, business associations, other, companies, trade unions and, to a lesser extent, umbrella NGOs.

By contrast, relatively few relevant replies are received from consultancy, academics, think tanks, and law firms.

Overall, a small minority of respondents express total opposition to or full approval of the proposal.

Of the relevant replies, most respondents take a negative position or express substantial concerns, albeit for different and often opposite reasons. Around a third takes a neutral or balanced position or provides a reply that does not allow a conclusion of either support or opposition. A small minority takes a rather positive or moderately supportive stance.

The results are overall not strikingly different depending on the category of respondents, although some categories (business associations and companies) have a more negative position than the average.

### **11.3. Main comments**

The large majority of the respondents that provided relevant replies to this question is not satisfied with the proposal, but is clearly split when it comes to the reasons for criticism. Indeed, one part (mainly NGOs and trade unions) considers that the proposals do not give the Parties enough control over the arbitration proceedings for the reasons set out below, while the other part takes the opposite view and argues that the Parties should not intervene with the arbitration Tribunals, which should remain free to decide also on issues of interpretation (mainly business associations and companies).

This reflects the more fundamental position with regard to ISDS. Those that argue against ISDS want more control from the Parties over the arbitration process and consider the proposed mechanisms still insufficient. By contrast, those that are open to arbitration tribunals are reluctant to accept control by the Parties and mechanisms potentially limiting the discretion and independence of Tribunals.

#### **11.3.1. Analysis of respondents who consider that the proposed interpretation mechanisms provide insufficient control for the Parties**

Some respondents across different categories (e.g. governments, NGOs, think tanks) consider that interpretation mechanisms may help to avoid interpretation errors, to limit the scope for interpretation by arbitrators and to correct unintended broad interpretations by arbitrators. They appreciate that the proposals contribute to this aim, and help to increase legal certainty.

However, many respondents in principle in favour of such mechanisms consider that they do not go far enough, may not work in practice or would not achieve the intended goals.

This is, first of all, because a binding interpretation requires the agreement of both parties to the Agreement (i.e. in TTIP, the EU and the US). A number of respondents (mainly NGOs) consider that the non-disputing Party should not have a veto right or that each party should have the right to unilaterally issue binding opinions. While most of those respondents do not explain how the proposed unilateral interpretation right would function in practice, some suggest that, in the absence of joint interpretations, unilateral documents or statements could be provided as guidance to arbitrators and thus constitute supplementary means of interpretation under Article 32 of the Vienna

Convention on the Law of Treaties. The suggestion for a unilateral interpretation right is mainly made by NGOs.

The other main concern expressed is that so-called "binding" interpretations may in reality not be considered as binding by the arbitration tribunals. In this respect, respondents also consider that the text to which the consultation refers is unclear and insufficient since it does not explain what happens if the arbitrators do not follow the provided interpretation. Many respondents argue that the experience has shown that tribunals may not feel bound by 'binding' interpretations. Moreover, there seem to be no enforcement mechanisms. The concern that an interpretation by the Parties may not have a binding effect in practice is especially expressed by NGOs, umbrella NGOs and trade unions (as opposed to business associations): half of the NGO replies, more than half of the submissions by umbrella NGOs and around a third of the replies from trade unions raise this concern.

A number of respondents in different categories (trade unions, NGOs and companies) also argue that the text of the international agreement should be as clear as possible in order to limit the scope and need for interpretation. To achieve this, some of those respondents propose clear definitions, annexes with a detailed explanation of each article and clarifications of context, object and purpose of the agreement in the preamble. Some NGOs consider that the preamble should, for example, emphasise that the treaty is not just a tool to protect investment, but also a means to facilitate sustainable growth and that it should not impede upon the Parties' right to regulate in the public interest. Clarifying this in the preamble should avoid that tribunals adopt an interpretation focusing primarily on investors' interests.

### **11.3.2. Analysis of respondents who consider that the proposed interpretation mechanisms give too much control to the Parties**

Other respondents express concern that the proposals confer too much power on the Parties. They argue that opinions on interpretation should only be recommendations, and not binding for the arbitration tribunal. This position is particularly strong among the main business associations, companies and other associations representing the business community (e.g. chambers of commerce), as opposed to NGOs<sup>6</sup> or trade unions. Indeed, half of the business associations which submitted a relevant reply state explicitly that they are against binding interpretations.

The main reasons invoked against binding interpretations are:

- The possibility for government bodies of interpreting TTIP investment provisions during ISDS proceedings bears the risk of politicisation of on-going disputes. This

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<sup>6</sup> It should be noted that some NGO and umbrella NGO are against binding interpretations. Those respondents, although they classified themselves as NGO, typically represent the business community or constitute arbitration organisations.

risk is particularly highlighted by some business associations and some chambers of commerce.

- Binding interpretations may undermine the independence and discretion of the arbitrators. This concern is raised in particular by business associations, companies, law firms and arbitration institutions.
- Binding interpretations create too a rigid system. It is more appropriate for arbitrators to look at cases on a case-by-case basis since the business environment and legal framework are constantly changing. This concern is raised in particular by half of the business organisations that stated they are against binding interpretations.
- Binding interpretations could jeopardise legal certainty for investors. In this respect, several respondents fear that control mechanisms for the Parties come at the expense of investor protection (costs, time, predictability, legal certainty). This risk is highlighted in particular by companies, but also chambers of commerce and some business associations.
- A few business associations argue that binding interpretations could be used to circumvent the rules for amending treaties.

The concerns regarding binding interpretations are expressed even more strongly when it comes to their possible retroactive application to pending cases. Concern about this possibility is flagged by respondents in many different categories, in particular business associations, companies, law firms, chambers of commerce. Even some respondents in favour of binding interpretations (e.g. a few NGOs, other organisations and ICC, as well as one academic) caution against such retroactive application arguing that this would be against due process and put at risk predictability and legal certainty for investors. In this respect, many ICCs argue that the Parties are masters of the Treaty and thus have the power to amend or change the Treaty formally through a revision or less formally through the adoption of other agreed text. However, in both cases, there should only be an effect for the future. If the Parties were to adopt a text with a view to an existing dispute, it is argued that this would be contrary to generally accepted legal principles and counterproductive with regard to the essential purpose of and reasoning behind investment protection, in that it would remove predictability for the investor as to the legal treatment of its investment.

Some respondents (mainly academics, chambers of commerce such as the ICC) also express doubts about the intervention right for the non-disputing Party. They consider that the intervention right should be exercised with care and in good faith and be accompanied by guarantees or conditions to ensure that any submission does not disrupt or unduly burden the arbitral proceedings or unfairly prejudice any disputing party. The disputing parties should also be given a reasonable opportunity to present their observations on any submission by a non-disputing party. The UNCITRAL rules on

transparency are proposed to serve as a model (rather than Article x-35 of the reference text).

## 12. QUESTION 12: APPELLATE MECHANISM AND CONSISTENCY OF RULINGS

### ***Explanation of the issue***

*In existing investment agreements, the decision by an ISDS tribunal is final. There is no possibility for the responding state, for example, to appeal to a higher instance to challenge the level of compensation or other aspects of the ISDS decision except on very limited procedural grounds. There are concerns that this can lead to different or even contradictory interpretations of the provisions of international investment agreements. There have been calls by stakeholders for a mechanism to allow for appeal to increase legitimacy of the system and to ensure uniformity of interpretation.*

### ***Approach in most existing investment agreements***

*No existing international investment agreements provide for an appeal on legal issues. International arbitration rules allow for annulment of ISDS rulings under certain very restrictive conditions relating to procedural issues.*

### ***The EU's objectives and approach***

*The EU aims to establish an appellate mechanism in TTIP so as to allow for review of ISDS rulings. It will help ensure consistency in the interpretation of TTIP and provide both the government and the investor with the opportunity to appeal against awards and to correct errors. This legal review is an additional check on the work of the arbitrators who have examined the case in the first place.*

*In agreements under negotiation by the EU, the possibility of creating an appellate mechanism in the future is envisaged. However, in TTIP the EU intends to go further and create a bilateral appellate mechanism immediately through the agreement.*

### ***Question:***

***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.***

## **12.1. Submissions**

### **12.1.1. Collective submissions**

Around one third of the collective submissions did not provide relevant comments on question 12. All the others take a negative position or express strong doubts on the proposed approach for various reasons.

The large majority of the relevant collective submissions question the usefulness of the proposed approach. Most of those respondents argue in particular that the suggested appellate mechanism is untested in practice and that it is therefore questionable whether it can achieve the desired objectives. A significant number of them refer to the additional costs and the increased duration of the procedure and the period of legal uncertainty caused by an appeal, as well as to the fact that an appellate mechanism does not provide a guarantee of correct interpretation of the agreement. Most of these submissions – those that question the usefulness of an appellate mechanism – consider in this respect that domestic courts in the EU and the US provide for appeal possibilities, and are sufficient.

Finally, a small minority of the collective submissions point out that they consider an appellate mechanism as indispensable but that it should already have been created at the multilateral level or should take the form of an international court.

### **12.1.2. Individual submissions by organisations**

Overall, around a third of the organisations did not comment on question 12 or did not provide answers relevant to the question. The proportion of non-relevant replies is even higher for "companies", "think thanks" and "other respondents" and especially for consultancies. By contrast, for business associations, the proportion of non-relevant replies is lower than the average.

Taking into account the total number of replies in a category of respondents and the number of relevant replies, there is a good turnout from NGOs, business associations, other, and to a lesser extent companies, trade unions and umbrella NGOs. By contrast, relatively few relevant replies have been received from consultancies, academics, governments, law firms and think tanks.

Overall, a small minority of respondents express total opposition to or full approval of the proposed approach.

Of the relevant replies, most respondents take a rather negative position or express doubts. This concerns around a third of the relevant replies. Around a quarter of the relevant replies takes a neutral or balanced position or provides a reply that does not allow a conclusion of either support or opposition. A small minority takes a rather positive or moderately supportive stance.

The results are overall not strikingly different depending on the category of respondents, although some categories (NGOs, trade unions) are more negative than the average.

## **12.2. Main comments**

### **12.2.1. Pros and cons of an appellate mechanism**

Many respondents across all categories are in principle in favour of an appellate mechanism or even consider it indispensable. This view is expressed in particular by many NGOs and several business associations, companies (both small and large), trade unions, umbrella NGOs and government organisations. While they see the advantages of an appeal possibility, they point at the same time to a number of concerns. There is therefore no clear view either in favour or against an appellate mechanism; it would rather depend on the concrete form of the mechanism and the extent to which the concerns can or cannot be addressed.

The main argument put forward in favour of an appellate mechanism is that it contributes to more consistency and coherence, and thereby also to legal certainty. All categories of respondents raise this. Many NGOs also argue that the possibility of appeal is a fundamental right in any legal system and should thus also be part of investment arbitration proceedings. Some see it as a possible guarantee to correct panel decisions in which they do not have much confidence.

The drawback most often raised is that an appellate mechanism adds costs and delays the procedure. This concern is expressed by most categories of respondents, but especially by a number of business associations, companies, national chapters of ICC and NGOs as well as some government respondents and one academic, who argue that arbitration is already expensive and that an appeal may raise costs even further. A few ICCs, chambers of commerce and business associations argue that this may be particularly problematic for SMEs. The time factor is a very important concern since arbitration should precisely provide a relatively quick outcome. An appeal would prolong the process and also the period of legal uncertainty. Some respondents (in particular a few ICCs and chambers of commerce) consider that binding deadlines are needed in order to limit the delay. Another argument raised (mainly by NGOs) against the appellate mechanism is that it will not guarantee a correct interpretation of the agreement and avoidance of jurisdictional errors. In the worst case scenario it could even overrule an award in favour of governments, which these respondents consider undesirable.

In examining the usefulness of the proposed appellate mechanism, a number of respondents question whether the approach will achieve the objectives and is worthwhile pursuing (both NGOs and companies). A number of NGOs argue that, although an appellate mechanism is in principle welcome, it can in any event not solve the more fundamental objections they have with respect to arbitration (see responses to other questions).



The ICCs and some business associations argue with regard to the usefulness of an appellate mechanism that it risks compromising the finality of arbitration, thus undermining the fundamental basis of international arbitration. For that reason, they are in principle against an appellate mechanism. Some companies also argue that an appellate mechanism may decrease confidence in first instance panels and adversely affect the willingness of well-qualified persons to serve as arbitrators. They may not wish to serve in a proceeding where their interpretations may be second-guessed and where the prospect of multiple rounds of review and remand could prolong arbitration for years.

Finally, a significant number of respondents in various categories including business associations, NGOs, think tanks, governmental organisations and other organisations state that the Commission services should provide more information about the structure and functioning of an appellate mechanism or claim that they cannot judge the proposal absent detailed information. Several of them consider that only if such information is provided can they weigh the pros and cons. The reference to the text in the consultation is considered insufficient in this respect, because it does not provide indications on how an appellate mechanism would look like, how it might work, who might sit on it, what interface there might be with the ICSID annulment procedure, etc. Many respondents understood the proposed approach as meaning that the appellate mechanism would only be an objective for the future, to be discussed by the Committee on Services and Investment, so that it would remain uncertain whether, when and how it would be set up.

### **12.2.2. What kind of appellate mechanism?**

Certain respondents consider that an appellate mechanism is not needed because there are sufficient existing mechanisms that can be used: the control mechanisms available under the ICSID Convention and the New York Convention have proven to be effective and provide a good balance between finality and procedural fairness. This view is taken mainly by several national chapters of the ICC. In this respect, those respondents also argue that there is another way of ensuring greater consistency between awards, which will not compromise the finality of arbitrators' decisions. In ICC arbitrations this is accomplished by the ICC International Court of Arbitration when it scrutinises awards rendered by ICC tribunals pursuant Article 33 of the ICC Rules. This mechanism allows the ICC Court to ensure a quality check before the award is notified to the parties. While those existing mechanisms may not allow a full appeal, they are argued to be sufficient.

However, most of the relevant responses (including most of the relevant replies from business associations, NGOs and umbrella NGOs, companies, think tanks, governments, trade unions, other organisations) and one academic consider that existing mechanisms are not sufficient and are in principle in favour of setting-up a genuine appellate mechanism. Nevertheless also most of those respondents take a rather negative

position on the proposal because they want a different appellate mechanism than what is included in the consultation documents:

- A number of respondents consider that domestic courts are sufficient, as they all contain possibilities of appeal. Since those appeal mechanisms should be used exclusively, the question of an appellate mechanism in TTIP becomes irrelevant in their view. This position is taken mainly by a number of NGOs and a few companies, business associations and trade unions.
- Many business associations and companies, as well as a few NGOs, other organisations and national chapters of ICC, consider that, if a mechanism is needed, it should be developed at the multilateral level, e.g. in close cooperation with UNCITRAL, ICSID and the ICC. Some suggest that the mechanism should preferably work like the ICSID Additional Facility or the UNCITRAL initiative on transparency in the sense that the mechanism could work for all treaties or parties and treaty partners could decide to opt in or opt out. The ICC argues that this would avoid a major reopening of existing treaties and conventions. Some business associations suggest that the WTO Appellate Body could be a model, while other respondents (ICC) point out that the WTO system is different in that it applies to state-to-state disputes and the remedies are not of the same nature.
- Finally a small number of NGOs suggest that, if there is to be an appellate mechanism, it should take the form of an International Court.
- An important concern expressed by a significant number of respondents including the majority of the trade unions, some business associations, arbitration organisations and other organisations is that, with the multiplication of BITs, there risks to be a high fragmentation of ISDS. Each BIT may have its own ISDS mechanism and tribunals may come to different interpretations of the same provisions contained in different BIT. Concerns about consistency and coherence are thus not limited to the interpretation of TTIP in isolation, but relate to the interpretation of the same provisions across different Agreements. This concern cannot be addressed by an appellate mechanism only for CETA or for TTIP. These respondents therefore propose the establishment of, what they call a "general Appellate Mechanism" that would apply to all investment treaties. Most of them do not explain in more detail what form this mechanism should take and how it would work.

### **12.2.3. Additional guarantees**

A number of respondents, in particular NGOs and some business associations, consider that the appellate mechanism should be a standing body with permanent members. This would contribute to consistency.

A number of respondents, in particular NGOs, consider that the appellate mechanism is conditional upon the independence of the arbitrators. They refer in this respect to the

concerns expressed in the replies to question 8 regarding independence, impartiality and potential conflicts of interest of arbitrators. If the appellate mechanism is composed in the same way as the panel in the first instance (as opposed, to for example, independent judges), the same concerns would apply. A number of the respondents in favour of an appellate mechanism stress that it should be included in the agreement itself, and not left for further consideration by a Committee. They consider the vague provisions in the proposed approach as insufficient and express concern that the mechanism may otherwise never be set up. This concern appears across different categories of respondents, but is especially raised by some NGOs, umbrella NGOs, other and government organisations.

#### **12.2.4. Scope of the Appeal**

Many respondents providing more detailed answers state that the possible scope of the appeal should be specified in detail. Views diverge on what the scope should be.

Some respondents are in favour of a narrow scope, limited to, in particular, formal issues, inconsistencies between reports issued by different tribunals, cases in which a panel declared lack of jurisdiction, ICSID grounds<sup>7</sup>. This view is taken in particular by several companies and one business association.

A few respondents (some law firms and NGOs) plead for a full review of law and facts.

Most of the respondents commenting on the scope for a possible appeal consider that it should include legal grounds (either exclusively or in addition to procedural issues). This view is taken by a number of NGOs and umbrella NGOs, as well as by a few business associations and companies.

#### **12.3. Clarification of the text submitted for consultation**

Many respondents understand the proposed approach as meaning that the appellate mechanism would only be an objective for the future, to be discussed by the Committee on Services and Investment, so that it would remain uncertain whether, when and how it would be set up. However, the consultation stated clearly that the creation of an appellate mechanism immediately through the TTIP agreement is envisaged and the consultation text already contained a possible draft article on the creation of a TTIP Appellate Body, albeit not set out in great detail.

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<sup>7</sup> In the ICSID Convention (Article 52), annulment may be sought on one or more of the following grounds: a. "That the Tribunal was not properly constituted; b. That the Tribunal has manifestly exceeded its powers; c. That there was corruption on the part of a member of the Tribunal; d. That there has been a serious departure from the a fundamental rule of procedure; or, e. That the award has failed to state the reasons on which it is based".

## 13. QUESTION 13: GENERAL ASSESSMENT

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**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?**

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### **13.1. Submissions**

#### **13.1.1. Collective submissions**

The 145,686 replies submitted collectively reflect a rejection of ISDS as a matter of principle. Most of them also reflect opposition against TTIP in general.

ISDS is perceived by most of the respondents as undemocratic, or as a threat to public finance. A significant number of respondents also stated that, in their view, ISDS is not needed between EU and US, or in general in any trade deal.

A significant number of respondents are concerned about the implications of TTIP and ISDS for democracy and democratic values. Some respondents are concerned about sovereignty issues and that the EU is being forced to succumb to American standards and attitudes, or would otherwise suffer from a power imbalance. Most of the replies contain references to the high amount of compensation that companies can obtain in investment disputes, or to the possible chilling effect that such amounts can have on States' right to regulate, i.e. the effect of delaying or even stopping new legislation from being issued.

Respondents regularly also express their concern that ISDS would have a negative impact on social policy areas such as protection for health services and the UK National Health Service (NHS). Several respondents are worried about the effect of ISDS on the subsidised nature of the NHS, but also concerns that the current proposals would increase the likelihood that the NHS would be privatised. Respondents also comment on TTIP's impact on other areas of public policy, most regularly wage protection and labour standards, as well as on food safety standards, citing concerns about the increased power corporations would, in the respondents' views, be given to challenge government policy in these areas. A significant number of respondents express fear that TTIP may trigger unfair competition towards the lowering of standards in fields such as consumer protection.

Hence, a large number of respondents call for stronger provisions, in particular human rights and sustainable development. Some specifically call for the protection of the precautionary principle, preventive action principle and polluter pays principle, while others call for the non-lowering of standards in the field of environment protection, labour or consumer protection.

ISDS is also perceived by most of the respondents as creating unjustified privileges for foreign companies. There is concern that ISDS favoured foreign, over domestic, investors and several respondents take issue with the fact that ISDS can be used as a way for companies to avoid national courts. Relatively few mention specific concerns about secret courts.

At the same time, it is noted that such privileges are not accompanied by a matching level of responsibility. Some respondents, for instance, refer to the practice of some companies to try to benefit from less restrictive regulations by investing abroad, thus circumventing various domestic rules, such as social or fiscal. In this respect, an important number of respondents make various suggestions with regard to investors' behaviour, the quality of investments and ways to improve them. For instance, it is suggested that only beneficial investments should be encouraged, e.g. investment that serves the public good or is beneficial to the society, while speculative investment should be discouraged. Others suggest that the EU improves internal market rules in order to attract more and better investment.

A large majority of respondents criticise the way in which the consultation has been designed, mainly complaining that the consultation is too technical to allow effective participation, and that there is no dedicated question on whether respondents agreed or not with ISDS or TTIP. Some also worry that the outcome of the public consultation would not be taken into account sufficiently as to determine a change in the current policy choices of the EU.

About one third of the respondents complain about insufficient transparency in the TTIP negotiations (in particular, in respect to the provisions on labour rights, environment, public services, consumer protection), and call for more transparency in the negotiation process.

Almost a half of the replies contain various negative statements also against CETA, or calls to stop the agreement or calls to exclude ISDS from it. About one third of the respondents specifically call upon the Commission services to exclude ISDS not only from TTIP but also from all its other agreements.

### **13.1.2. Individual submissions from organisations**

All the respondents in the "academics" and "think tanks" categories answer the last question of the questionnaire (i.e. 19 respondents in total). All 6 replies in the "law firms category" and 7 out of 9 of replies in the "consultancy firms" category contain answers to question 13. Most of the trade unions (34 out of 35) and business associations (53 out of 64) provide answers to this question.

The general comments made can be grouped in the following categories:

- views on ISDS and investment protection in TTIP or in general;

- views on the proposed approach to investment protection and ISDS in TTIP, in particular in relation to the balance between the right to regulate and the protection of the investors' interests;
- specific views on arbitration and alternatives to ISDS; and
- views on the conduct of the consultation.

## **13.2. Main comments**

### **13.2.1. ISDS in TTIP or in general**

With regard to investment protection and ISDS in TTIP in general, views diverge between categories of respondents.

Among academics and think tanks, the replies containing views on ISDS are rather negative. The views expressed in this respect by law firms and consultancies are few in number, and also predominantly negative. A very large majority of the trade unions is not in favour of ISDS, while most of the business associations, on the contrary, express strong views in favour of ISDS.

Among academics and think tanks, some express a generic opposition to ISDS, while others are not convinced that ISDS is necessary between the EU and the US, given the already well-developed legal and judicial systems in the EU and US.

Almost all the trade unions who replied to the questionnaire oppose ISDS, based on generic negative considerations such as: the perceived threat that ISDS can pose to the democratic rights of the citizens or to the democratic functioning of a State, mainly because it may allow putting into question public decisions that result from a democratic process; distrust with regard to the independence and impartiality of the arbitrators involved in ISDS proceedings, on grounds of lack of institutional control over the arbitrators' conduct and decisions, or conflicts of interests created by past or parallel involvement in corporate counselling; concerns about the high costs of arbitration proceedings or the high amounts of compensation granted to investors; the perceived lack of transparency of the ISDS system; the fear that ISDS may create a possibility for investors to circumvent domestic courts or regulations. The majority of the trade unions also rejected the argument that ISDS is needed in TTIP, in particular that its inclusion in TTIP would contribute to a general reform process, or that excluding it from TTIP would create a dangerous precedent for other EU negotiations. Some give examples of countries and agreements where it has been decided to exclude ISDS from investment agreements or to subject it to more ambitious reforms.

A large majority of the NGOs and umbrella NGOs considers that ISDS is not necessary between the EU and the US. Some respondents recall that the conventional rationale of BITs is to secure investment into countries with administrative and judicial systems considered to be less reliable and consequently presenting risks of unjustified regulatory intervention in private economic activities. These respondents argue that this is not the

situation in the case of the EU and the US as both partners seem to be characterised by having advanced and well-functioning administrative and judicial systems.

All respondents from Government organisations criticise the inclusion of ISDS in the TTIP negotiations. About half of the respondents saw no need for investment protection in TTIP, arguing that the EU and the US had highly-developed legal systems.

Similarly, the majority of trade unions does not agree that investment protection is necessary or helpful in an agreement between the EU and the US, considering that both countries' legal systems provide sufficient legal protection to businesses. Most trade unions also believe that the proposed approach gives foreign investors rights that domestic investors do not have access to, in particular the recourse to ISDS. A couple of think tanks indicate that, in their view, corporations have too many rights or power, sometimes to the detriment of the democratic rights of citizens.

In contrast, a majority of business associations make statements in favour of investment protection, mainly referring to the importance of investment protection in general, and in TTIP in particular. A considerable number of replies underline the positive role that FDI can play with regard to growth and jobs. Some respondents specifically refer to the impact that TTIP will have on other agreements, hence the need to ensure strong investment protection in TTIP.

Most business associations vigorously support ISDS, mainly stating that ISDS is important, or even indispensable in TTIP, and highlighting various arguments in this respect, such as: ISDS is used and justified between OECD countries; ISDS is needed in order to enforce investment protection; ISDS would create a level playing field between investors; EU investors may not always receive adequate protection in US courts; excluding ISDS would weaken the existing level of protection.

Certain business associations state that the various concerns raised around the ISDS system are largely unjustified; therefore they should not serve as basis for policy making. They compare, for instance, the huge amounts of FDI in or from the EU, with the number of ISDS cases won by investors.

However, about one fifth of the business associations are not favourable to the inclusion of ISDS in TTIP. Some consider that ISDS is not necessary in TTIP because both Parties have well-developed legal systems. In addition, some fear that it would pose a threat to the right to regulate in certain sensitive areas, such a risk being outweighed by the potential benefits. Others are negative about ISDS in general, for reasons such as the perceived lack of transparency and lack of impartiality of arbitrators.

Several companies express the view that investment protection and ISDS should be part of TTIP. These companies often consider that given the size of their investment relations, the EU and the US are in a unique position to develop modern rules that should serve as a model for the rest of the world. These rules should primarily create a framework that encourages further foreign investment. TTIP should therefore provide

for a comprehensive and robust investment protection framework, including a state-of-the-art ISDS.

Finally, within the "other organisations" category, opinion could be split into two groups, those broadly supportive of investors' rights and those broadly against the concept of ISDS, with the latter category forming roughly a quarter of those addressing the question. Those against the inclusion of ISDS in TTIP had several different reasons for this opposition, such as the objection to the costs involved, and particularly the use of taxpayer funds for compensation, its perceived increasing use in tackling non-discriminatory measures, the regulatory chill effect, and the existing strength of US and EU laws. Those supporting investor protection point out that if TTIP lacks ISDS provisions then investors may seek to access investment protection, and corresponding dispute resolution capacity, through another treaty.

Some respondents in the "other organisations" category are of the opinion that the questions in the consultation start with the assumption that investment obligations and the ISDS process has somehow proven to be flawed. These respondents feel that there is a lack of evidence to support this perceived premise behind the consultation. Further, it is felt that the volume of modifications under consideration both with regard to investment obligations and the ISDS enforcement process tilt the balance decidedly against the investor. These respondents feel strongly that there is no crisis with respect to investment protection and the use of ISDS that supports any significant overhaul. In their view, hypothetical concerns are, but should not be, driving the public-policy process. In particular, they urge caution not to let single, outlier ISDS cases dictate the terms of a future treaty. Any deviation from the current system should be carefully crafted, taking into account the joint experience of the close to 600 known ISDS cases.

### **13.2.2. Specific views and suggestions on the proposed approach**

With regard to the proposed approach, a number of academics and think tanks express appreciation with regard to the various improvements under the proposed approach, or for the fact that the Commission services have shown responsiveness with regard to the main existing concerns. While directly or implicitly acknowledging that the proposed approach represented an improvement compared to past practices, in particular compared to Member States' BITs, a significant number of trade unions consider nevertheless that such improvements are not ambitious enough, and that a stronger reform is necessary. Incidentally, some consider that it would be more appropriate for the EU to discuss investment in the multilateral fora, such as UN or WTO, rather than bilaterally. Similarly, a majority of government organisations acknowledges the improvements brought by the proposed EU approach but states that these didn't satisfy all concerns.

A notable number of business associations indicate in various ways support for the proposed improvements regarding ISDS in TTIP, or in general terms indicate that they would support a more inclusive and coherent ISDS system, characterised by transparency and ethics. Some make specific suggestions for further improvements, for



instance, that ISDS proceedings should be shortened or that the cost of the proceedings should be reduced, for the benefit of SMEs.

Some NGOs acknowledge that the EU has made an appreciable effort to address the main criticisms against ISDS. However, a large group of respondents from NGOs and umbrella NGOs considers that the proposed approach does not provide sufficient changes to respond to concerns or criticism. For some respondents concerns remain about the "regulatory chill" effect and the risk of potentially large claims filed by investors under an ISDS mechanism.

One reply in the "academics" category reiterates the call for more protection to investors and investments, including stronger access to ISDS, while the group of 120 academics would like to see a stronger right to regulate reflected in the proposed approach, as well as a balance between the rights of the investors and their obligations. A couple of respondents in the same category refer to the need to protect the right to regulate in the cultural sector.

Several law firms and consultancies are overall negative with regard to the proposed approach, either fearing that it would undermine the achievements of the strong investment protection tradition in the EU, or considering that it contains loopholes that would allow abuses, while a couple of the replies are focused on the need for an adequate legal certainty and investment protection.

Trade unions express various doubts and concerns with regard to the balance between rights and obligations reflected in the proposed approach. Some perceive this balance as unjustifiably tilted towards favouring the investors. About a half of those who replied call for stronger investor obligations, in particular obligations to respect human rights, social and environmental regulations. Some specifically call for the obligation to adhere fully to international standards and guidelines for multinational enterprises (such as the OECD Guidelines or the ILO Declaration) before turning to ISDS, or to prove the respect of the host State legislation. Others note the absence of clear obligations for investors in terms of legislation or in terms of contribution to job creation and sustainable development.

Certain trade unions consider that there should be reciprocity in the use of ISDS, in the sense that States and other relevant stakeholders must also be able to sue investors based on ISDS proceedings.

A strong call is made by trade unions for a stronger sustainable development dimension, for instance to respond to the need to protect investments that contribute to sustainable development, or to promote legislation that encourages sustainable development.

A few trade unions note that the agreement creates unequal rights for all the actors involved in international investment, by favouring those for-profit or multinationals to the detriment of the non-profit investors. Certain respondents request that the agreement creates equal rights for both for-profit and not-for-profit investors.

A large minority of business associations calls for caution in the use of various limitations and clarifications, in order not to alter the balance between investment protection and the right to regulate in a manner that would negatively affect investment.

As it currently stands the proposed approach for TTIP is considered by several companies to decrease significantly the level of protection contained in existing investment agreements. This is of high concern to a number of companies in light of the fact that TTIP is to serve as a global standard but because EU investors reportedly encounter problems in the US. One respondent insists that US legislation can be discriminatory and mentions a specific example of US legislation which cannot be reviewed in domestic US courts.

A small minority of companies which consider that ISDS should be part of TTIP agree that investment protection rules should not restrict the right of the European Union or its Member States to pursue the public interest on issues such as health, safety, consumer protection and the environment. Several other respondents consider that BITs have never limited a State's ability to regulate. They often insist on the lack of evidence of link between a State's ability to regulate and being Party to an investment agreement. To the contrary, these respondents argue that countries that have signed BITs seem to have successfully met their treaty obligations while also pursuing legitimate domestic policy initiatives, including with regard to environmental and public health concerns. Foreign companies have, in turn, invested, complied with regulations, created jobs and paid taxes in their host states.

Several companies which support the inclusion of ISDS in TTIP consider that the main source of improvement of the system lies with a better prevention of frivolous and unfounded claims.

Some NGOs and umbrella NGOs consider ISDS a necessary element in TTIP and criticise the proposed approach on investment protection and ISDS as undermining the protection given to investments, not least by watering down existing investment protection standards on Fair and Equitable Treatment (FET) and indirect expropriation. These respondents argue that lower investment protection standards might have a negative impact on Europe by attracting less investment than before. The same respondents argue that implementing strong investment protection standards should therefore be a policy priority for all governments in order to promote new waves of prosperity-enhancing FDI. A lowering of standards of protection would conversely be a negative signal – not only for US investors – and have a negative impact on the investment climate in Europe, these respondents conclude.

Concerns are expressed that the accessibility to the ISDS mechanism remains de facto a prerogative mainly of large-scale firms, as its costs and complexity make it difficult for small private investors to resort it. A dispute resolution more suited to SMEs is seen as desirable.

A major number of respondents not opposing investment protection or ISDS agree with the proposed approach that public policy space of states has to be safeguarded; and the correct balance will need to be achieved between protection of investors and the right to

regulate. The principle of treaty primacy would need to be respected, so that ISDS could not be used as a means to weaken or undermine existing treaty obligations of the EU or its Member States, including in cases where such obligations have been translated into EU or national law.

Respondents request that the right to regulate shall not be reduced and that ISDS shall not lead to arbitration rulings which further develop national law.

Government organisations underline the importance to maintain sovereignty and that legitimate goals for the general welfare (health, security, labour, consumer protection, agriculture and environment) must continue to be pursued without influence by the investment protection chapter.

Several NGOs are in favour of carving out specific sectors from investment protection, with particular concern from the healthcare sector. Others suggest that arbitrators in public interest cases should be relevantly qualified to deal with public interest issues in addition to the protection of private interests.

Among other individual ideas, concerns and suggestions is the creation of a council of elders, including a range of professionals beyond business lawyers to sit in a business capacity. Another respondent discusses a permanent investment court composed of fixed-term judges in charge of the enforcement of the treaty. Some request a specific focus on accessibility for SMEs. Some indicate as desirable an increased role for domestic remedies, with respondents of the opinion that the fact that an issue – such as arbitrator conduct, cost allocation or challenge mechanisms – is left outside of TTIP does not mean that the issue is unregulated. Dispute resolution pursuant to an investment treaty is always supplemented by procedural rules and/or domestic legislation at the place of arbitration;

Certain respondents are concerned about the continued success of diverse European arbitration practices under the proposed approach: if the EU has taken over responsibility for negotiating international investment treaty provisions, then it is likely that the ICSID independence rules will pose a problem if EU arbitrators are wishing to chair arbitration cases involving parties in other Member States or those Member States themselves. These respondents feel that it is unclear how the roster system, in particular, works in that situation and whether EU arbitrators would be able to act in those circumstances. For example, whether a UK arbitrator is unable to act as chair in a claim brought by a French company and vice versa. These respondents are concerned that the practical effect may therefore be to reduce the circumstances in which EU lawyers (and other arbitration experts) may be able to act as arbitrators in future.

### **13.2.3. Suggestions for alternatives for ISDS**

Some trade unions suggest alternatives for investment protection and ISDS, such as investment guarantees, treaties with institutional dispute settlement (such as ECHR), the use of investor-State contracts or the use of State-State mechanisms.

One company argues that the political risks covered by investment treaties are now comprehensively covered by commercial insurance, as well as by the Multilateral

Investment Guarantee Agency, a World Bank body. Protection through insurance is a quicker and less costly route for firms, and imposes none of the risks on States that are mentioned in the consultation. It is non-discriminatory, being available to national and international investors, and it does not impose broader economic inefficiencies.

One respondent provides model guidelines in support of the inclusion of a set of mediation rules as part of the agreement.

A couple of business associations suggest that the Commission services should encourage a preference for the use of domestic courts for dispute settlement, or should assess carefully to what extent the necessary enforcement tools are not already available in domestic courts.

#### **13.2.4. Conduct of the consultation**

A few business associations criticise the way in which the consultation has been designed, while a larger number of respondents in the same category express appreciation in this respect. Complaints are also made by several trade unions, NGOs, academics and think tanks, mainly on grounds that the consultation has been too technical, or too narrow in scope (because it did not allow them to see other chapters of TTIP), or because it has not been possible to have the provisions translated from English. Some complain in particular that the consultation has not allowed them to state from the outset if they agree or not with the inclusion of ISDS in TTIP, thus avoiding a fundamental debate about the decision of including ISDS in TTIP.

Some trade unions suggest that a broader consultation, which would cover all aspects of the TTIP negotiations, should be organised.

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