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The Trans-Atlantic Business Council (TABC) welcomes the opportunity to comment on the European Commission public consultation on investment protection and investor-to-state dispute settlement (ISDS). The TABC is a cross-sectoral business association representing global companies headquartered in the European Union and the United States. TABC provides one voice for EU and US member companies in the Transatlantic Trade and Investment Partnership (TTIP).

1. **SCOPE OF THE SUBSTANTIVE INVESTMENT PROTECTION PROVISIONS**

The definitions of "investor" and "investment" are foundations to determining the scope of the rights and obligations provided for in international investment agreements (i.e., bilateral investment treaties (BITs) and the investment chapters of free trade agreements (FTAs)). For this reason, a TTIP investment chapter should define these terms consistent with the overarching principle of increasing investment activity across the Atlantic.

With regard to the definition of "investment", the TABC supports a comprehensive, asset-based definition that encompasses the broad array of forms used by European and American investors in the US and EU markets. Such a definition should take into account that capital is fungible, and that investors are continuously adopting sophisticated structures through which they make their investments for a host of legitimate business reasons. In this regard the TABC supports the negotiation of a durable TTIP that will serve as a high-standard model for future agreements. Accordingly, the definition of "investment" should be broad and non-exclusive such that it will cover the types of investments being made today as well as those that may proliferate in the future. Furthermore, the scope of the definition of "investment" should cover all products and services to safeguard investments from discrimination against specific sectors, services, or products.

The Commission has proposed that the definition of a "covered investment" include investments "made in accordance with the applicable law at that time." The TABC shares the aim of the Commission to prevent bribery and fraud and illegal procurement practices. However, it would be necessary to provide guidance on the violations of substantive laws which would prevent protections for "covered investments". TABC considers that minor deficiencies, such as technicalities or errors in administrative procedures should be disregarded because of their limited impact. For example, an investor should not be denied the protections of a TTIP investment chapter if, for example, permits are obtained lawfully but filed incorrectly as a technical matter, a common mistake for foreign investors attempting to navigate often complex legal and administrative regimes at different levels of government.

On the definition of "investor", we concur that the investment protections to be provided for in the TTIP should be limited to investors from the European Union and the United States. Such protections should be afforded regardless, however, of the way in which such investments are structured. To the extent that there are cases where such structures are being used to invest improperly or fraudulently, it is our view that a "denial-of-benefits" clause, which is not uncommon in international tax or investment treaties, can sufficiently address these concerns.



The TABC also supports a definition of “investor” that makes clear that the pre-establishment phase of an investment is covered. This is particularly critical in setting a global standard that will help protect EU and US investors seeking to enter other markets on fair and non-discriminatory terms.

Finally, TABC members believe that an “umbrella clause” should be included in TTIP. Such a clause guarantees that if a host state fails to abide by its contractual obligations to the investor, that the investor may have recourse under the investor-state dispute settlement provisions of the agreement. An umbrella clause, viewed together with the agreement’s other substantive investment protections, provides greater certainty to foreign investors who are often making complex foreign investments that include contractual and other undertakings.

2. NON-DISCRIMINATORY TREATMENT FOR INVESTORS

Non-discrimination is a cornerstone of international economic law and is a core principle of international investment law. However, customary international law and most jurisdictions’ domestic law do not provide a general obligation to treat foreign investors no less favorably than domestic nationals. It is therefore important for a TTIP investment chapter to contain both national treatment and most-favored nation (MFN) obligations.

The TABC's view is that the Commission should seek to avoid the inclusion of general exceptions – other than those identified in the reserved list and the sectors traditionally exempted from international investment agreements, such as public procurement and subsidies – that would reduce the scope of the non-discrimination principle. Accordingly, in order to provide greater legal certainty to investors, any non-conforming measures set forth in the TTIP should be explicitly listed and drawn as narrowly as possible.

Finally, the TABC's members are concerned about the application of measures, including those that are reasonable on their face, in an arbitrary or discriminatory manner. In this regard the TABC is concerned about the Commission’s proposal to limit the TTIP's MFN clause, which should ensure that covered investors and investments under the TTIP receive at least the same protections for their investments than other foreign investors.

3. FAIR AND EQUITABLE TREATMENT

"Fair and Equitable Treatment" (FET) ensures foreign investors receive a minimum level of protection against harmful government actions against their investments.

As the Commission itself has recognized, a FET provision is incorporated in almost all modern investment agreements, including those of EU Member States and the United States. Since it is not practicable to anticipate the range of future State actions taken against investors, the FET standard should remain sufficiently flexible and act as a safety net to safeguard investors where the other more specific standards of protection to be provided in the TTIP cannot provide adequate protection.

On the other hand, the TABC sympathizes with the Commission's aim to provide legal certainty and clarity on the scope of application of the FET clause. These clarifications can provide guidance to the ISDS tribunals when interpreting the FET standard with respect to particular fact patterns. At the same



time, the TABC does not endorse the inclusion of a closed, exclusive list of State measures and actions that may be inconsistent with the TTIP's FET standard. Such an approach would not only run the risk of undermining the core investor protections afforded by the agreement but would also set a negative precedent in third country markets. Rather, the Commission may wish to provide illustrative examples of State measures and actions that are *de facto* inconsistent with the FET standard.

4. EXPROPRIATION

As stated in the Commission's consultation questionnaire, guarantees against expropriation are “at the core of any international investment agreement.” The TABC supports strong protections in a TTIP investment chapter against all forms of expropriation, including both direct and indirect expropriation. The legal standard for this protection is well-established in investment treaties and ISDS jurisprudence and is part of customary international law: foreign investments shall not be expropriated except for a public purpose, on a non-arbitrary or discriminatory basis, with full due process, and with prompt, adequate and effective compensation.

The TABC is of the view that it is important that a TTIP investment chapter apply the same standard of protection for indirect expropriation as it does for direct expropriation. The TTIP's protection against indirect expropriation should encompass any covered investment, including intellectual property rights without qualification.

On the other hand, the TABC fully recognizes that reasonable State measures or actions that regulate investment may not necessarily constitute an expropriation; a fact specific inquiry is required in each instance. The TABC welcomes the opportunity to work with the Commission to develop a TTIP investment chapter that will provide greater clarity around when a State's reasonable measures may constitute an indirect expropriation by enumerating relevant factors to be considered. Such factors may include: (1) the economic impact of a measure; (2) the necessity and proportionality of the measure in order to achieve the public objective; and (3) whether the measure interfered with an investor's reasonable expectations, among others. A TTIP investment chapter need not carve out specific types of regulatory measures or provide for general exceptions to the scope of its expropriation protection.

5. ENSURING THE RIGHT TO REGULATE AND INVESTMENT PROTECTION

The TABC does not believe that the protection of foreign investment is at odds with a sovereign government's legitimate right to regulate in the public interest. With more than 1400 investment protection agreements in place, EU Member States' ISDS history suggests that the protections provided to foreign investors in these treaties have not circumscribed the flexibility of States to regulate. A TTIP investment chapter should continue the long-standing practice of many Member States and the United States by including strong foreign investment protections. Such protections serve both the host States and the foreign investors by supporting the promulgation and enforcement of well-designed, clear and efficient government regulations.

The TTIP should discourage government measures that are unreasonable or discriminatory. One of the over-arching objectives of a TTIP investment chapter should be to reduce the risk to investors of government measures that contain disguised restrictions that harmfully impact foreign investment.



TABC supports an appropriate balance among the particular areas of substantive investment protection. The TABC opposes broad general exceptions such as those detailed in the reference text. Such broad exceptions would unduly diminish investment protections. The TTIP should establish a model for future bilateral and multilateral international investment agreements, and a long list of general exceptions would create the risk of diminishing the high standards of investment protection needed in future agreements.

General exceptions could increase uncertainty in a TTIP investment chapter. A ratified TTIP will apply for decades to come. In light of the changing landscape for foreign investment, a TTIP investment chapter should be flexible enough to permit the assessment of State regulatory measures based on their particular facts. Accordingly, the TABC is of the view that particularized concerns about State regulation should be addressed through clear definitions of key substantive protections, including, as discussed above, "FET," "expropriation" - both direct and indirect, and "national and MFN treatment," rather than through a list of general exceptions.

6. TRANSPARENCY IN ISDS

An important element of a TTIP investment chapter is to ensure transparency in the ISDS process. The TTIP is intended to be a model FTA. As transparency has increased in the ISDS system, it is important that the TTIP reflect these modern trends.

Consistent with efforts by ICSID and UNCITRAL to move toward greater transparency, the parties to an ISDS dispute and the tribunal should make available to the public the essential documents of the dispute, including: awards, decisions and orders of the tribunal; the pleadings of both parties to the dispute; pleadings of any non-disputing party or *amicus curiae* submissions; notice of arbitration and response to the notice of arbitration; any additional written statements or submissions; and expert reports and statements.

The public should have access to the key details of international investment disputes due to the inherently public nature of the State measures underlying ISDS cases but safeguarding companies' confidential business information. Updates on the progress and resolution of an ISDS case are important to keep the public informed of the status of these disputes and the consistency of State measures with international law. Moreover, increased transparency will promote increased certainty and coherence in the ISDS system and assist investors in their assessment of the climate for future investments.

The TABC also supports the ability of third parties to submit *amicus curiae* written submissions to ISDS tribunals, provided this does not interfere, nor cause undue delay, to the tribunal process. Allowing these third-party submissions enables tribunals to receive broader viewpoints with respect to the public policy issues at stake in a particular investment dispute. The TTIP thus should ensure that tribunals and Parties have sufficient discretion to permit third-party submissions and to accord them due weight. This approach will help to ensure that key stakeholders are able to participate meaningfully in the ISDS process.



Finally, in considering the level of transparency to be required in ISDS proceedings, the Commission should balance the public's "right to know" with legitimate confidentiality issues. Tribunals must be permitted the latitude to promulgate reasonable rules to safeguard sensitive and confidential information from public dissemination. This is particularly the case with respect to business and commercial information such as trade secrets, internal financial information, and other proprietary and sensitive information (including but not limited to information protected by legal and/or accountant privilege).

7. MULTIPLE CLAIMS AND RELATIONSHIP TO DOMESTIC COURTS

The TABC agrees that a claimant should not receive more than one award for the same claim. We therefore support the Commission's desire to prohibit claimants from pursuing the same claims at the same time in domestic courts and before an international tribunal.

At the same time, TABC also believes it is important that investors not be prohibited from choosing whether to pursue claims before domestic courts or through ISDS. As the Commission itself notes, there may be times when domestic courts may favor the local government over the claimant. There may also be instances where certain investment treaty claims do not have a direct corollary under domestic law. Any obligations that essentially require a claimant to exhaust local remedies first would therefore be counter-productive and delay recourse to effective relief. Moreover, an investor should not be prohibited from withdrawing from domestic court proceedings in order to pursue ISDS. TABC would also like to note that while we have no objections to a cooling-off period, 180 days seems excessive. We believe a 90 day period would be more appropriate.

8. ARBITRATOR ETHICS, CONDUCT AND QUALIFICATIONS

It is essential to the integrity of the ISDS process that arbitrators be held to the highest ethical standards. We therefore support concrete suggestions that would provide additional guidance for the ethical conduct of arbitrators, including independence and impartiality. We appreciate the Commission's reference to the development of a "Code of Conduct" but are not in a position to endorse this code absent more specifics. It is worth noting that the International Bar Association already maintains Guidelines on Conflicts of Interest in International Arbitration, and we recommend that if the Commission does seek to develop its own Code, it takes these Guidelines into account.

We also urge the Commission to take precautions to ensure that any ethical guidelines are not abused by those who might disagree with an arbitrator's judgment. For that reason, remedies for any breach of a code of conduct would need to be appropriately tailored and not result in an automatic reversal of a judgment.

TABC would also discourage the creation of an approved list of arbitrators. Predetermined, closed lists of arbitrators have proven problematic in practice. ICSID, for example, has difficulty keeping the list updated, and since no one can anticipate which disputes may arise, the arbitrators are chosen in a relative vacuum. Also, to the extent potential conflicts are a concern and there is an interest in seeing a diverse pool of arbitrators in ISDS disputes, a closed list can unfortunately limit the options available to the parties.



Finally, TABC also suggests specific qualification requirements for arbitrators, such as experience in “international law and international investment law and, if possible, experience in international trade law and international dispute resolution,” are not necessary.

9. REDUCING THE RISK OF FRIVOLOUS AND UNFOUNDED CASES

It is appropriate for investment treaties to include rules on the dismissal of frivolous claims. The ICSID Arbitration Rules, for example, provide for expedited dismissal of such claims. Such rules, however, should not be so restrictive as to serve as a barrier or disincentive to pursuing justified investor claims under TTIP.

TABC strongly opposes a blanket “loser pays” rule. Many cases are difficult and complex, and losing a case does not necessarily mean that the loser should bear all costs. We believe the better practice is to provide the tribunal with discretion to determine fees and costs.

10. ALLOWING CASES TO PROCEED (FILTER)

As the Commission itself notes, some investment agreements have introduced mechanisms granting the regulators of the Parties to the agreement the possibility to intervene, particularly in cases that involve measures taken for prudential reasons. While TABC supports efforts to protect the integrity of the financial system, we also oppose any sector specific or product carve outs. As such, we believe that any use and scope of a filter for prudential measures must be carefully defined and circumscribed so as not to sweep in legitimately covered activity.

11. GUIDANCE BY THE PARTIES (THE EU AND THE US) ON THE INTERPRETATION OF THE AGREEMENT

TABC is generally supportive of the Commission’s proposed approach. We do not have concerns about general guidance being provided by the parties so long as it is clear that any guidance would not be retroactive, i.e., it would not apply to existing cases filed before the interpretation issues.

12. APPELLATE MECHANISM AND CONSISTENCY OF RULINGS

TABC is not convinced that an appellate mechanism is necessary, and there are a lot of questions about how such a mechanism would operate and be constituted within the confines of a single investment agreement. Absent greater details about how such a mechanism would work, we would request that the Commission provide additional guidance about how such a mechanism would work in practice before moving forward with any such proposal.

13. GENERAL ASSESSMENT

ISDS is an integral part of any modern investment treaty. It provides an efficient and neutral forum for the resolution of disputes arising out of foreign investment. ISDS and the substantive protections in an investment treaty also greatly increase legal certainty and minimize risk when an investor is assessing whether to invest in a particular foreign market. Therefore, the TABC is strongly of the view that ISDS should be included in a TTIP investment chapter.



We are concerned that many of the questions in this survey suggest that there is a crisis in today's system. TABC would argue that EU experience, based on the more than 1400 Member State investor protection agreements, suggests otherwise. While the TTIP provides an opportunity to address any significant, evidence-based criticisms of existing agreements, it is also important not to lose sight of the importance of robust investor protections for both economies. Anything less would create significant uncertainty for investors, rollback existing protections in this area and set a negative precedent in third country markets.

European and American investment represents the majority of the world's foreign investment. There is thus a transatlantic common interest in ensuring that the TTIP supports a secure and stable investment climate, protected by the rule of law and clear, transparent standards. This is critical not only for the investments to be made under the auspices of the TTIP but also to set a high standard for future investment agreements.