TTIP - Public consultation of the EU-commission on modalities for investment protection and ISDS in TTIP

http://ec.europa.eu/yourvoice/ipm/forms/dispatch

Sample of answer sheet

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Question 1: Scope of the substantive investment protection provisions

Question:
Taking into account the above explanation and the text provided in [the (or attached)] 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?

Response to 1:

<u>Higher priority of and explicit reference to precaution, preventive and polluter pays principle</u>
First of all, it must be made clear in the negotiating documents that investments in the EU can only be made if the precautionary, preventive and polluter pays principle (Article 191 TFEU) are being respected and followed.

Furthermore, the public interest must not be in conflict with the planned investments. For this purpose, it shall be examined through public participation if the respective investment project is contrary to the common good. Depending on the size and impact of the investment, public participation has to take place on the regional, national and/or international level.

<u>Higher priority of and explicit reference to the EU Charter of Fundamental Rights</u>
According to Article 37 of the EU Charter of Fundamental Rights, a high level of environmental protection and the improvement of environmental quality must be integrated into the policies of the European Union and must be ensured in accordance with the principle of sustainable development. In addition, the Union's policies shall ensure a high level of consumer protection (Article 38 Charter of Fundamental Rights of the EU).

The free trade agreements which are being negotiated by the EU must include explicit references to the fact that investments are only permitted in accordance with the articles of the Charter of Fundamental Rights and the EU's legal framework.

I share the view of the EU that investors and investments should be treated according to the laws of the host country. However, this is already clear according to the basic democratic rule that no one should be discriminated because of her/his profession or origin.

On the other hand, investors must also explicitly commit themselves to respect and follow the constitutional principles and values of the host country.
In order to implement the scope of the substantive conditions for investment and for the definition of investors and their rights and obligations in the host country, a clarification within the trade agreements as mentioned in the paragraphs above would be sufficient.

<u>No need for an ISDS</u>
The establishment of an additional elitist parallel judicial system like the investor-state dispute settlement (ISDS) is not required within TTIP and CETA in order to guarantee non-discrimination and substantive investment protection. Quite the contrary is the case. With the establishment of an ISDS arbitration between two functioning democracies with established and functioning legal systems – consistent with the principle of separation of powers –, all the other citizens and domestic investors would be discriminated against. This is

inconsistent with the basic legal principles of the European Union.
All of the above statements are also true with regard to the free trade agreement with Canada (CETA), which is pending ratification. The therein agreed ISDS clause must also be removed.

Question 2: Non-discriminatory treatment for investors

Question:
Taking into account the above explanations and the text provided in the annex as a reference, what is your opinion of the EU approach to non –discrimination in relation to the TTIP? Please explain.

Response to 2:
See response to 1.

<u>Non-discriminatory treatment guaranteed by EU legal framework</u>

First of all, it is noted that the EU Charter of Fundamental Rights prohibits discrimination of any kind.

In the preamble it reads thus:
Conscious of its spiritual and moral heritage, the Union is founded on the indivisible , universal values of human dignity , freedom , equality and solidarity. It is based on the principles of democracy and the rule of law.
(CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, 2000/C 364/01, Preamble , paragraph 2 , sentence 1 and 2)"

Any breach of these fundamental principles can and must be criticised and sued before a court on the basis of the existing legal framework within the EU and its Member States. See in particular Chapter III (equality) of the EU Charter of Fundamental Rights. Article 20 guarantees equality before the law and Article 21 lays down the principle of non-discrimination.
The claim that investors fear discrimination, arbitrariness, injustice, and abuse within the European Union (as well as the U.S. and Canada), is de facto a declaration of bankruptcy of the existing democracies and legal systems in the EU, the U.S. and Canada.
There is no rational, legal basis and plausibility for the establishment of "special justice for investors" within the framework of the transatlantic free trade agreements.
The agreement of an ISDS clause is simply not necessary in order to ensure non-discrimination of investors on both sides of the Atlantic, in the EU, the U.S. and Canada.
Finally, it should be noted that health, environmental or consumer protection measures are not "exceptions" but legal principles and fundamental rights!

Question 3: Fair and equitable treatment

Question:
Taking into account the above explanation and the text provided in the 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?

Response to 3:
See responses to 1 and 2.

<u>Fair and equitable treatment guaranteed by existing legal framework</u>

The agreement of an ISDS clause is not necessary in order to ensure fair and equitable treatment of investors on both sides of the Atlantic, in the EU, the U.S. and Canada.
If investors have serious concerns about this, then there is no explanation why EU Member States had investments amounting to around 1,573 billion US dollars in the US, while US direct investments in the EU totalled 2,094 billion US dollars by the end of 2011, without having any reservations and without taking into consideration separate investor protection rights as indispensable (Source: www.auswaertiges-amt.de/EN/Aussenpolitik/RegionaleSchwerpunkte/USA/EU-USA_node.html).
There are also no rational or legally tenable reasons as to why investors should be granted the status to

exercise "law of nations". The "legal character" of an investor is – as a rule – that of a private company and not of a state or nation. For the same reason, one would have to grant each individual the status to exercise "law of nations".
Finally, it is pointed out that the overall impression is that the free trade agreements (CETA and TTIP) are not being negotiated and later on agreed between sovereign states but between investors and states. This of course raises questions about the responsibility of the EU, Canada and the United States towards society and community as a whole. The focus of the agreements is clearly not enough economically and too much oriented towards private business.

Question 4: Expropriation

Question:
Taking into account the above explanation and the text provided in the annex as a reference, what is your opinion of the approach to dealing with expropriation in relation to the TTIP? Please explain.

Response to 4:
See responses to 1 - 3.

Concerning the issue of "expropriation" (direct and indirect), it must first be clarified within the EU that the revocation of, for example, exploration and exploitation licences for oil and gas projects with the aim of protecting the public interest (for example, preventative water and soil conservation measures, as well as measures to maintain clean air quality) do not constitute indirect expropriation.

At the same time, it is now already clear that – concerning the completion of oil and gas projects - restrictions, exclusions, prohibitions and protection zones for and in many sensitive areas must be established (for example, for and in water and healing spring protection zones, sources of mineral water producers and breweries, FFH- and Natura-2000-sites , nature-/nationalparks, UNESCO world heritage sites, former mining mining areas, settlements, flood protection and flood plain areas, tourism and recreation areas, priority areas for forestry and agriculture, areas with unfavorable geological and hydrogeological conditions, earthquake areas and other sensitive areas which require protection).

The revocation of licences in the public interest would equate to non-discriminatory measures in pursuit of legitimate public interest such as health or environmental protection and could not be considered as equivalent to an extent of expropriation.

This, together with a proposed clarification that a measure has an impact on the economic value of an investment cannot create a demand of indirect expropriation, should and can be made clear by the EU through the inclusion of appropriate paragraphs in the texts of the trade agreements.

The national courts and the ECJ are considered [as] established instances who can clarify these issues legally in [the] event that this legal viewpoint should be challenged. The establishment of a parallel justice system such as the ISDS is not required for this legal clarification.

Question 5: Ensuring the right to regulate and investment protection

Question:
Taking into account the above explanation and the text provided in the 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?

Response to 5:
See responses to 1 - 4.

It is self-explanatory that public welfare concerns such as public health, environmental and consumer protection and prudential regulation by the democratic state have priority over any investments which must be regarded as subordinate to the aforementioned public interest. The investor protection is ensured by the separation of powers of democracy within the framework of applicable laws.
If the foreign investors have doubts concerning the legality or appropriateness of regulation, they can - just like domestic investors do - commence appropriate legal proceedings within the existing legal framework.

The introduction of a parallel justice system as the ISDS Arbitration is entirely unnecessary.

Question 6: Transparency in ISDS

Question:
Taking into account the above explanation and the text provided in the 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.

Response to 6:
The reasons why the establishment of an ISDS arbitration within CETA or TTIP is unnecessary, and even counter-productive in terms of the democratic process, were already given in the previous answers (1 - 5).

There is a need for a reform towards a transparent ISDS system, which provides an appeal and is overall better functioning. The ISDS must of course feel committed to and must reflect the public interest and the public welfare objectives. It must also respect and follow the precautionary, prevention and polluter pays principles. But this necessary reform is something that the EU (as well as the USA and Canada) should and can proceed with at the WTO-, ICSID- and UNCITRAL-level.

There are no comprehensible reasons for the establishment of the ISDS arbitration within CETA or TTIP. Only the reform efforts on the aforementioned levels (WTO, ICSID , UNCITRAL) would really create a necessary legal clarification (especially with regard to the existence of most-favored-nation-clauses in other free trade/investment agreements).

Question 7: Multiple claims and relationship to domestic courts

Question:
Taking into account the above explanation and the text provided in the 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.

Response to 7:
See responses to 1 - 6.
Concerning the formulated fear that, under U.S. law, foreign companies may be discriminated, the legal opinion of Professor Jan Kleinheisterkamp, London School of Economics and Political Science, Department of Law states that:

"1. There is no evidence for any broader problem with the US judicial system. Whereas some few cases may have been unfortunate, they do not reveal any systemic deficiency capable of proper remediation. On the contrary, those cases cited by the Commission, if anything, rather suggest weaknesses of investor-state arbitration as well as a lack of efficiency of ISDS mechanisms to overcome the foreign investors' problem.
2. International commitments by the US to European investors can very well be made applicable in US courts and even confer right of action to individuals. The exact form of such implementation for the US to comply with international law is ultimately an internal problem of the US institutions."
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410188

The given explanation "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***" is also nothing but a declaration of bankruptcy of European and American democracies, the functioning of their legal systems and the integrity of their courts.***

This explanation does not convince at all, unless the European Commission would actually want to argue that the integrity and functioning of the European and American courts have to be questioned.

The EU also does not need "incentives" for investors to pursue claims in domestic courts. A clarification concerning this point within the trade agreements is sufficient. The ISDS arbitration is not necessary.

Question 8: Arbitrator ethics, conduct and qualifications

Question:
Taking into account the above explanation and the text provided in the 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?

Response to 8:
See responses to 1 - 7 (especially to 6):
There is no need for the agreement of an ISDS arbitration within CETA or TTIP. Only the reform efforts on the aforementioned levels (WTO, ICSID, UNCITRAL) would really create a legal clarification (especially with regard to the existence of most-favoured-nation-clauses in other free trade/investment agreements).
In the view of the importance and impact on state budgets and democratic legislative processes, it is rather strange, incomprehensible and worrying that it took such a long time and all the public pressure in order for political decision makers to seriously think about ethics, conduct and qualifications of arbitrators within ISDS procedures.

Question 9: Reducing the risk of frivolous and unfounded cases

Question:
Taking into account the above explanation and the text provided in [the (or attached)] 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.

Response to 9:
See responses to 1 - 8.
The required reform must be achieved at WTO, ICSID, UNCITRAL levels. In order to ward off malicious and unfounded actions, it only requires a clear formulation within CETA and TTIP. The ISDS arbitration may not be part of CETA and TTIP, because this will only make possible deliberate, unfounded and costly lawsuits. In particular, the already formulated most-favoured-nation-clause within the CETA must be removed.
See also the following opinion (especially Chapter 9) of the International Institute for Sustainable Development: http://www.iisd.org/pdf/2014/reponse_eu_ceta.pdf.

Question 10: Allowing claims to proceed (filter)

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 [the (or attached)] annex as a reference, what are your views on the use and scope of such filter mechanisms in the TTIP agreement?***

Response to 10:
See responses to 1 - 9.

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

Question:
Taking into account the above explanation and the text provided in the 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?

Response to 11:
See responses to 1 - 9.
In order to ensure a consistent and predictable interpretation of the agreement in the public interest and for the public good, it only requires a clear formulation together with references to the precautionary, preventive and polluter pays principle within the] TTIP and the CETA. The establishment of a parallel justice, such as the ISDS arbitration, is not required for the intended reasons. Quite the contrary is the case. The establishment of the planned ISDS mechanism opens the gateways for lawsuits.

Question 12: Appellate Mechanism and consistency of rulings

Question:
Taking into account the above explanation and the text provided in [the (or attached)] 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.

Answer to 12:
See responses to 1 - 11.
The same previously mentioned points apply here as well. It is again appalling to note that the necessary clarification of a possibilty of appeal within the ISDS has not yet been achieved at the WTO, ICSID and UNCITRAL levels. The establishment of an ISDS arbitration within the TTIP and the CETA does not solve the problem and is therefore firmly rejected.

C. General assessment

What is your overall assessment of the proposed approach on substantive standards of protection and ISDS as a basis for investment negotiations between the EU and US?
Do you see other ways for the EU to improve the investment system?
Are there any other issues related to the topics covered by the questionnaire that you would like to address?

Response to C:
See responses to 1 - 12.
The establishment of an investor-state-dispute-settlement (ISDS) is rejected.

<u>Higher priority of and explicit reference to precaution, preventive and polluter pays principle</u>
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Furthermore, the public interest must not be in conflict with the planned investments. For this purpose, it shall be examined through public participation if the respective investment project is contrary to the common good. Depending on the size and impact of the investment, public participation has to take place on the regional, national and/or international level.

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The free trade agreements which are being negotiated by the EU must include explicit references to the fact that investments are only permitted in accordance with the articles of the Charter of Fundamental Rights and the EU's legal framework.

I share the view of the EU that investors and investments should be treated according to the laws of the host country. However, this is already clear according to the basic democratic rule that no one should be

discriminated because of her/his profession or origin.

On the other hand, investors must also explicitly commit themselves to respect and follow the constitutional principles and values of the host country.
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The claim that investors fear discrimination, arbitrariness, injustice, and abuse within the European Union (as well as the U.S. and Canada), is de facto a declaration of bankruptcy of the existing democracies and legal systems in the EU, the U.S. and Canada.
There is no rational, legal basis and plausibility for the establishment of "special justice for investors" within the framework of the transatlantic free trade agreements.
The agreement of an ISDS clause is simply not necessary in order to ensure non-discrimination of investors on both sides of the Atlantic, in the EU, the U.S. and Canada.

<u>NO need for an ISDS</u>
There is a need for a reform towards a transparent ISDS system, which provides an appeal and is overall better functioning. The ISDS must of course feel committed to and must reflect the public interest and the public welfare objectives. It must also respect and follow the precautionary, prevention and polluter pays principles. But this necessary reform is something that the EU (as well as the USA and Canada) should and can proceed with at the WTO-, ICSID- and UNCITRAL-level.

There are no comprehensible reasons for the establishment of the ISDS arbitration within CETA or TTIP. Only the reform efforts on the aforementioned levels (WTO, ICSID, UNCITRAL) would genuinely create the necessary legal clarification (especially with regard to the existence of most-favoured-nation-clauses in other free trade/investment agreements).

With the establishment of an ISDS arbitration between two functioning democracies with established and functioning legal systems - consistent with the principle of separation of powers -, all the other citizens and domestic investors would be discriminated. This is inconsistent with the basic legal principles of the European Union.

The establishment of an additional elitist parallel judicial system like the investor-state dispute settlement (ISDS) within the free trade agreements CETA and TTIP is not necessary and is being firmly rejected.