POSITION PAPER

AmCham EU response to EU proposal for investment protection and Court System for TTIP

European Commission proposal for an Investment Court System a step backwards and would weaken investment protection

Executive summary

A robust Transatlantic Trade and Investment Partnership (TTIP) investment chapter should include all of the core substantive legal obligations (i.e. prohibition on nationality-based discrimination; obligation to accord fair and equitable treatment (FET); obligation to provide prompt, adequate and effective compensation for both direct and indirect expropriations) as well as effective investor-state dispute mechanism.

AmCham EU is concerned that the European Commission's proposal appears to weaken rather than strengthen investment protection.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €2 trillion in 2014 and directly supports more than 4.3 million jobs in Europe.

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Introduction

AmCham EU restates its support for the inclusion of robust investor provisions within TTIP; without investment provisions, we do not believe TTIP can fulfill the EU objective to act as a blueprint for twenty-first century trade agreements. AmCham EU reiterates its concerns with the Investor Court System proposal which we believe would benefit from additional analysis.

A robust TTIP investment chapter should include all of the core substantive legal obligations (*i.e.* prohibition on nationality-based discrimination; obligation to accord fair and equitable treatment (FET); obligation to provide prompt, adequate and effective compensation for both direct and indirect expropriations) as well as an effective investor-state dispute mechanism.

However, we have concerns that the Commission's proposals with respect to investor protection appear to take major steps backwards, in ways that would weaken rather than strengthen investment protections as compared with Bilateral Investment Treaties (BITs) (including the nine existing US-EU Member State BITs) and FTAs.

AmCham EU's response

The Commission has undertaken serious efforts to secure political support for investor protection within TTIP by the European Parliament and Member States and, as a result, the EU debate has moved on from 'should there be investor protection provisions?' to 'what kind of protection should we ensure for EU companies?'

AmCham EU welcomes the more constructive environment in which the debate is now taking place. We welcome debate around the transparency of proceedings and conflict of interest provisions for those making the rulings in investor-state dispute processes. Given foreign investors may have suffered prejudicial treatment by a host state, we support the principle that investors should not have to demonstrate an exhaustion of local remedies before triggering investor-state dispute mechanisms. We also welcome clarity provided by the EU proposal regarding the involvement of and constructive role that civil society can play during ISDS hearings.

Nevertheless, in our capacity as US investors committed to Europe, we have serious concerns with elements of the EU proposal, notably:

- The more prominent role that the Commission proposes for the investor's home state in the resolution of disputes between the investor and a host state. This runs counter to one of the key protections offered by ISDS to date: the depoliticisation of disputes via a neutral, third-party forum.

- A closed list approach to the host state's obligation to accord Fair and Equitable Treatment (FET) to investments of foreign investors and to limit conduct considered to be a breach of the FET obligation. This is discriminatory and undermines the very principle of investor protection.

- Reinforced recognition, via treaty text, of a state's 'right to regulate in the public interest'. Rather than a 'clarification', we are concerned this has the potential to be used as a 'catch all' clause to justify breaches of FET. Nothing in any trade or investment agreement amends or challenges the fact that governments not only have the right to regulate but that this is one of a government's most basic functions. Regulation, however, must be non-discriminatory, based on sound science and contribute to or deliver its stated policy objective. Regulations that do not meet these criteria and that impinge on investor rights should be subject to review in a neutral forum. The right to call a state to account when fundamental legal principles and international obligations are considered not to have been respected must also be present in EU and international law. It is perhaps worth reiterating that referral to neutral bodies when a dispute arises results more often in success for governments than for investors.

- Limitation (or elimination) of treaty provisions that make a state's contractual and other undertakings to foreign investors subject to treaty-based arbitration (*i.e.*, independent of whatever contract- or statute-based dispute settlement provisions may be agreed). This means investors who have suffered discrimination based on contracts may not have access to a neutral forum but could remain dependent on national dispute settlement processes. This undermines a core principle of international law that has operated successfully for more than fifty years.

- The lack of clarity around TTIP Parties issuing 'binding interpretation' of a treaty provision and imposing this interpretation on court proceedings. Specifically, the potential for Parties to use this to their advantage during a dispute. The Commission's proposal suggests that the US and EU could change the rules of the game in the middle of a dispute settlement proceeding. AmCham EU recommends that an appeals mechanism be put into place only in the event that a state is considered to be abusing its position. AmCham EU also recommends that binding interpretations issued by the Parties apply only on a prospective basis and not to any initiated proceedings.

- Under the current model, when a dispute arises, the investor and the state each select an arbitrator and then endeavor to agree on a presiding arbitrator. They are on equal footing when it comes to composition of the arbitral tribunal. However, under the Commission's proposal, the judges on the investment court would be selected by the US and EU governments. The investor in a given dispute would have no say. This further tilts investor-state dispute processes in favour of states.

- AmCham EU believes it is important to ensure that small and medium sized enterprises (SMEs) have adequate recourse to investor-state dispute procedures. The proposal to allow 'fast track' processes is a welcome development but runs somewhat counter to the EU proposal to introduce the 'loser pays' principle which may dissuade SMEs.

- In addition, we do not believe that the establishment of a permanent, international investment court to replace the current arbitration system will garner sufficient political support from the US Congress.

The Commission's proposal to create an appellate court for investment (whereas the US to date has stated only that it is prepared to discuss the *idea* of an appellate body, as has Canada) also raises concerns in terms of the standard of review; the scope of review (i.e., whether to include factual findings); availability of remand and subsequent appeals; and relationship of appellate review to the existing mechanisms for set-aside or annulment review.

As the negotiations on the investment chapter take shape, AmCham EU remains committed to engagement with both the EU institutions and the US government and hopes that the investment chapter will not impact the political timeline for negotiations overall. AmCham EU echoes the call to maintain the ambitious goal to conclude negotiations on TTIP by the end of 2016.

Context

On May 5, 2015, the Commission issued a Concept Paper: "*Investments in TTIP and Beyond—The Path for Reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an investment court.*"

Keeping very closely to the 'reforms' and 'improvements' laid out in the Concept Paper, the Commission released its proposed negotiating text for investment provisions within TTIP in late September 2015. From the perspective of the Commission, the goal is to propose a blueprint for investment provisions in all future EU trade agreements.

The proposal was presented formally to USTR in November 2015 following input from Member States and informal consultation with the European Parliament. Negotiations on investment protection provisions began during the 12th round of TTIP negotiations.

Foundations of the EU approach:

- The starting point between the US and the EU is not a blank slate. There are 1990s-era BITs in force between the US and nine EU Member States (Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, Slovakia). These BITs are more investor-friendly than the current U.S. model BIT.
- The Commission proposal builds on the investment chapter in the recently concluded Canada-EU Trade Agreement (CETA), but strengthens a state-oriented (as opposed to investor-oriented) direction. There is significant evidence to show that states 'win' the majority of ISDS cases under the current system. The Commission proposal appears to provide additional *structural* support for states. This raises concerns that elements of the proposal are a response to NGO concerns, some of which are not well founded.
- The Commission developed its text fully aware of the Trans-Pacific Partnership (TPP) negotiation between the US and Pacific-rim countries, but in isolation from that negotiation, which does not include the EU. The EU approach deserves careful consideration in relation to investor protection provisions agreed under TPP to ensure compatible trade systems or, at the very least, trade systems that do not create divergent approaches.