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ETUCE GUIDELINES TO THE EC'S PUBLIC CONSULTATION ON MODALITIES FOR INVESTMENT PROTECTION AND ISDS IN TTIP

2. VIEWS ON THE PROPOSED TEXT TO BE USED AS THE BASIS FOR INVESTMENT NEGOTIATIONS WITH THE US

A. *Substantive investment protection provisions*

Question 1: Scope of the substantive investment protection provisions

It is positive that the EU wants to avoid "shell" and "mailbox" companies from exploiting ISDS's provisions that were not intended for these companies in the first place. However, the EU's new approach is **only common sense** and "shell" and "mailbox" companies should never have had this option. This is equally the case with the correction that the investment must be "made in accordance with the applicable law at the time". In our point of view, the **new approach needs to go further**. While we welcome that an investor must have **substantial** business activities, it is **essential to clearly define "substantial"** business activities. In some previous cases "substantial" business activities were judged to be fulfilled based on a tiny investment. Therefore, the EU must set out a clear definition of what is to be understood as substantial to ensure that no misinterpretations will occur based on this concept. One option is to set out the monetary level that an **investment** must involve in order to be characterised as "substantial". Considering the reference text, investment is defined as "every kind of *asset* that an investor owns or controls, directly or indirectly, *which has the characteristic of an investment*"; there is the **need for a clear and meaningful definition**. Similarly, investment is set out to uphold "certain duration". Again there is a need to define what timeframe is foreseen.

Question 2: Non-discriminatory treatment for investors

We are positive to the fact that the EU aims to exclude the so-called "importation of standards" from ISDS procedures of other international investment treaties and other trade agreements as this have proven to be a serious mistake in the past.

We agree that it is important to take in exclusions in order to protect health, the environment, consumers etc. However, there is a need to include **further exclusions to take into account societal considerations**. Given the importance of **education** in particular and **public services** in general and in view of the weak GATS exemption that is open to conflicting interpretations, it is **essential to include a similar carve-out for education and public services as has been taken for the audio-visual sector**. It is essential to avoid the effect of locking-in and intensifying pressures of commercialisation and privatisation, which would be the likely outcome of the disciplines of national treatment and most-favoured nation when applied to education. In particular, governments must be assured that the subsidies they provide to their education system cannot be undermined by private education companies demanding to benefit from the same subsidiaries as domestic schools and institutions.

Question 3: Fair and equitable treatment

The principle of **fair and equitable treatment** has proven **very controversial and problematic** in previous interpretations of that principle. While it is positive to clarify and narrow the scope of interpretation of the principle, it is **regrettable that it includes the possibility to again broaden the scope** of the principle by **letting the parties “regularly, or upon request of a party, review the content”**. If such possibility is to be included, it is crucial to make clear that any future amendments may not broaden the scope of the principle beyond the scope defined in the agreement. Rather than open up the principle for new uncertainties, the EU must make sure that ambiguities are excluded. Moreover, **to include legitimate expectation based on a specific statement by one party** is again **opening up the principle for substantial ambiguity**. Furthermore, it signifies an **unacceptable constraint on democratic decision-making** whereby a current government limits the liberty of action of future governments.

Question 4: Expropriation

Like the principle of fair and equitable treatment, the principle of **expropriation** has demonstrated to be **highly questionable**. Here the interpretation of indirect expropriation has proven to be very **disturbing from a societal and democratic point of view**. While the EC seems to be proud of its new approach that the EC claims will ensure the state's right to regulate. However, this is questionable as long as states can be required to pay huge amounts of compensation on the basis of regulations with societal purposes. The **right to regulate does not have any substance if a state must compensate an investor** for regulations it has put in place to **achieve societal objectives**. On a more general note, the proposed aim of the current consultation is to achieve “the right balance between protecting investors and safeguarding the EU's right and ability to regulate in the public interest”. However, considering the reference text, especially, in relation to expropriation, it becomes very clear that the **protection of investors significantly dominates** compared to the state's right to regulate. For example, compensations must be “*prompt, adequate and effective*” and must amount to “*the fair market value*”. While it can **be reasonable to give a strong protection to investors, it must be combined with similar strong protection to citizens**. Investment should never become a goal in itself, but should remain a means of achieving improved well-being to citizens.

Question 5: Ensuring the right to regulate and investment protection

As already described in the answer to the fourth question, we disagree that a genuine right to regulate exists as long as states are required to pay vast amounts in compensations to investors on the basis of regulations that are put in place due to societal purposes. Concerning the EC improvement that arbitration panels should not be able to order the repeal of a regulatory measure, we consider it shameful that this has ever been possible. However, there is **clearly a need to make sure that regulations can be maintained not only in a formal way, but also in practice**, i.e. it must be expected that **the duty to pay compensations results in a policy chill as such compensations are a heavy burden on the public budget**.

The ongoing ISDS case between Achmea and the Slovak Republic on its draft legislation which would establish a single public health insurance scheme, clearly illustrate the **very critical problems to the right to regulate that ISDS result in**. At the same time, it is embarrassing that the EC wants to give investors carte blanche, while the state's right to regulate is conditioned on necessity and legitimacy, as if states are constantly adopting illegitimate regulations. Again, the **concerns and well-being of citizens should be the focus rather than the profit of investors**. Concerning frivolous claims it is welcomed that

such cases will be prevented, but it is unacceptable that states in past have been required to defend themselves in such cases. However, the type of **cases** that fall **under this category must be expected to be quite limited**, as it is only those cases that can be characterised as **“without merit” or “legally unfounded”** e.g. a case brought in bad faith with the purpose of harassing. Moreover, **the correction that it is the claimant that must pay the costs of the government concerned seems only reasonable and natural.**

There is a need to assure a much better balance between safeguarding citizens and protecting investors. Consequently, we consider it necessary to include **further exclusions to take into account societal considerations**. Given the importance of **education** in particular and **public services** in general and in view of the weak GATS exemption that is open to conflicting interpretations, it is **essential to include a similar carve-out for education and public services as has been taken for the audio-visual sector.**

B. Investor-to-State dispute settlement (ISDS)

Question 6: Transparency in ISDS

We **strongly agree that transparency and openness are fundamental to any mechanism of ISDS. The publication of the ruling is of critical importance.** It is crucial for a number of reasons. First of all **transparency and openness are essential from a democratic perspective**; citizens and stakeholders must have the right to know all details and provide their point of view in ISDS cases. The **secrecy around ISDS can merely foster distrust**. Secondly, public available **ISDS rulings are central to ensure consistency and predictability** for all parties involved. When the provisions under interpretation give considerable room for interpretation there is a **special need for openness in order to have certainty of the legal position and to assure the protection of the law**. Here **precedents** plays a major role in **securing consistency and predictability and prevent conflicting interpretation** of the very same provision.

Question 7: Multiple claims and relationship to domestic courts

We do not favour the EU's eagerness to include ISDS into the TTIP, however we welcome that the **EU favours domestic courts before ISDS tribunals**. While it is positive to give incentives to pursue claims in domestic courts, to be effective **it should be a requirement that the investor exhausts the domestic remedies within the host state** before being able to exploit ISDS provisions. The **only exception should be if the investor can demonstrate that local remedies are not available.**

There is a **need to find a balance of time frames**. In particular, **societal considerations and the legislator's ability to regulate must be taken into account**. As have been clear from previous ISDS cases, a certain case affects not only the government being sued, but results also in a **regulatory chill on other countries fearing to face a similar case.**

The correction that investors will be unable to bring claims on the same matter in both an ISDS tribunal and a domestic court, is a welcomed improvement, however in similarity with some of the changes already commented above, **obviously investors should not be able to use this kind of forum shopping.**

Question 8: Arbitrator ethics, conduct and qualifications

We agree that there are **numerous problems concerning ethics, conduct and qualifications of arbitrators** and consequently there is an **urgent need for reforms**. Unfortunately, the modifications proposed by the EC do not achieve its aim. It is

particularly alarming that the reference text states *“if the disputing parties agree to appoint a sole arbitrator, the disputing parties shall seek to agree on the sole arbitrator.”* In the first place, it is **controversial that the parties can decide that one single arbitrator can decide** on a case, secondly the language above suggests that it is **not mandatory that the parties agree on this arbitrator**. This arrangement definitely needs to be **fundamentally revised to ensure a proper legal proceeding**.

We welcome the development to establish a **code of conduct for arbitrators**, which is binding. It is not clear from the reference text **what would happen to an arbitrator that was removed** from a tribunal. Would this very same arbitrator be able to continue as an arbitrator or **will the person be sanctioned and removed as an arbitrator?**

However, the **conflict of interests of arbitrators will remain as they are paid by the parties**. In order to ensure a genuine independent and impartial system **arbitrators should not merely be listed on a roster, but be engaged on a permanent basis**, essentially as judges in permanent courts. This approach would also make sure that the arbitrators do not have an interest in prolonging the cases. In addition, the **selection of the judges must be made by an independent body**, not by the parties themselves. **When arbitrators are appointed by the parties, it raises questions to the arbitrators’ impartiality and independence**. Even if the arbitrator is not in fact biased in favour of the appointing party, it cannot be avoided that an appearance of impartiality persists. In any case, it must be assumed that any party will select their arbitrators based on the arbitrator’s likeliness to rule in its favour. Like in court systems, there is a **need for clear safeguards on arbitrators to ensure their independence from state and private power through institutional safeguards**, including secure tenure, bars on outside remuneration, and an objective method of case assignment. **The lack of these safeguards raises a reasonable perception that inappropriate factors have influenced a decision or award**.

Question 9: Reducing the risk of frivolous and unfounded cases

Avoiding frivolous claims is certainly welcomed, but it is unacceptable that states in past have been required to defend themselves in such cases. However, the type of **cases that fall under this category must be expected to be quite limited**, as it is only those cases that can be characterised as **“without merit” or “legally unfounded”** e.g. a case brought in bad faith with the purpose of harassing. Still a **more progressive approach is required**, instead of giving the state the possibility to file an obligation, there should be **put in place a procedure** in which the tribunal **evaluates whether the case is without merit or legally unfounded prior to the onset of case**.

Moreover, **the correction that it is the claimant that must pay the costs of the government concerned seems only reasonable and natural**. The reference text gives rise to uncertainties that this will indeed be the case. Accordingly in **“exceptional circumstances”** the tribunal may decide to distribute the costs between the parties, however it is **not clear what constitutes an “exceptional circumstance”**.

Still, when excluding the exception it is **questionable** if this modification will be **successful in changing the behaviour of big corporations in filing such cases**. The sums of the proceedings that multinational companies may risk to pay will certainly not put in jeopardy their activities.

Question 10: Allowing claims to proceed (filter)

We believe that as part of the state’s right to regulate in general as well as in the financial sector, it is essential that the **state is guaranteed the right to take all appropriate measures in times of crisis** to protect citizens and to ensure the stability and integrity of

the financial system. An investor cannot expect that its usual rights can be upheld in such a situation; in particular **an investor shall not condition the kind of actions to be taken by the state**. There is essential to strike the right balance in times of financial crisis, which being an extraordinary situation must also be treated as such.

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

The attempt to achieve improved control of rulings of ISDS tribunals is welcomed based on the controversial rulings of the past, it must however be noticed that the proposal **of providing the parties with the right to adopt binding interpretation** gives rise to questions. **On the part of the EU, who is entitled to this right?** If the EU is to mean the European Commission in this case, this would imply that a **tremendous power of interpretation would be given to the EC**. Not only would it be questionable to give such a power to the EC, furthermore it would result in a de facto **change in the EU's institutional balance**. This cannot be justified, and consequently it must be made clear that this cannot be the outcome. Instead, the **EU member states should have the right to intervene when necessary**.

It is important to stress the role of court rulings to ensure consistency and predictability for all parties involved. When the provisions under interpretation give considerable room for interpretation there is a **special need for openness in order to have certainty of the legal position and to assure the protection of the law**. Here **precedent** cases play a major role in **securing consistency and predictability and prevent conflicting interpretation** of the very same provision.

Question 12: Appellate Mechanism and consistency of rulings

It is **essential to create an appellate mechanism** to rulings of ISDS tribunals. In particular, it is critical to **ensure that errors can be corrected**. On a more general note, the right to appeal is a fundamental guarantee for legal certainty in any legal system, and consequently it must also be assured under ISDS. However, as an appellate mechanism can also be **a means of multinational companies to play for time**, it is central to **ensure a balance of time limits** to avoid additional pressures to policy chill.

Based on the weak formulations in the reference text, it is worth stressing that **the rapid implementation of an appellate mechanism is needed** for the reasons outlined above.

We want to stress the role of case law to ensure consistency and predictability for all parties involved. When the provisions under interpretation give considerable room for interpretation there is a **special need for openness in order to have certainty of the legal position and to assure the protection of the law**. Here **precedent** play a major role in **securing consistency and predictability and prevent conflicting interpretation** of the very same provision.

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?

While some improvements to the ISDS system are proposed by the EC, this nonetheless does not mean that investment protection is either necessary or helpful in an agreement

between the EU and the US. Therefore, ETUCE sincerely requests the EC **NOT to include ISDS neither in TTIP nor in CETA.**

Investor-state dispute settlement provisions are **contentious** because they **enable foreign investors to directly sue states before arbitration panels.** As a result, **foreign investors are given legal rights to challenge any regulatory or policy measure of the host-state which it feels violates its rights to access a market or affects its future profits.** The **extraordinary cost of defending investor-state dispute settlement cases is likely to deter governments from pursuing policy goals or taking regulatory measures** that may have an impact on foreign investors. ISDS not only requires vast sums to defend the case itself, but also the **amounts involved in the claims of ISDS are astonishing.** It has therefore been pointed out that **the gross exaggeration of claims has reached a new level with ISDS.** This is **partly because of the amounts involved and partly because there is a bigger chance that ISDS tribunals will take the claim seriously than in the case of national courts** due to the checks and balances which national court systems are subject to. It is particular serious that **ISDS do not contains safeguards on arbitrators to ensure their independence from state and private power through institutional safeguards,** including secure tenure, bars on outside remuneration, and an objective method of case assignment. The lack of these safeguards **raises a reasonable perception that inappropriate factors have influenced a ruling.** Moreover, **ISDS threatens the domestic judicial system,** because **public measures can be subject to two diverging legal assessments, which results in legal uncertainty.**

Previous investor-state dispute settlement cases have caused **serious concerns both about the ability of states to maintain domestic regulatory space, but also about the accountability of foreign investors for damage caused** by investment operations in the host state.

In addition, **ISDS establishes a system of judicial protection which is only available for foreign investors.** By definition, ISDS awards benefits to foreign companies which are not given to domestic companies. This **discriminates against domestic companies.**

The EC proposal to include ISDS into an agreement such as TTIP is of highly questionable value. While there are **no substantive arguments to defend the inclusion of ISDS in TTIP,** at the same time the **ISDS system evidently poses real and serious dangers to democratic decision-making and governments' right to regulate.**

While it is true that bilateral investment treaties (BITs) have existed for quite some time, the conventional rationale of BITs was 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. This is, nevertheless **NOT** the situation in the case of the EU and the US as both countries are **characterised by having advanced and well-functioning administrative and judicial systems.** In 2004, Australia and the US refrained from including ISDS in their FTA because of **“the fact that both countries have robust, developed legal systems for resolving disputes between foreign investors and government”.**

Also, academic research illustrates both that the weaknesses and inefficiency of ISDS, and furthermore the research demonstrate that ISDS would **NOT** be beneficial to the EU. On a more all-encompassing point of view, the very harsh criticism of the ISDS system should make anyone proposing this system to **seriously reflect a second time.** **Countries have already take such steps and are as a result determining their BITs,** e.g. Australia, Indonesia and South Africa.