ESF2016-01

Mr. Henk Kamp
Minister for Economic Affairs
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THE NETHERLANDS

Brussels, 29 January 2016

Subject: **ESF Position Paper on European Commission's Proposal on investment protection and an investment court system in TTIP**

Dear Minister Kamp,

I am writing to send you the European Services Forum (ESF) Position Paper on the Commission's Proposal on investment protection and an investment court system in the Transatlantic Trade and Investment Partnership (TTIP). This has recently been transmitted to the US negotiators. All our comments are guided by the important consideration that the Commission's proposal is intended as a general template to be used beyond the TTIP negotiations.

European investors look to international investment agreements to promote high standards in investment protection and property rights. We believe that these are fundamental to market economies such as the US and EU; and TTIP should set the standard in this field. The ESF is however concerned that the level of protection for outward European foreign direct investment (FDI) could be seriously diminished under the proposal, when compared with the level of protection under the existing 1400 Bilateral Investment Treaties signed by the EU Member States with trading partners across the world.

When EU investment policy began to develop in the wake of the Lisbon Treaty, one repeated point of principle was that its objective was to safeguard EU business interests. This assurance was reiterated by the Council's TTIP negotiating mandate to the Commission in 2013, which clearly stated that "The aim of negotiations on investment will be to negotiate investment liberalisation and protection provisions (…) on the basis of the highest levels of liberalisation and highest standards of protection that both Parties have negotiated to date."

Having considered the Commission's proposal, and acknowledging the benefit of some reforms, the ESF is concerned that it represents an erosion of previous levels of investment protection, with the risk that disputes will be more difficult to bring, except in clear cases of direct expropriation. The "loser pays" principle is also likely to be an additional deterrent to SMEs to try to obtain redress.

European services industries take the view that the Commission has not made a clear case for abandoning the system established by the Conventions of the United Nations and the World Bank. The new proposal appears to alter the previous balance between complainant and defendant – a factor of particular importance for a proposal designed to operate in various jurisdictions across the world with differing standards and approaches.

As the system set out in the proposed Chapter will be presented to the EU's trading partners as the EU's preferred system, ESF urges the Commission to carry out a general study of its potential impact on EU investment flows and effective investment protection. A specific country-analysis should also be undertaken every time that the Commission intends to negotiate a system of investment protection with a target country, so that it can be taken into account in the negotiating mandate to be given by member-states to the Commission.

We remain at your disposal for any further information.

Yours sincerely,

Sir Thomas Harris
ESF Chairman

Cc: Commissioner for Trade Ms Cecilia Malmström

January 2016

ESF Position Paper on
The Commission's Proposal on Investment Protection in TTIP

Executive Summary:

- The EU needs to have strong investment protection policies, both to ensure that the EU will continue to attract FDI creating jobs and growth and so that EU businesses benefit from strong investment protection when they invest abroad, contributing to global growth and jobs.
- In general, investment arbitration against a host state is a last resort solution used – very reluctantly – by investors. Against this background, the European Services Forum (ESF) welcomes the Commission's aim of achieving a balanced approach that encourages investment while satisfying public policy objectives. However ESF believes that the Commission's Proposal for a new Investment Chapter in the TTIP Agreement will not provide EU investors and investments with adequate legal certainty and a stable, predictable, fair and properly regulated environment in which to conduct their business.
- ESF welcomes the fact that, unlike the CETA investment provisions, the proposal would not make the financial sector subject to a filter. Nevertheless, it takes the view that, under the Commission proposal, the protection afforded to European investors will diminish in comparison with the level of protection offered in the best examples of EU Member States' existing BITs. The effect of the Commission's proposal appears to be to increase the Commission's and governments' influence over the dispute resolution process, which ought to be neutral. Small and medium enterprises (SMEs), whose interests the EU seeks to serve, are likely to be those most affected by any reduction in protection and increase in costs.
- If there is to be a statement of the right to regulate, it should include, as a provision of international public law, and as a necessary part of a chapter on investment protection, a clear indication that whenever the parties activate their right to regulate, the right should be exercised in a non-discriminatory way.
- The form of investment protection proposed by the Commission (Section 2 of the proposed Chapter) looks likely to have the effect of making it virtually impossible "except in rare circumstances" for investors to win a case in a claim alleging indirect expropriation. These are the key cases in which a neutral arbitral approach is needed. The fact that the proposed Chapter is intended to be used as a template for future investment chapters or agreements with the EU's trading partners causes this to be of great concern to the ESF.
- The ESF has major concerns over the proposed new Investment Court system's ability to deal with dispute resolution (Section 3), and its quality in terms of offering sufficient guarantees that investors will benefit from judicially neutral treatment and obtain legitimate compensation.
- Moreover, as the system set out in the proposed Chapter will be presented to the EU's trading partners as the EU's preferred system, ESF urges the Commission to carry out a general study of its potential impact on EU investment flows and effective investment protection. A specific country-analysis should also be undertaken every time that the Commission intends to negotiate a system of investment protection with a target country, so that it can be taken into account in the negotiating mandate to be given by member-states to the Commission.

A. Definitions specific to investment protection

ESF is supportive of clearer definitions in the text of the investment protection chapters but would recommend that exceptions to the rules should be kept to a minimum, since they often can be a source of diverging interpretation triggering more disputes and uncertainty.

1. Definition of "investment": commercial contracts for the sale of goods and services

ESF is surprised that the Commission has retained the definition used in the text of the draft Comprehensive Economic Trade Agreement (CETA) between the EU and Canada, instead of the definitions used in the draft EU-Singapore FTA, which has been finalised more recently.

ESF does not support the blanket and seemingly arbitrary exclusion from the definition of "investment" of "*claims to money that arise solely from commercial contracts for the sale of goods or services...".* We understand that the original intention was to exclude cross-border services from the investment protection. But we would like to have further clarification from the Commission on the reasons for this carve-out which could exclude from the protections of the treaty, for example, financial services and products which would have the characteristics of an investment. For example, a hedging agreement with a 12-month term fulfils the criteria for an investment, namely contribution, risk and duration[1], but would likely be excluded.

Claims arising under other types of contracts for the sale of goods and services which nonetheless constitute investments may similarly be excluded from the intended scope of the treaty. An example is a contract of worldwide telecommunication services to a client, where only the small tangible part of the investment will be protected but not the value of the contract, which is the raison d'être of that investment.

ESF therefore advocates the deletion of the paragraph starting with the words "*For greater certainty*..." in order to allow for a more accurate and fairer fact-based assessment by a tribunal/court as to whether a particular contract for the sale of goods and services has the characteristics of an investment as set out in the definition starting with "*Every kind of asset...*" including items (a) to (i). In addition, it should be noted that this paragraph in its current form may be difficult to reconcile with the main definition of "investment" including, in particular, sub-paragraph (i) which provides that: *"Forms that an investment may take include....(i) claims to money or claims to performance under a contract"*.

Finally, we would like to point out that existing International Investment Agreements (IIAs) do not contain the reference to the investment being of "certain duration" (see second line of the definition of "investment". It is unclear to us what this phrase exactly means but it looks capable of being exploited by a defendant to at the very least prolong the proceedings.

2. Definition of "investment": management contracts

ESF would like clarification on whether, in the definition of "investment", paragraph f) "an interest arising from i) concession conferred pursuant to domestic law or under a contract, (…) covers also management of construction contracts. In the vast majority of the existing 1400 European BITs and in the draft EU-Singapore FTA, the definition of this kind of investment reads: "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts". In the current proposal the word "management" has been excluded from the definition of investment. This is an important form of services related in particular (but not only) to public procurement contracts. ESF would strongly advocate the express inclusion of management contracts in the definition of investment.

B. Section 2 – Investment Protection

ESF would like here to reiterate its previous public comments where we expressed our regret that the underlying purpose of investment protection appeared to have shifted, at least to a degree, away from protecting EU investors from possible discriminatory measures adopted by the authorities of the other party. The proposed TTIP Chapter however reads as if its purpose may be to protect the EU and its member states against foreign investors. As the level of protection of investors and investments decreases and the level of risk for investments increases, this will raise the cost of investment, as businesses price in the additional risk. This will very likely have a negative impact on the flow of foreign direct investment, especially the ability of SMEs to directly invest in third countries.

[1] *Deutsche Bank AG v Sri Lanka* (ICSID Case No ARB/09/02), Award, 31 October 2012, paras 296ff

On the other hand, it is noteworthy that, unlike the EU-Canada CETA provisions, the proposed chapter would not exclude the financial services sector, which would accordingly benefit from the investment protection like any other sector. This move is welcome, with the caveat regarding the possible exclusion of hedge funds operations (see above).

Article 2 – The right to regulate

Article 2 reaffirms the right of the Parties to regulate. ESF questions whether the EU and its member states need to reaffirm their own existing rights, which are uncontested. To do so suggests a certain lack of confidence in the rights and powers of institutions. If there is such a statement of the right to regulate, it needs to include, as a provision of international public law, and as a necessary part of a chapter on investment protection, a clear indication that whenever the Parties activate their “right to regulate”, the right should be exercised in a non-discriminatory way. Such a provision would be of real additional value.

This said, ESF is extremely concerned that the right to regulate is very broadly expressed, almost as if it were a warning to investors. This contradicts the implicit purpose of such a provision, which should be to reassure foreign direct investors that they are welcome and will benefit from legal security for their investment.

We acknowledge that Paragraph 1 refers to the necessity test, but given the very broad scope of the “right to regulate”, ESF calls for some express language reaffirming that the Parties shall always respect the principles of necessity and proportionality when exercising this right.

Given the Commission’s published intention to use such a chapter as a template for all the other forthcoming investment agreements by the EU, ESF is concerned that this very broad definition of the “right to regulate” can be a tool by a government - where the rule of law is less strict than in the EU or the US - to unilaterally justify the lifting of the investment protection, when felt convenient. Contrary to Article 3 §3 where a revision needs to be agreed by the two Parties, and hence provides a certain mutual control, nothing in this Article 2 would prevent one of the Parties to have its own possibly abusive definition of its “necessary” “right to regulate” that might result in depriving the investor of the supposed protection granted by this Chapter. ESF calls upon the European institutions to seriously assess the possible impact of an abusive interpretation of this right to regulate and at the very least establish the possibility of a mutual control by the two Parties of that interpretation.

The insertion of new paragraphs 3 & 4 on state aids appears to confirm that the Commission is introducing an added protection for governments, as a reaction to recent intra-EU ISDS cases.

Article 3 – Fair and Equitable Treatment - FET

- Paragraph 1 = ESF supports the obligation to grant foreign investors “fair and equitable treatment” (FET) in the TTIP. Other treaties, and in particular those signed by the United States, refer to the concept of “customary international law”, but this is considered by many European investors to provide a lower level of protection and represents a minimum standard for the treatment of property or foreign investors.

- Paragraph 2 = the proposed definition of FET might lead to a significant narrowing of the protection to investors: ESF supports the EU’s aim of bringing more clarity to the meaning of FET. However in our view, the proposed definition carries the danger of a significant narrowing of the protection currently afforded to investors. In particular, the references to “manifest” arbitrariness, “fundamental” breaches of due process and transparency, “targeted” discrimination imply a very high threshold of misconduct, tantamount to bad faith, in order to establish a breach of the right to FET. The consensus among investment lawyers in this area is that there is no requirement for an investor to prove bad faith in order to establish a violation by the state with this obligation of FET[2]. And, there seems no doubt that these supposed “clarifications” of the meaning of the FET could lead to more dispute, not to less, as intended.

[2] *see Técnicas Medioambientales Tecmed SA v Mexico (ICSID Case No ARB (AF)/00/2), Award of 29 May 2003, at para 153 and Biwater Gauff (Tanzania) Ltd v Tanzania, (ICSID Case No ARB/05/22), at para 602.*

Therefore, in order to avoid legal uncertainty and the lowering of investment protection, ESF urges the Commission to propose a clearer wording.

- Paragraph 3 = the right of the Parties to revise the content of the FET obligations must be more clearly circumscribed. This paragraph as it stands could convey a message that governments retain the right to modify protection of an investment, for instance after losing a case. We understand that for this revision to be accepted, it would need both parties' consent, but ESF would nonetheless like to see more transparency for the revision process. The work of the various joint committees in the EU FTAs is usually behind closed doors. The importance of such a revision process should at least entail consultation with stakeholders, as proposed by the European Commission in the TTIP Horizontal Regulatory Cooperation proposal. It should be clearly specified that any revision should go through the normal and transparent legislative process involving the EU institutions, and not only the members of the Joint Committee of the FTA.

- Paragraph 4 = This wording narrows the protection currently afforded to investors under FET by eliminating, as a stand-alone right, respect for legitimate expectations arising from specific representations by a state to an investor to induce a covered investment. The proposed text, using the word "a tribunal may …" is too weak. ESF would urge the Commission to re-introduce this protection as a separate element of FET in Paragraph 2, or at the very least to change "may" to "shall". This would not deny a Party's right to exercise sovereign powers because the legitimacy of the investor's reliance on the state's conduct must take into account the Party's reasonable right to regulate domestic matters in the public interest. And the right to regulate is already (amply) emphasised in Article 2.

Article 5 and Annex I – Indirect expropriation

One of the fundamental protections provided by investment protection agreements is the prohibition of expropriation without fair, prompt and effective compensation. The problem here lies in Paragraph 2 of Article 5, which requires judges to interpret this prohibition of expropriation in accordance with Annex I.

Paragraph 1 of Annex 1 = Direct expropriations, like for instance nationalisations, rarely lead to disputes because public authorities usually abide by the rules of fair compensation, although recent examples of nationalisation in Argentina or in Venezuela are a reminder of the importance of these basic protections. We therefore welcome the explicit protection of the direct expropriation, since this chapter in TTIP seems intended as a template for other investment chapters of other EU FTAs or BIAs.

We also welcome the explicit indication that expropriation may be also indirect (Paragraph 1 (b)). An important number of claims introduced in the last decade were indeed about alleged indirect expropriations by investors arguing that an administrative measure of some sort would have deprived the investor of enjoying the fruit of an investment, including legitimate profit expectations.

Paragraph 2 of Annex 1 = ESF understands the willingness of the EU to clarify that the simple fact that a state measure has an impact on the economic value of the investment does not automatically justify a claim that an indirect expropriation has occurred. But nor should a claim be automatically excluded. When necessary, such a claim should be examined on a case-by-case basis and ESF therefore supports the approach at Paragraph 2 of the Annex on Expropriation which requires the tribunal to conduct a fact-based inquiry.

Paragraph 3 of Annex 1 = ESF recognises the right and responsibility of a Party to protect "legitimate policy objectives". However, this paragraph raises great concerns for ESF. By stating that "except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, (…) non-discriminatory measures do not constitute indirect expropriations", the Commission proposal is de facto reducing the trust that foreign investors should have in EU investment protection. This wording appears to ESF to require judges to accept that it will virtually never be possible for an investor to claim indirect expropriation, and hence annihilates the content of Art 5 and Paragraph 1 of the Annex.

In this regard, ESF would support a less prescriptive approach which would allow the tribunal/court to make a determination following the fact-based inquiry with reference to the general criteria at paras 2(a) to (d) of the Annex, including the extent to which the government action interferes with distinct reasonable investment-backed expectations.

To reiterate, we do not seek to question the right of a government to radically change its policy in one domain or another. But, if that policy is discriminatory or amounts to direct or indirect expropriation, that government must take full responsibility of the consequences of that new policy and adequately compensate domestic and foreign investors who took long term investment decisions with good faith economic expectations. For instance, when a state changes its policy in a given sector, this can be done by respecting all the criteria listed at Paragraph 3 of the Annex, i.e. for a legitimate public purpose, to protect health or/and the environment, etc.; and it is possible that the only way to achieve such a policy would be to decide to close down some types businesses related to that sector, which will probably not be considered to be a measure "manifestly excessive in light of its purpose". Does this mean that all operators (domestics and foreigners) who invested in that targeted sector can be expropriated without receiving any compensation? We believe that this should not necessarily be the case. Our understanding is that this could correspond to an indirect expropriation, and hence be eligible for compensation (including for the loss of profits).

ESF calls the negotiators to better assess the implications of paragraph 3 and recommends its deletion. The plain message of this paragraph to the investors is that the EU and the EU governments will (except in rare circumstance, i.e.) nearly never lose an investment dispute case. But is also would mean that any EU investors will also not have much chance to win a case against the government of the country it would have invested. The EU has made clear that this chapter will serve as a basis to investment chapters with other trading partners. It means that those countries with which the EU will negotiate in the future will also have the possibility to change their legislation or regulation or administrative acts at any time for any broad reason linked to "legitimate policy objectives", and our companies will not be able to get any compensation even if it might be clearly discriminatory. The economic, business, legal and political realities are very different in these countries and there is an urgent need to first understand what might be the potential impact of such a text on the investment flows and the protection of European investors abroad.

As EU investment policy began developing after the ratification of the Lisbon treaty, one point of principle that was repeated by the European Commission to investors was that its objective was to safeguard EU business interests. The Council mandate to the Commission clearly stated that "The aim of negotiations on investment will be to negotiate investment liberalisation and protection provisions (…) on the basis of the highest levels of liberalisation and highest standards of protection that both Parties have negotiated to date."(See mandate here). This Commission has frequently assured EU investors that business protection will not be lowered and that overseas investments by EU business should continue to enjoy the best protection available under whatever investment agreement offers the highest standard of cover, whether an EU investment agreement, or a Member State's bilateral BIT. Should this paragraph remain, this objective will have failed.

C. Section 3 - Resolution of Investment Disputes and Investment Court System

1) General preliminary comments

The political perceptions in Europe and by civil society do not correspond to the facts and it is regrettable that EU institutions have not sufficiently explained the facts & figures and the ISDS system itself, which is established by international institutions that the EU usually supports. The UN and World Bank rules and practice on international arbitration are all deeply embedded in the 3200 Bilateral Investment Treaties worldwide, including in the 1400 EU member state BITs, the vast majority of which will remain legally binding for a long period of time. So, should the new investment court system be agreed by the two parties in TTIP, the current ISDS system will continue to exist in parallel.

The international arbitration system has been established by countries, not by companies. The ICSID convention and the UNICITRAL convention are part of international public law, ratified by EU member states and hundreds of government across the world. Not by private companies.

The International arbitration system is not about preventing a government from enacting legislation to regulate. An arbitration tribunal is not empowered to ask a government to change its legislation or regulation. Furthermore, 90% of all ISDS cases concern administrative measures, not legislative acts.

It is important also to reiterate the fact that the EU trade and investment policy will have an impact only on non-EU foreign investors. Among the 608 known ISDS claims (of which 356 cases are concluded) in the last 50 years, only 29 cases were directed against EU countries by non-EU investors (5% of total cases!). Only about 25% of these cases (i.e. +/- 8) were decided in favour of the investor with compensation. The average of these compensations was about 10 Mio US$. In exchange, the EU has attracted more than 4 trillion Inward FDI stocks in 2013 thanks to the legal certainty that the EU is providing to the foreign investors.

On the other hand, the 1400 BITs have provided valuable protection to European investors, and the EU companies are indeed the greatest users of the ISDS system, in particular in countries where lack of political neutrality lead to discriminatory measures. ESF therefore requests the European institutions to conduct a proper impact assessment of the proposed new system and the effectiveness of the new investment protection, in particular in countries where governments might have a very extensive notion of their "right to regulate", and where the necessity and proportionality tests might not carry the same meaning as in the EU and in the United States.

We would express some surprise that the Commission has gone so far in its proposal for a new system for resolution of investment dispute without any attempt to meet possible US concerns and the principles set out in the US Model BIT, which has now gained added acceptance in the recently concluded Trans Pacific Partnership. Looking at the U.S. policy on these matters over recent decades, we envisage that the Commission's proposals to establish a new Court – whose judgements would be binding on US entities (Article 30 §2) - would be probably seriously questioned by the U.S. TTIP negotiators. This can be expected to further delay progress towards the conclusion of the agreement.

2) A dispute resolution system must be neutral

Let first reiterate that dispute against the government in which it invested is a last resort for an enterprise. Businesses have used the ISDS system since that was the only system that was put at their disposal by states via the ICSID, UNICITRAL and other conventions. We hope that the proposed new system, provided that it is politically neutral and non-discriminatory, could lead to acceptable resolutions to the disputing parties.

Bilateral Investment Treaties or Agreements are instruments of international law, under which two parties commit to each other that they will not discriminate against investors of the other party because of their (foreign) nationality. The parties undertake that they will provide fair and equitable treatment and full protection and security, and finally, they commit to pay prompt, adequate and effective compensation in the event of expropriation; and that they will allow the free transfer of funds between investors and their investments.

Investor-state dispute settlement ensures that these commitments can effectively be enforced by individual investors that might be affected by a violation of them, without dragging the government of the investor's Party into the dispute. Neutral third party arbitration is used specifically to avoid that a government (by definition, always the defendant) is called before an international court, the aim being to avoid any politicisation of a case.

Let us highlight the main aspects of international investment arbitration that this new "system" changes. First, governments alone appoint the judges, when governments are, by definition, the defendants in every case. Therefore, in this new system, the defendant can be seen as "judge" and "party". The claimant has no right to choose a panelist/judge. If the three judges of a "Division" are fully independent and neutral in the cases that they will handle, the system will be acceptable. But national or international politics could interfere, negating the whole concept of neutrality of the "arbitration court". The new system does not give any guarantee against possible "politicisation" of the tribunal. Nationals of the Parties to the dispute

are on the panel, although the lead roles are reserved to non-nationals. It must be recalled that in ICSID, panelists may not be of the same nationality as the claimant and respondent. If the EU wants to introduce a new "court" system, it must set up a fully neutral court. A judge is not supposed to be for any party to a case, but is meant to deliver justice. We can hope that this would be the guiding rule of a "Division" in a case under the TTIP. But can it be guaranteed that this model will be respected in other investment agreements? Can a system be trusted to ensure full neutrality in all cases in any jurisdiction? If there is any doubt on the point, the new system will put a heavy burden on the "neutral" member of the "division", who will be also the chairman, with a decisive position.

At this point of the analysis, ESF has not yet made detailed comments on all the provisions of this section 3. We have focussed our comments only on the aspects where, at this stage, we have identified significant concerns.

<u>Article 4 – Consultations =</u> ESF would like to indicate that Articles 2 (Amicable Resolution) and 3 (Mediation) of Section 3 already provide a sufficient encouragement for parties to attempt to amicably resolve any disputes. In general, investment arbitration against a host state is the last resort solution used by investors very reluctantly – hence mandating a compulsory consultation only extends the process unnecessarily. Therefore, we believe that this Article 4 should be removed. Moreover, if this article is retained, we consider that any consultations should take place in a neutral location to increase their chances of success. Finally, paragraph 5 of this article provides that the request for consultation should be submitted "*within three years of the date of which a claimant first acquired, or should have first acquired (emphasis added), knowledge*…" This language significantly increases the onus of proof falling on investors and will make it very difficult to successfully initiate any case as it is relatively easier for a defendant state to prove that an investor "*should have* "known about some action or behaviour. These highlighted words should be deleted.

<u>Articles 5 (Request for determination of the respondent) & 6 =</u> Article 5.1 states that if the dispute cannot be settled within 90 days of the submission of the request for consultations, the claimant should send a notice for determination to the EU. The EU has <u>60 days</u> to inform the claimant about the determination concerning the respondent (Paragraph 3). On the other hand, Article 6 states that the claimant can only submit a claim after <u>*at least three months (i.e. 90 days)*</u> have elapsed from the submission of the notice requesting determination of the respondent pursuant to Article 5. This would mean that for at least 30 days after the determination of the respondent the claimant cannot initiate the claim. ESF would like to ask the Commission whether there is any reason for extending the process unnecessarily. We believe that the claimant should be able to submit the claim as soon as the defendant is identified.

<u>Article 6 - Submission of a claim =</u> With regard to paragraph 5, we would suggest that in certain instances not only may it be cost prohibitive for many claimants to file individual claims but it would also be practically impossible for the TTIP arrangements or any other investment court to deal separately with claims which would otherwise be dealt with in a form of a mass claim (for instance in relation to sovereign debt restructuring). This may in certain instances equal a denial of justice. This would be highly undesirable, given that all of the investments would otherwise be protected under the TTIP or any other IIAs.

<u>Article 7 - Consent</u> & Article 30 – Enforcement of awards = we note that this article refers to the fact that the Parties accept to refer to the New York Convention for the Recognition and Enforcement of the Foreign Arbitral Awards. But we also note that, unlike CETA, there are no references to the New York Convention in the key article dealing with the enforcement of award (Article 30). We would welcome an explanation of this difference.

<u>Article 9 - Tribunal of First Instance</u>: ESF would want to see the process by which the judges will be appointed to be effectively transparent and impartial. We welcome the fact that third country judges will chair the "division", as it is the case in the ICSID and UNICITRAL arbitration panels. It is not clear however whether that president will have sufficient authority and ability to take a decision if the two other judges (nationals of the two disputing parties) are strongly divided on the case. The complainant has no right to choose one of the panelists; they will be chosen "at random" from the pool of 15 nominated judges. These adjustments risk skewing the process in favour of the (defendant) state. We believe that the claimant

should at least have the right to choose a judge among the government-approved lists upon its competence on the particular case.

Moreover, one frequent criticism against the current system of ISDS is that it is controlled by an elite of a few arbitrators. In order to remedy this, the Commission proposes to limit the number of possible arbitrators even further. Rather than having some 951 panelists to choose from as under ICSID, they limit it to a universe of 15. The ESF doubts whether this is the optimum approach. It is not true that arbitrators are private individuals chosen by corporations. In the current ISDS system, the panelists are generally taken from the ICSID register – created by each of the 151 contracting parties nominating 4-8 people, although the complainant may choose a panelist not on the roster (this guarantees that at least two panelists will be from the roster, those nominated by the state and the presiding panelist). The CVs of the ICSID potential panelists are (generally) available on the ICSID site. They are almost universally people who can claim a high degree of respect and knowledge in international investment law.

Article 13 – Applicable law and rules of interpretation: With regard to paragraph 5 of this article we would like to indicate that the concept of legal certainty is a cornerstone of the EU law and is paramount to the maintenance of the rule of law. This has been clearly recognized by the Court of Justice of the European Union. Ability of states parties to an investment treaty to set a binding interpretation of the provisions of the treaty with retroactive effect, as clearly permitted under this paragraph, constitutes a significant setback for the concept of legal certainty.

Article 18 – Transparency: The Commission proposes that the UNCITRAL rules on transparency apply to disputes "with the following additional obligations". ESF considers it as crucial that sensitive and confidential information is safeguarded throughout the dispute resolution procedure, including in the publication of documents and the participation of experts and third parties in the hearings. ESF welcomes the application of the UNCITRAL Transparency Rules in the new system. We also agree with the additional obligations listed in paragraph 2 of Article 18.

But we are concerned by paragraph 3 of Article 18, which will establish automatic access to exhibits. ESF is concerned that there has been inadequate debate on the impact of such level of transparency in investment disputes. The open nature of proceedings risks the leaking of protected information (e.g. to competitors) and politicisation of the process (e.g. through media intrusion). In many domestic courts of the EU, automatic access to documents is more restricted. Exhibits and other documents, such as witness statements, expert reports, skeleton arguments, can only be obtained if the court gives permission. It is in the interest of the tribunal and of justice in general that the claimant feels able fully to present its case to the tribunal through the disclosure of internal documents and the provision of expert and witness evidence. Concerns about the protection of confidential information may discourage a full ventilation of the issues, and even may discourage some claims, leading to disinvestment rather than trying to seek for redress.

ESF is of the view that the 2012 US Model BIT strikes a better balance in the types of documents made available to the public in light of the considerations discussed above: pleadings, memorials and briefs are made available but not automatically the witness statements or experts' reports or exhibits, which are made available only on case by case basis. Upon request of one of the party to keep some of these documents confidential, it should be for the judges to decide on the confidential nature and whether or not to allow publication.

Article 28 – Provisional award: Paragraph 4 of Article 28 establishes the 'Loser Pays" Principle, which will apply by default. The Tribunal may decide against the implementation of the 'Loser Pays Principle' under certain conditions. ESF is concerned by the fact that in practice the implementation of the 'Loser Pays' Principle may prevent a company from using the system, in particular if the company is an SME. It is our view that 'Loser Pays' should only apply in cases of abuse of the system, and not as a general principle. It must be remembered that the proposal already foresees provisions to address frivolous claims (Articles 16 and 17 of the Commission's Proposal) making 'Loser Pays' unnecessary.

We acknowledge that the proposal aims at shortening the timeframe in the initial phase before the tribunal and we note the establishment of the Appeal tribunal (which will be open to both parties to a case), but that new phase inevitably lengthens the overall timescale of the dispute. It is of crucial importance that investors (particularly SMEs) should not renounce justice and fair and equitable treatment because the system is too complex and costly.

Article 30 – Enforcement of awards

As mentioned in comments above on Article 7, unlike to CETA, there are no references to the New York Convention in this key article 30, dealing with the enforcement of award, which we believe is missing and should be introduced.

Article 30, paragraph 2 appears to have a drafting error. It states that "Each Party shall recognize an award rendered pursuant to this Agreement as binding enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party". The text does not include "and shall" between the words "binding" and "enforce".

LIST OF ESF MEMBERS
SUPPORTING THIS POSITION

- Ageas Insurance
- Architects' Council of Europe –ACE
- British Telecom Plc
- BDO
- Bundesverband der Freien Berufe - BFB
- Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
- BUSINESSEUROPE
- BUSINESSEUROPE WTO Working Group
- Deutsche Bank AG
- Deutsche Telekom AG
- Deutsche Post DHL
- DI – Confederation of Danish Industries
- Digital Europe
- Ecommerce Europe
- EK - Confederation of Finnish Industries
- Ernst & Young
- EuroCommerce
- EuroCiett
- European Community Shipowners' Associations – ECSA
- European Express Association – EEA
- European Federation of Engineering and Consultancy Associations – EFCA
- European Public Telecom Network – ETNO
- European Savings Banks Group – ESBG
- European Satellite Operators Association - ESOA
- Fédération des Experts Comptables Européens – FEE
- Fédération de l'Industrie Européenne de la Construction – FIEC
- Foreign Trade Association – FTA
- IBM Europe, Middle East & Africa
- Inmarsat
- Irish Business and Employers' Confederation - IBEC
- Law Society of England & Wales
- Le Groupe La Poste
- Microsoft Corporation Europe
- Oracle Europe, Middle East & Africa
- Prudential Plc.
- SELDIA – European Direct Selling Association
- Svenskt Näringsliv (Confederation of Swedish Enterprise)
- Tata Consulting Services - TCS
- Telenor Group
- TheCityUK
- Thomson-Reuters
- Zurich Financial Services