Friends of the Earth Europe

Contribution to the European Commission consultation on modalities for investment protection and ISDS in TTIP[1]

A. Substantive investment protection provisions

Question 1: Scope of the substantive investment protection provisions

Q: 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 provisions in TTIP?

Friends of the Earth Europe (FoEE) would like to state that we fundamentally disagree with the European Commission approach on investment protection in the Transatlantic Trade and Investment Partnership (TTIP) through the inclusion of the investor-state dispute settlement (ISDS) mechanism. We believe ISDS should not be included in the TTIP[2].

ISDS is a mechanism essentially discriminatory in nature, which favours foreign investors above the domestic ones, also granting them special rights that other parts of society do not have. It allows companies to bypass existing court systems to sue states when they are unhappy with the impacts that regulatory changes have on their investment potential (including their expected profits). It undermines the states' right to regulate and it is characterised by fundamental conflicts of interest of arbitrators. Finally, it is absolutely not needed as investors can turn to national courts if they consider that they are not treated properly.

When it comes to the scope of the substantive investment provisions in TTIP, the European Commission refers to the revised definitions used in the EU-Canada (CETA) agreement. These definitions provide some tightening but not enough in order to restrict potential misuse by companies. In the end, it will be up to three for-profit arbitrators to determine how these definitions apply, which we think is essentially lopsided as these arbitrators are not accountable for what they decide and there is no appeal mechanism.

According to the reference text, an investment covers "every kind of asset", which encompasses but is not limited to an indicative list provided in the definition. This is useful but not restrictive enough. For instance the list includes "expectation of gain or profit", which is very broad and can be interpreted in a very loose way by arbitrators. The definition of a "covered investment" includes investments "directly or indirectly owned or controlled by an investor of the other party", but does not give details on the situations falling in this definition.

[1] http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=ISDS
[2] http://www.foeeurope.org/sites/default/files/publications/foee_factsheet_isds_oct13.pdf

The clarification of what defines an "investor" is useful to avoid the misuse of the treaty by mailbox investors, but it does not reduce the use of investor-state arbitration by thousands of potentially covered investors.

FoEE believes that the objectives and approach taken in relation to the scope of the substantive investment provisions in TTIP will not solve the fundamental flaws of ISDS. ISDS should be left out of the TTIP.

Question 2: Non-discriminatory treatment for investors

Q: "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?"

FoEE believes that including the ISDS mechanism in the TTIP essentially equals to introducing a discriminatory treatment, which provides foreign investors with privileged treatment over other actors. It also dangerously leaves the interpretation of what constitutes discrimination up to three for-profit arbitrators. The Most Favoured Nation (MFN) provision is one of the most problematic features of the ISDS mechanism, and therefore one of the reasons why we object to including an ISDS in the TTIP.

By definition the MFN is bound to undermine any specific provision that parties may try to tighten up in the context of a specific agreement, since it allows investors to invoke any rights given to them under other treaties. The MFN allows companies using the ISDS mechanism to cherry-pick provisions from other investment treaties that are more favourable to their case – this is fundamentally flawed and contrary to the procedures that apply in existing court systems (where the same law applies equally to everybody). The restrictive language about the MFN in CETA does not solve the fundamental problems about this provision and will allow going back to earlier treaties that do not contain such restrictions. Therefore, including a MFN provision in CETA and TTIP will nullify any other reforms included in the texts.

In addition, the paragraph on general exceptions that is included in the reference text lacks clarity, and the references to GATT-WTO are questionable. WTO tribunals have already interpreted these exceptions very narrowly and against the test of necessity, where regulation is seen as a measure of last resort. Giving arbitration panels a green light to apply a necessity test to investment measures bypasses the democratic process and it is a direct challenge to the right to regulate of states[3].

Therefore FoEE is not supportive of the Commission approach to non-discrimination and believe it will allow for continued excessive use of the ISDS mechanism. The only way to close the loopholes is to drop ISDS as a whole.

Question 3: Fair and equitable treatment

Q: 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?

FoEE believes that the fair and equitable treatment (FET) provision is one of the most dangerous features of the ISDS mechanism. FET has been the most relied on clause in ISDS cases, and its interpretation by arbitration tribunals has been very broad and also dangerously abused[4] - as

[3] http://www.iisd.org/pdf/2014/reponse_eu_ceta.pdf

[4] http://unctad.org/en/docs/unctaddiaeia2011d5_en.pdf ; http://www.iisd.org/pdf/2014/reponse_eu_ceta.pdf ; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf

recognised by the European Commission itself[5]. This is one of the reasons why we think the ISDS mechanism should be dropped as a whole, instead of trying to promote a reformed version of this dangerous clause.

According to the reference text proposed, "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". The interpretation about what constitutes FET, or is in breach of it, relies fully on the private arbitrators. This is very dangerous as arbitrators have often used a very broad interpretation of FET, highly favourable to investors, in the past.

In particular, there is no guidance on how "manifest arbitrariness" should be interpreted (c.) and no safeguard to avoid that the proposed "breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article" might re-open the supposedly close definition list proposed for the provision. Article 3 says that the "Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment"; which means that the definition might be expanded in the future. Therefore this creates uncertainty, while leaving it unclear what the process for such expansion would be.

The Commission states that the text on 'Fair and Equitable Treatment' in CETA is closed. This is questionable. CETA combines a closed list with open-ended and vague formulations that leave arbitrators far too much freedom to interpret investor rights in a way that limits governments' right to regulate in the public interest.

Article 4 also introduces uncertainty by referring to a "specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated." This is very vague wording, failing to provide a clear definition of what "representation" encompasses in this context. It also requires the representation to have been made to induce the investment, but not that the investment took place only because of this. The introduction of a broad basis for reviewing the legitimate expectations of an investor adds increased uncertainty and subjectivity to the interpretation and application of this clause. According to the article, it is up to for-profit arbitrators to decide whether an investment only took place because of this representation or not – which is a big loophole, making the article much broader than the Commission states.

Therefore we are not satisfied with the European Commission approach to fair and equitable treatment and we believe that the proposed reforms by the Commission will not alleviate the current concerns about the misuse of the clause. FET is one of the most dangerous features of ISDS, and is one of the reasons for FoEE to demand that ISDS be dropped.

Question 4: Expropriation

Q: ***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?***

FoEE believes that approaching expropriation of foreign investors through the ISDS mechanism is wrong. It is unacceptable that three for-profit arbitrators can interpret and decide on which measures taken by a sovereign state constitute a breach of contract obligation according to the agreement[6].

[5] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1015

According to the reference text provided by the European Commission, states will be put under pressure to comply with a necessity test undertaken by three private arbitrators. The tribunal will be mandated to decide which measure is or is not for "public purpose", dangerously taking over the leverage of a state to apply its right to regulate.

The annex referred to by the Commission defines direct and indirect expropriation, but again it is problematic in that it leaves it up to the same set of arbitrators to determine whether expropriation has occurred – a loophole that has already been highlighted by academics[7]. One of the criteria included to take into account in this interpretation is the extent to "which the measure or series of measures interferes with distinct, reasonable investment-backed expectations", without providing guidance on what is "reasonable investment-backed expectation" and what form it should take (oral or written commitment). Again this leaves significant room for broad interpretation to arbitrators, which could limit the possibility for states to act in the public interest.

Despite the Commission claims that the wording provided will allow to protect the state's right to regulate, the wording "except in rare circumstances" allows for the possibility that certain public interest measures would be defined as indirect expropriation – and here again final interpretation is left to the arbitrators. Likewise point 3 of the annex leaves it up to for-profit arbitrators to determine what is "manifestly excessive" or whether a measure serves the protection of legitimate public welfare objectives such as health, safety and the environment. Submitting public policy choices to the test of for-profit arbitrators is the wrong way to look at the problem.

We are not satisfied by the Commission's proposals on expropriation and think they will not solve the flaws of the ISDS mechanism in any way. ISDS should be excluded from the TTIP.

Question 5: ensuring the right to regulate and investment protection

Q: ***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?***

FoEE believes that the essential features of the ISDS mechanism are an attack on the right to regulate, which is completely unacceptable. ISDS allows private investors who are not parties to the agreement to test the legitimacy of public regulations, which are introduced by democratically elected governments, through private arbitration. The sheer mention of the right to regulate in the ISDS chapter of TTIP is not enough to safeguard it, and even less to deter companies from launching expensive lawsuits against states. Interpretation of what is in line with the state's right to regulate will be relying on private arbitrators: again it is unacceptable.

The text provided by the European Commission as a reference only mentions the right to regulate in the preamble, not anywhere else in the actual agreement, or in the articles provided by the European Commission for consultation. As such, having the right to regulate mentioned in the preamble of the agreement is not binding on the parties. This was confirmed by a Commission representative at a debate organised by Friends of the Earth Europe on March 13, 2014[8].

Furthermore the formulation of the exceptions lacks clarity to ascertain that states will be exempt of paying monetary compensation, even in the case where the existence of exceptions would avoid that they have to repeal a measure. This is also endangering the right to regulate.

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[6] http://www.tni.org/briefing/profiting-injustice?context=70931

[7] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf

[8] http://www.tni.org/multimedia/untangling-trade-talks

Therefore we are not satisfied with the way the right to regulate is dealt with in the EU's approach to TTIP. As long as ISDS will be in the agreement, the right to regulate will be endangered and there will be potential for the mechanism to create a chilling effect on regulation. ISDS as a whole must be excluded of TTIP.

B. ISDS

Question 6: Transparency in ISDS

Q: "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."

FoEE is of the opinion that improving the transparency of the ISDS mechanism will not solve its fundamental flaws or make it acceptable a system.

In addition the proposed improvements will not allow for full and sufficient transparency. On the one hand, the new UNCITRAL rules will only cover new cases, not cases that are already ongoing. On the other hand, it remains up to the arbitration tribunal to "determine that there is a need to protect confidential or protected information" and decide to hold a hearing in private. This allows for significant loopholes and will lead to crucial information often not being in the public domain. This is far from the enhanced level of transparency that would be needed.

Therefore FoEE is not satisfied with the Commission's approach to openness and transparency in the ISDS for TTIP. Transparency and openness would be much better served if disputes would be dealt with in existing court systems.

Question 7: multiple claims and relationship to domestic courts

Q: ***"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*****."***

In the opinion of FoEE, preventing multiple claims to be filed in parallel does not solve one of the key loopholes at present, which is that arbitrators use the system to circumvent existing judicial remedies. This is of particular relevance in the context of the EU-US trade agreement, where both parties have strong, reliable, and predictable court systems. The reference text does not provide any indication that under the reforms presented, companies will be encouraged to use the domestic courts instead of going straight to private arbitration. While the European Commission keeps repeating that ISDS is necessary because EU companies would not have access to US courts in case of dispute, a recent London School of Economics study , concludes that the Commission concerns about the US judicial system are not substantiated enough to justify the inclusion of ISDS in TTIP[9].

When it comes to the proposals made in relation to mediation, FoEE does not understand what is new, since the disrupting parties can always agree to submit to mediation. In addition, according to

[9] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410188

the reference text, you do not have to go to mediation before going to arbitration tribunal. In that sense, proposals made on mediation are not really discouraging the use of ISDS.

Question 8: Arbitrator ethics, conduct and qualifications

Q: "*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?"*

FoEE is of the opinion that the set-up of arbitration panels is fundamentally flawed and this is one of the reasons why the ISDS mechanism is not acceptable and should be excluded from the TTIP[10]. Having three private arbitrators, paid by the hour, sitting on a panel, interpreting how public policy measures might breach treaty provisions based on the profit making expectations of companies is fundamentally biased. Many arbitrators, or the law firms they work for, have a conflict of interest as they do not have the public interest in mind but the interest of their clients, which are often private investors.

Even in cases when the three arbitrators themselves do not have an individual conflict of interest, the system is inherently flawed. Indeed it is biased towards awarding claims to investors, as such decisions are likely to lead to more cases being filed. This in turn means additional income for the individual arbitrators and the law firms that they represent – who therefore have a financial interest in keeping the ISDS system alive.

When it comes to the Code of Conduct for arbitrators mentioned in the reference text, it is currently not available for comment. There is no reason for not finalising this code as part as the proposed text. Therefore FoEE is not in a position to support the proposed measures by the European Commission – and even less to agree that the problems of impartiality and independence of the arbitrators have been solved - until we can see and fully assess the mentioned code.

In addition, FoEE's experience of working with European Commission codes of conduct and guidelines for European Commissioners and staff ethics regulation has been unsatisfactory. Civil society complaints have raised serious problems of implementation of the Commission's own ethics rules and unchecked potential conflicts of interest[11]. Once ethics rules are agreed on, their effectiveness depends on strict implementation of the rules and close monitoring. The European Commission has not performed well in those areas.

Furthermore, while it is true that investment treaties do not provide a roster of arbitrators, the ICSID system does use one. However this approach has not helped mitigate concern of impartiality and independence of arbitrators[12].

According to the reference text submitted by the European Commission, the roster will only come into play when both sides fail to appoint the presiding arbitrator within three months of submission of the claim. So it is only a backup that does not require that all arbitrators on the case fulfil the same criteria, have the same experience, or act with the same independence and impartiality.

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[10] http://www.tni.org/briefing/profiting-injustice?context=70931

[11] http://www.alter-eu.org/press-releases/2013/02/14/ombudsman-investigates-conflicts-of-interest-via-revolving-door
http://www.alter-eu.org/sites/default/files/AlterEU_revolving_doors_report_0.pdf
http://www.alter-eu.org/sites/default/files/revolving_door_provides_privileged_access.pdf
http://www.alter-eu.org/documents/2011/01/new-commission-code-not-enough-to-close-revolving-doors

[12] http://www.iisd.org/pdf/2014/reponse_eu_ceta.pdf

Therefore FoEE is not satisfied with the European Commission approach to proposals in relation to arbitrators' conduct, impartiality and ethics. Such loophole makes the ISDS mechanism very dangerous; we recommend dropping ISDS out of TTIP.

Question 9: reducing the risk of frivolous and unfounded cases

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

FoEE is of the opinion that – while we appreciate the effort to reduce the risk of frivolous and unfounded cases – the proposal of the European Commission shows a lack of understanding of one of the key problems with ISDS. It is not so much frivolous cases that civil society is concerned about, but rather with the claims that make it to the arbitration panels and allow some companies to abuse the system. Under the current Commission proposals, cases such as the ones filed by companies Philip Morris against Australia's attempts to introduce anti-tobacco legislation or Lone Pine Resources against Québec's precautionary moratorium on fracking would still be possible[13]. According to the text, the only claims that can easily be dismissed are the ones without any legal merit.

Furthermore, according to the reference text, the European Commission intends to ask the arbitrators themselves to decide what is frivolous or not – as we have mentioned earlier, we think this is fundamentally flawed and unsatisfactory.

Finally, according to the proposal of the European Commission in the context of CETA, the reforms will only address the issue of costs (case terminated without expensive and long procedures), but in no way the scope of the decisions that would otherwise be made on jurisdiction or the merits.

Question 10: Allowing claims to proceed

Q: "*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?"*

According to FoEE the fact that the reference text foresees a specific filter mechanism of ISDS claims for rules relating to the financial stability is another illustration of the dangers of the ISDS mechanism as described above. It is another reason to argue for dropping the mechanism as a whole instead of seeking for reforms or specific carve-outs. Furthermore we do not understand why the financial sector is being singled out as a sensitive sector, while we believe other public policy sectors in relation to the environment, health, safety, social and labour protection also deserve special attention.

When it comes to the approach of the Commission on filter mechanisms in TTIP, we believe that leaving the final decision on whether the prudential carve-out is a valid defence to the claim to the arbitration tribunal is unlikely to solve the problem of protecting the regulatory space of states in a time of financial crisis. In addition, the carve-out process foresees the implication of the financial

[13] http://corporateeurope.org/sites/default/files/annex-2-still-not-loving-isds.pdf

services committee, which adds another layer of complexity in the system and may further limit policy space at a time of crisis.

Therefore FoEE is of the opinion that the use and scope of the proposed filter mechanisms will not prevent abuses and will not serve the announced purpose. The only way to ensure that financial stability (or other public interest objectives) is not undermined by ISDS is to drop the ISDS mechanism in its entirety.

Question 11: Guidance by the Parties (the EU and US) on the interpretation of the agreement

Q*: "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?"*

FoEE believes that the fundamental structure of the ISDS mechanism is bound to introduce unpredictability in the interpretation of trade agreements, by allowing companies to raise claims that a panel of three private arbitrators will have to interpret without any duty of public accountability towards the parties and their respective citizens. Therefore we think that introducing guidance by the Parties on the interpretation of the agreement - while keeping ISDS in - will not ensure the highly needed predictability and uniformity that the regular court systems provide. ISDS should be abandoned.

According to the reference text, it is up to the committee on services and investment to make a recommendation to the CETA trade committee on the adoption of the interpretations of the agreement. It does not outline an automatic process for concerns to be raised. When it comes to the Commission proposals on how guidance by the parties would look like in CETA, the reference text mentions that "interpretation adopted by the CETA Trade Committee shall be binding on a Tribunal established under this chapter. The CETA Trade Committee may decide that an interpretation shall have binding effect from a specific date", while leaving it unclear what will be the exact process to ensure this interpretation becomes binding on the tribunal. It does not mention to whom arbitrators will be accountable to and what happens in cases when they do not follow the provided interpretation. To underscore the relevance of that point, **in the context of NAFTA, there are several examples of arbitrators ignoring the supposedly binding interpretations provided by either the US, Canada, or Mexico**[14].

Therefore FoEE believes that the Commission propositions on guidance by the Parties to interpret the agreement are neither sufficient nor satisfactory. We believe ISDS should be abandoned.

Question 12: Appellate mechanism and consistency of rulings

Q: *"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."*

FoEE notes that the notice accompanying the consultation mentions that "the EU aims to establish an appellate mechanism in TTIP so as to allow for review of ISDS rulings". This does not give us

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

clear indications on whether this will actually materialise, including whether the US is supportive of this idea. The CETA reference text provided mentions that "the committee on services and investment shall provide a forum for the parties to consult on issues relation to this section, including […] whether, and if so, under what conditions an appellate mechanism could be created…" This creates further uncertainty, partly by leaving it up to the committee on services and investment to take the issue forward, and partly by allowing this committee to bypass the right of scrutiny of parliaments and citizens.

Furthermore, the reference text does not provide details on how such appellate mechanism would work, nor who would sit on it and what the selection criteria would be, if it were created. In any event, an appellate system could only contribute to predictability and uniformity if all appellate cases ultimately were to be subject to the same final appellate mechanism, of which decisions would be binding on 'lower' tribunals. Such a system does not exist within the ISDS set up (contrary to the domestic court systems), and the Commission does not provide a roadmap for how it would be put in place and integrated in the ISDS context.

Even with an appellate mechanism, we see only risks and no benefits from including any form of ISDS in TTIP. An appellate mechanism could possibly be considered for a State-State mechanism, which we think is the adequate dispute settlement path for TTIP. The fundamental instability brought by the introduction of the ISDS mechanism remains, which is why the entire ISDS mechanism should be abandoned.

C. General assessment

Question 13

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

As outlined all along this contribution, FoEE has a fundamental problem with the ISDS mechanism as a whole[15]. We believe that ISDS essentially is biased in favour of foreign investors vis-à-vis the rest of society, as well discriminatory among foreign and domestic investors – this is an undemocratic tool, which undermines the right of governments to regulate and existing court systems, relies on the broad interpretation of for-profit arbitrators with significant conflict of interest issues, with no possibility to rely on jurisprudence or appeal mechanism. The reforms proposed by the Commission as part of this consultation do not alleviate our concerns about the fundamental flaws of the system, nor about its abuse by companies. In the context of the EU-US deal, ISDS is particularly not needed.

Finally the consultation is making reference to texts produced in the context of the EU-Canada trade agreement (CETA), while it remains unclear whether this agreement has been fully finalised at the time of writing. Civil society is also neither in a position to assess whether all of the propositions presented in this document will be re-used exactly in the same format in the TTIP negotiations, nor whether the US is supportive of such proposals. What comes out of the negotiations between the EU and the US on investment protection cannot be predicted at the time of writing. FoEE is not in a position to assess the Commission propositions until we can have access to the final texts.

Therefore, we continue to believe that the only way to ensure predictability and consistency around investment protection is to keep ISDS out of the TTIP.

[15] http://www.foeeurope.org/sites/default/files/publications/foee_factsheet_isds_oct13.pdf

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

As mentioned above, FoEE believes ISDS should be excluded from the TTIP. Investors can rely on the national court systems and where there are shortcomings in these systems, these should be addressed instead of installing a parallel and inferior system. For further consistency and predictability, ISDS should also be excluded from the EU-Canada agreement as well as any other free-trade agreement the EU is negotiating.

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

FoEE notes that the consultation - as prepared and presented by the European Commission - falls short of meeting civil society expectations. In particular, it does not address the fundamental question about whether the ISDS mechanism should be included in the transatlantic trade agreement in the first place. This fundamentally alters the character of this "public consultation". Rather it merely asks for opinions on the proposed Commission reforms.

It is only when reaching this last question (number 13) of the 44-page technical document that the respondent has the chance to express his/her broad views on the system. This is very disappointing to say the least. What the consultation's format and structure primarily show is the lack of genuine openness to civil society criticism of the system as a whole. Rather the Commission seems to aim at using it to justify a reform that will not address the fundamental flaws.

Finally, we would like to make the following comments and raise the following questions:

- While other parts of the TTIP agreement such as regulatory coherence and proposals for ongoing regulatory cooperation, non-trade barriers, etc… are equally controversial, the European Commission only consulting the public about the ISDS chapter of TTIP. Why is that so?
- While the ISDS mechanism of the EU-Canada agreement (CETA) is equally controversial, the European Commission is not consulting about it. Why is that so?
- In cases when the interests of citizens and civil society groups are affected or damaged by investors, these receive no similar level of protection as investors do. At the time of writing, no measures have been taken to ensure that these citizens and civil society groups can have easy access to courts in the home country of the investors that are responsible for the damage. In the meantime, the European Commission is considering granting special privileges to investors through the ISDS mechanism. Why are these groups of stakeholders treated differently, and why is the European Commission not taking step to ensure adequate protection and access to courts for citizens and civil society groups?

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Friends of the Earth Europe
Member Groups

Austria	Global 2000
Belgium (Wallonia & Brussels)	Les Amis de la Terre
Belgium (Flanders & Brussels)	Friends of the Earth
Bulgaria	Za Zemiata
Croatia	Zelena Akcija
Cyprus	Friends of the Earth
Czech Republic	Hnutí Duha
Denmark	NOAH
England, Wales & Northern Ireland	Friends of the Earth
Estonia	Eesti Roheline Liikumine
Finland	Maan Ystävät Ry
France	Les Amis de la Terre
Georgia	Sakhartvelos Mtsvaneta Modzraoba
Germany	Bund für Umwelt und Naturschutz Deutschland (BUND)
Hungary	Magyar Természetvédok Szövetsége
Ireland	Friends of the Earth
Italy	Amici della Terra
Latvia	Latvijas Zemes Draugi
Lithuania	Lietuvos Zaliuju Judéjimas
Luxembourg	Mouvement Ecologique
Macedonia	Dvizhenje na Ekologistite na Makedonija
Malta	Friends of the Earth Malta
The Netherlands	Milieudefensie
Norway	Norges Naturvernforbund
Poland	Polski Klub Ekologiczny
Scotland	Friends of the Earth Scotland
Slovakia	Priatelia Zeme
Spain	Amigos de la Tierra
Sweden	Jordens Vänner
Switzerland	Pro Natura
Ukraine	Zelenyi Svit

Friends of the Earth Europe campaigns for sustainable and just societies and for the protection of the environment, unites more than 30 national organisations with thousands of local groups and is part of the world's largest grassroots environmental network, Friends of the Earth International.