Public consultation on modalities for investment protection and investor-to-state dispute settlement in TTIP

On 27.3.2014, the European Commission launched an online consultation on the investor protection provisions in the Transatlantic Trade and Investment Partnership TTIP. The Austrian Federal Chamber of Labour (AK) and the Austrian Trade Union Federation (ÖGB) respond to the questions defined by the European Commission as follows:

## A. Substantive investment protection provisions

***Question 1: Scope of the substantive investment protection provisions***

**We fundamentally oppose the investment protection provisions in the TTIP**, even when investors have committed substantial resources, because

- developed democracies and constitutional states such as the EU Member States and the US ensure compliance with the basic principles that the investment protection provisions are intended to guarantee for their citizens and companies locally established, and thus also for foreign companies, under domestic legislation;
- the Parties to the TTIP agreement are democratic governments with well-developed rules of law and legal cultures;
- in the European Union and in the US, the right to property and equal treatment are fundamental principles in the legal system;
- the strong economic interdependence of the two economies, as well as the increasing flows of direct investments, are evidence that domestic legislation is fair and adequate;
- separate investment protection provisions for foreigners would mean positive discrimination and foreign investors would thus be in a better position than domestic investors;
- alongside the well-functioning property rights and investor protection that currently exist under the law, it would result in the creation of a parallel private jurisdiction for foreign investors with privileged conditions;
- taxpayers would once again be liable for corporate risk.

**We are opposed to the proposed investment protection provisions in the TTIP in particular** because

- the proposed scope includes all types of assets;
- foreign direct investment and the investor are not clearly differentiated from other forms of investment or speculative investments by a clear and narrow definition;
- there is no attempt to balance the rights and obligations (e.g. stable investment, social and ecological sustainability, compliance with all the domestic legislation and practices, positive economic effects such as job creation, continuing vocational training, research and development) of foreign investors;
- portfolio investments and other financial instruments are not excluded from the scope, and therefore it would be possible for financial speculators to make frivolous and unfounded claims;
- sensitive sectors, such as education, health, aid, public procurement, culture, public and social services, as well as policy areas such as labour and social affairs, the environment, education,

research, regional development, financial market regulation and tax policy, are not excluded from the scope of the investment protection provisions, and therefore the democratic sovereignty to take regulatory measures in the public interest could be restricted, both directly and also indirectly.

***Question 2: Non-discriminatory treatment for investors***

**We are decidedly opposed to the fact that the scope of the investment protection provisions is being extended to include market access** (pre-establishment) because

- otherwise the European welfare state model would be under threat.

**We do not see any need to introduce non-discrimination clauses** for foreign investors because

- the domestic legal regimes of the Parties to the TTIP agreement are based on equal treatment and non-discrimination;
- the positive discrimination of foreign investors would destroy the equal competition that currently exists for domestic and foreign investors;
- there would be no legal certainty for regulatory exceptions, for example in areas such as aid or public procurement.

**We vehemently oppose the inclusion of the most-favoured nation clause** in the investment protection standard because

- it is not possible to regulate the "importation of standards" of the procedural and substantive provisions from existing bilateral investment agreements (Member States have agreed over 1,500 differently worded bilateral investment agreements!);
- and therefore all efforts at reform by the European Commission in terms of achieving greater legal certainty by clarifying definitions and more precise standards are rendered worthless. This enormous problem is mentioned by the Commission itself.

***Question 3: Fair and equitable treatment***

Foreign investors are adequately protected from arbitrary, unfair, abusive or otherwise unacceptable treatment in the European and US legal systems - in the same way as domestic investors!

**We vehemently oppose the inclusion of the "fair and equitable treatment" clause in the TTIP** because

- as the claims filed in recent decades clearly demonstrate, this clause is used as a gateway for dubious claims against regulations and procedures that were established democratically in the public interest;
- it creates a large amount of legal uncertainty, as the rulings within international investment law demonstrate;
- it is therefore associated with the problem of being interpreted inconsistently by the arbitral tribunals;
- it is increasingly being used by investors to fight political decisions made in the public interest which affect the profitability of the original business model, or to contest high compensation payments;
- with this clause, the states effectively take on a so-called "stabilisation obligations" with regard to investors, namely not to take any measures to their economic disadvantage in future if they do not want to be sued;
- governments become vulnerable to blackmail with regard to weakening new legal or procedural measures that are in the public interest or not addressing them at all in future;

- the breaches of fundamental rights quoted by the Commission, which this standard are intended to cover, are adequately covered by the existing legal systems of the Parties to the agreement;
- the proposed standard limitations cannot guarantee that claims by investors will be ruled out when new social, labour and environmental laws are adopted.

***Question 4: Expropriation***

The European as well as the American legal systems provide for compensation payments in the event of direct and, under certain circumstances, indirect expropriation, whereby domestic and foreign investors or citizens are treated equally.

**We fundamentally oppose special rights for foreign investors in relation to expropriation and indirect expropriation** because

- this would lead to positive discrimination of foreign investors or to a parallel private jurisdiction;
- the stable balance between investor protection and the right of the states to regulate, which in the European and the US legal systems is backed up by comprehensive basic rights, should not be undermined;
- even important protective provisions for workers, health and the environment can be and have been regarded as indirect expropriation;
- it puts investors in a position of being able to challenge a wide range of regulatory measures that are clearly in the public interest before international arbitral tribunals;
- the interpretation of the extent to which a legal regulation constitutes an indirect expropriation or not would fall to an international arbitral tribunal, which only interprets the investment protection provisions of the agreement;
- the case law shows how vulnerable agreement provisions are to wide-ranging and questionable interpretations;
- an obligation to pay compensation for "indirect expropriation" in international investment law significantly limits the freedom and rights of citizens and parliaments;
- disproportionately large sums of tax-payers' money have to be paid out in compensation.

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

**We fundamentally oppose the fact that investment protection is placed above the sovereign right to regulate** because

- rules arising from a democratic process (democratic and parliamentary decision-making process), which therefore reflect the public interest and the will of millions of people, must always weighted more heavily than private sector vested interests;
- we see a far greater urgency in making institutional arrangements to assert the public interest over individual corporate interests than vice versa;
- fundamental social rights and human rights must not be limited by economic freedoms.

In particular, **we reject the draft proposals** because

- it is wholly inadequate to write the unrestricted legislative powers of states which are Party to the agreement in the preamble as this has only an interpretive effect, and has insufficient binding effect;
- the basic constitutional order and the freedom of the legislator are limited;
- these significantly limit the intervention potential of governments to respond appropriately to future socio-political challenges;
- the public policy objectives are not excluded from the scope of the investment protection provisions ("carve out") and no specific clause governing this issue is included;

- in addition, the public policy objectives quoted by the Commission (protection of public health, safety and the environment) 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.

## B. Investor-to-state dispute settlement (ISDS)

***Question 6: Transparency in ISDS***

**We fundamentally oppose the mechanism for investor-state dispute settlement (ISDS)** because

- foreign investors should not be granted privileged rights to file claims;
- the private ad hoc arbitration process takes place behind closed doors, is expensive and unpredictable, and furthermore has proved to be biased and inconsistent in terms of its rulings;
- in democratic constitutional states, the courts and their institutions up to the supreme courts are responsible for resolving disputes;
- ISDS undermines the existing "level playing field" between domestic and foreign investors;
- it is unacceptable to allow private arbitral tribunals to ultimately decide future political issues.

***Question 7: Multiple claims and relationship to domestic courts***

We **fundamentally oppose the privatisation of the legal system (ISDS) for a privileged group of investors** because

- foreign investors receive equal treatment in developed democracies and constitutional states, such as the EU states and the US, as well as Canada, Japan etc.;
- a private ad hoc arbitration process which is ( 1) inconsistent, (2) expensive, ( 3) unpredictable and (4) in some cases biased and which lays out privileged investment protection provisions, will abolish the existing "level playing field";
- the EU recommendations to foreign investors to favour domestic courts and to create incentives for this or to seek amicable solutions, and to veto parallel claims in order to prevent excessive compensation payments, are ineffective approaches, as the ISDS would give foreign investors privileged rights to file a claim, which they will of course then use;
- the private arbitration system is basically out of control and cannot be regulated by means of recommendations. When the arbitration process was established several decades ago, nobody could have guessed that it would now be used by specialist law firms and corporations against constitutional regulations that are in the public interest.

***Question 8: Arbitrator ethics, conduct and qualifications***

We **fundamentally oppose granting ISDS to a privileged group of investors from developed constitutional states** because

- the reforms related to the ethics, conduct and qualifications of arbitrators proposed by the EU are only recommendations, with no obligation on plaintiffs or arbitrators to adhere to them;
- the fact of having to state such fundamentally obvious minimum standards as a recommendation clearly shows how much the private ad hoc arbitration system is out of control;
- filing claims against regulatory government measures has developed into a very lucrative industry for clever law firms and legal science, which cannot be regulated by means of recommendations;
- the existing system cannot be reformed due to the inherent basic orientation to protect only investor rights.

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

The mere fact that the EU has to ward off frivolous and unfounded claims demonstrates the extent to which the existing system is inadequate, and reaffirms our determination to vehemently oppose the inclusion of ISDS in the TTIP because

- the costs of the arbitration proceedings are disproportionately high - on average USD 6-8 million - turning the filing of claims into a booming business for law firms;
- the state has nothing to gain from claims, but has to defend its democratically legitimate actions in the public interest before individual arbitrators;
- taxpayers have to pay the bill for the horrendous costs;
- this is the most effective way of preventing frivolous and unfounded cases.

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

We believe that **ISDS should not be included in the TTIP**, and also that the filtering mechanisms are inadequate because

- adequate regulation of the financial markets cannot be ensured by these proposals;
- current claims, especially against Cyprus and Greece, confirm how investment protection provisions are abused by financial speculators to the detriment of the general public, thereby ultimately also jeopardising the stability of the financial and economic system of the EU.

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

We are of the conviction that the **negative effects of investment provisions cannot be mitigated with interpretive notes and agreement interpretations** because

- as the practical experience of the arbitration process shows, these are not absolutely binding for the private ad hoc arbitral tribunals;
- the power of parliaments to define essential elements of the agreement and the legitimacy of the agreement would be further contradicted.

***Question 12: Appellate Mechanism and consistency of rulings***

We **fundamentally oppose any privatisation of jurisdiction** and therefore do not see any need to discuss appellate mechanisms.

## C. General assessment

***Question 13: Overall assessment of the proposed approach as a basis for investment negotiations between EU and US***

We are of the **opinion** that the highly specialised detailed questions, technical hurdles and in particular the lack of principled debate, make this public consultation look like **a farce**, not only to the general public, because

- the questions presented relate only to questions of detail on individual investment protection provisions, which are moreover purely technical in nature. After failing to allow a fundamental

debate on investment protection provisions and ISDS, the Commission is now not exposing itself to criticism by the general public;

- the individual provisions reproduced in the submitted reference text do not correlate with the actual text of the agreement and its structure, and therefore a serious assessment of the investment protection provisions is impossible, even for experts.

We are critical of the fact that **not all of the agreement provisions on investment protection or the full negotiation documents were published**. This is because, in addition to investment protection, there are also other sensitive areas, such as the rights and protection of workers, environmental, health and consumer protection, regulations concerning public services, issues of sustainability, etc. It is not tolerable that in democratic countries, the population only learns of liberalisation and deregulatory measures after the resolution of the negotiations, thereby rendering impossible a debate about any liberalisation offers.

We **call for the analysis of the responses received** to state how many of the participants fundamentally oppose the inclusion of ISDS or investment protection provisions in the TTIP.

The **criticisms and positions expressed here** apply not only to the TTIP, but also unreservedly **to other EU free trade agreements under negotiation**, e.g. with Canada, Japan, Singapore, etc:

- We categorically reject the **privatisation of jurisdiction**. The experience of the arbitration tribunals for the currently existing 3,000 bilateral investment agreements clearly demonstrates their shortcomings: extremely expensive, inefficient, lack of independence, unpredictable, lack of transparency.
- **ISDS severely restricts the future political scope to the detriment of our own population**; the fact that the European crisis countries have been sued for compensation by many investors because of individual crisis measures, particularly in the last two years, is clear evidence of this democratically problematic effect.
- **It is politically totally irresponsible to introduce ISDS into TTIP** if one considers in the light of the claims cases filed, how quickly US investors react to unwelcome laws and procedures by lodging claims against states. Conversely, based on previous experience, European investors have "nothing to gain" because to date, the US has successfully defended itself against numerous claims and has not lost an arbitration proceeding.
- The **huge increase in arbitration cases**, especially when new laws in the public interest are enacted (a lucrative area of business for specialist law firms), is clear evidence that the system of different investment protection agreements is out of control and is thus no longer viable. For this reason, we vehemently advocate that no further agreements should be concluded on this basis. The existing agreements of the Member States also need to be revised. A few countries, such as South Africa, have already recognised this and have taken appropriate steps.

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