Corporate Europe Observatory, TTIP's corporate super-constitution: debunking the business propaganda over investor rights, 3 July 2014

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Annex: The Commission's ISDS reform plan is an echo chamber of business views

Big business position[1]	**European Commission position as outlined in its consultation document**[2]	**Critical assessment**
"Instead of **categorically rejecting** arbitral proceedings, the current system needs to be **improved**." (BDI)	"The EU will **improve** the ISDS mechanism."	The 'improvements' avoid dealing with the two most fundamental flaws of investment arbitration: one, that it grants special rights to foreign investors, rights that no one else has. And two, that it surrenders to for-profit arbitrators with a vested interest in this privatised judicial system the judicial interpretation of these rights and the awarding of large compensation sums to be paid from public budgets.
"The overriding aim is to strike a **balance** between [the] adequate **protection of foreign investors** and the **right of states to regulate**." (BusinessEurope)	"The objective of the EU is to achieve a **solid balance** between the **protection of investors** and the **Parties' right to regulate**." (question 5)	It is very worrying that the EU does not consider the right to regulate as more important than the protection of private property (such as article 1 of the Protocol to the European Convention on Human Rights does, for example[3]).
States' "right to regulate" regarding the protection of the environment, public health etc. needs to be protected, for example, by integrating public policy **exceptions** known from the GATT regime. (BDI)	The EU will include "**exceptions** allowing the Parties to take measures relating to the protection of health, the environment, consumers etc." (question 2)	The exceptions are narrowly drafted, placing a big burden of proof on governments to justify their actions. Is Australia's plain packaging law for cigarette packs necessary to protect public health? Might there not have been other measures with fewer costs for Big Tobacco? It would be up to a tribunal of private lawyers with lack of accountability to decide. An easy hurdle to pass for investors.
The so-called substantive investor rights "need to be formulated **more precisely**, but **without restricting the level of investment protection**." (BDI)	The EU is "**clarifying** the meaning of those investment protection standards", so that they "cannot be interpreted... in a way that is detrimental to the right to regulate". (question 5). Behind closed doors, the Commission has promised business that it will "keep **the highest possible level of protection**" for investors.[4]	The Commission seems to be playing a double game: promising business the highest level of investor protection while suggesting to the public that it will rein in investor abuse. These options are mutually exclusive. Analyses of the Commission's proposed treaty language suggest that its 'clarification' of investor rights could indeed be interpreted in very pro-investor ways.[5]

Business "supports the idea of a mandatory '**code of conduct' for arbitrators**." (BusinessEurope)	"The EU will introduce specific requirements in the TTIP on the ethical conduct of arbitrators, including a **code of conduct**." (question 8)	This falls very short of real reforms to guarantee the independence and impartiality of arbitrators, such as security of tenure and a fixed salary. Existing codes of conduct have not prevented a small club of for-profit arbitrators from deciding on the majority of investor-state disputes, where they are able to pave the way for more arbitration business in the future with expansive, investor-friendly interpretations of the law.[6]
"It is important that measures to **prevent** investors from launching **frivolous claims** are also taken. Options to consider include a more thorough **review** of claims before proceeding to the arbitration phase." (BusinessEurope)	"The EU will introduce several instruments in TTIP to quickly **dismiss frivolous claims**", for example, through an "early and effective **filtering mechanism.**" (question 9)	The biggest pitfall of this reform: the filtering will be done by for-profit arbitrators, who will make a lot of money if claims go ahead. This conflict of interest might explain why not a single dismissal of a frivolous claim has occurred[7] – even though some existing rules allow for that.
The introduction of the **"loser pays" principle** may also discourage frivolous claimants." (BusinessEurope)	"To further discourage unfounded claims, the EU is proposing that the **losing party should bear all costs** of the proceedings." (question 9)	This wouldn't make any difference to deep-pocketed multinationals, which can pay the legal costs for such lawsuits out of petty cash.
We support "that an arbitral tribunal will only be able to decide on **compensation** and **not** on the **repeal** of a specific **legislative measure**." (Cefic)	"An arbitral tribunal will **not** be able to order the **repeal** of a measure, but only **compensation** for the investor." (question 5)	This won't stop governments from 'voluntarily' repealing measures when a multi-billion-dollar lawsuit has been filed or threatened. The resultant chilling effect has arguably become the main purpose of investor-state arbitration.
"Provide for an **appellate body/review mechanism** to provide coherence to the interpretations of investment provisions in trade agreements." (Transatlantic Business Council)	"The EU aims to establish an **appellate mechanism** in TTIP so as to allow for review of ISDS rulings. It will help ensure consistency in the interpretation of TTIP..." (question 12)	To tackle the problem of bias (not just inconsistency) in the system, the appellate body would need to be made up of independent, tenured judges – not for-profit arbitrators. But it is unclear if that is the EU's proposal. Even then, the initial ruling would still be from for-profit arbitrators with strong potential for pro-investor bias.
Business is "in favour of a **more open and transparent** ISDS mechanism. Although certain **sensitive information** should not be publicly disclosed, the overall ISDS procedure must be more open." (BusinessEurope)	"In ISDS cases brought under TTIP, all **documents** will be **publicly available** (subject only to the **protection** of **confidential information** and **business secrets**) and **hearings** will be **open** to the public." (question 6)	This positive step towards more openness in proceedings has serious pitfalls: exceptions for confidential information and business secrets could severely hamper transparency; and it will be up to for-profit arbitrators to decide whether hearings and documents should be public.

Notes

1 BDI (2014): Position Paper. Protecting European Investment Abroad: A Roadmap for Improved International Investment Agreements; BusinessEurope (2014): Position Paper. Investor-State Dispute Settlement – a Necessary Mechanism to Ensure Investment Protection; BusinessEurope (2014): Speaking points on investment protection and ISDS, TTIP Stakeholder event, 12 March; Cefic Response to the Commission Questionnaire. Confidential first draft, dated 16 May 2014. On file with CEO; Transatlantic Business Council (2013): Comments of the Transatlantic Business Council Concerning the Proposed Transatlantic Trade and Investment Agreement.

2 European Commission (2014): Public consultation on modalities for investment protection and ISDS in TTIP.

3 The article states that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." It then adds: "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

4 European Commission (2012): Report of a meeting with BusinessEurope and ESF on investment, dated 7 November 2012. Obtained through access to documents requested under the information disclosure regulation. On file with CEO.

5 For a critical analysis of the Commission's 'reform' agenda, see, for example: IISD (2014): A Response to the European Commission's December 2013 Document "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)"; Seattle to Brussels Network (2014): Investment in CETA. A response to a lobby document by DG Trade; Corporate Europe Observatory (2014): Still not loving ISDS. 10 reasons to oppose investors' super rights in EU trade deals.

6 Corporate Europe Observatory/ Transnational Institute (2012): Profiting from Injustice. How law firms, arbitrators and financiers are fuelling an investment arbitration boom.

7 See: Inside US Trade (2013): Revised EU Mandate Seeks To Prevent 'Frivolous' Investor-State Claims, 23 May.