



GMB TRADE UNION RESPONSE to

European Commission

Public Consultation on

***Investment protection and investor-to-state dispute
settlement (ISDS) in the Transatlantic Trade and
Investment Partnership Agreement (TTIP)***

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Introduction and Background

GMB is the UK's third largest trade union with approximately 628,000 members across a wide range of sectors, both public and private. We confirm that this response is on behalf of our GMB members.

GMB has long been active in campaign work around EU and international trade issues and has been critical of the increasing number of bilateral trade deals and deals between groups of countries and the EU that are being agreed as negotiations for comprehensive global agreements through the World Trade Organisation (WTO) have broken down. More and more of these agreements are increasing and entrenching corporate power, pushing for ever more deregulation to boost company profits, whilst forgetting that these very regulations exist for a reason: to protect the social, employment and environmental rights of workers and their families.

In particular, GMB has major concerns about the EU and US Transatlantic Trade and Investment Partnership (TTIP) currently being negotiated and the threat it poses to our members and the wider UK, EU and global economies on a number of levels. As the biggest ever international trade deal, the stakes could not be higher. Its impact will be huge, and it will act as the blueprint influencing all other future global trade agreements.

The proposed inclusion of an Investor-State Dispute Settlement (ISDS) is particularly alarming as this extremely dangerous mechanism will effectively limit, weaken and undermine the power of democratically elected national governments and public authorities to legislate in the public interest, whilst giving unelected and unaccountable foreign businesses and investors unprecedented control to challenge directly state actions which they perceive to be a threat to their profit-making. It also poses a major threat to public services and labour standards.

We believe ISDS is unnecessary and impinges on state sovereignty in any trade agreement. Moreover, the EU and US have more than adequate legal systems to deal with disputes.

GMB and our EU and international trade union colleagues are strongly opposed to ISDS in TTIP and all other trade agreements and, following immense public pressure, we initially welcomed the EU Commission's decision to launch a public consultation on the issue.

However, we are dismayed at the EU Commission's refusal to explicitly extend the scope of the consultation to cover other EU trade deals currently under negotiation, as GMB had requested when the consultation was announced.¹ GMB wants to see the EU Commission consultation resulting in ISDS being removed from *all* EU trade agreements.

¹ See GMB January 2014 letter to EU Trade Commissioner Karel de Gucht on widening the scope of the ISDS consultation:
<http://www.gmb.org.uk/assets/media/Commissioner%20Karel%20De%20Gucht%20Letter%20on%20ISDS%20in%20EU%20trade%20agreements%20-%2031.1.14.pdf>
And his response: <http://www.gmb.org.uk/assets/media/De%20Gucht%20response%2014.3.14.pdf>

GMB also has major concerns that the EU Commission has skewed the consultation questions to ask only *what kind* of ISDS mechanism we would like included in TTIP, rather than whether or not ISDS should be included *at all*.

In our view, the EU Commission has thereby compromised the integrity of this public consultation and has shown that it has no regard for wider public opinion, making a sham of its civil society dialogue.

EU Commission spokespeople have claimed in the TTIP civil society dialogue meetings that the public consultation never intended to determine whether or not ISDS should be included or scrapped as they already had a water-tight mandate from Council to include it. This is not true, and the EU Commission should acknowledge that a growing number of Member States, including Germany and France, oppose or have major uncertainties about ISDS, along with the international trade union movement at all levels, much of the NGO sector on both sides of the Atlantic, and the Socialists and Democrats and other political groups in the European Parliament.

The EU Commission will be putting itself in a very difficult position if it proceeds with the inclusion of ISDS, further consolidating corporate control in TTIP and other global trade deals, in the face of such widespread opposition.

Below is the GMB response to the questions raised in the European Commission's public consultation. GMB urges the EU Commission to give serious consideration to the issues of concern raised and would be happy to provide additional information or discuss further any of the points made in this submission.

GMB Responses to questions in the European Commission's Public consultation on modalities for investment protection and ISDS in TTIP

A. Substantive investment protection provisions

1. Scope of the substantive investment protection provisions

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the objectives and approach taken in relation to the scope of the substantive investment protection provisions in TTIP?

As GMB has already outlined in its introduction to this consultation response, we are dismayed at how the EU Commission has decided to undertake this public consultation, both in terms of its scope – which we had repeatedly demanded be extended to include *all* EU trade deals currently being negotiated – and in terms of the skewed questions – asking only *what kind* of ISDS should be included in TTIP, rather than whether or not the mechanism should be included *at all*.

This runs completely contrary to demands from trade unions, wider civil society and the general public to abolish ISDS altogether, from TTIP and all other global trade agreements – demands which pressured the EU Commission to launch the public consultation in the first place.

The EU Commission risks turning this entire public consultation process into a sham and heightening public perceptions of unaccountable EU bureaucracy standing up for business rather than public interests.

Moreover, we believe ISDS directly impinges on state sovereignty in all trade agreements, and is unnecessary when the EU, US and all other trade country partners have more than adequate legal systems to deal with disputes. It is divisive of the EU Commission to propose it, especially when there is no evidence of companies investing less in countries with which they have no ISDS agreement.

GMB has long campaigned against ISDS. It is an extremely dangerous mechanism which gives unprecedented powers to unelected, unaccountable and often tax-dodging businesses and corporate investors to sue national governments and local and public authorities for vast sums of money for denting their profit-making abilities by daring to legislate in the public interest.

Faced with the risk of multibillion dollar corporate law suits, many States may simply decide no longer to regulate in the public interest. An example of this is when the Czech Republic had to compensate the *Central European Media Enterprises* corporation \$354 million in a 2003 ISDS case – the equivalent of the country's entire health budget.² ISDS therefore undermines democratic

² M. Desai and A. Moel, 'Czech Mate: Expropriation and Investor Protection in a Converging World' (April 2006) – http://papers.ssrn.com/sol3/papers.cfm?abstract_id=585843

accountability for public authorities and governments who are elected on policy manifestos yet lose control over how public services are set up and run, with a potentially disastrous effect on our social, employment and environmental rights and protections.

Corporations are very much aware of the so-called ‘chilling effect’ even the threat of an ISDS lawsuit can have on public policy, and are increasingly using ISDS as a bargaining chip to block public legislation that may dent their profit-making.

Meanwhile, ISDS clauses make no attempt to tie investors to binding obligations on human rights, social justice and non-discrimination.

The impact of ISDS across a range of sectors cannot be underestimated – jobs in manufacturing, chemicals and pharmaceuticals, transport, utilities, health (including corporate take-over of key NHS services) and education³ are all at risk.

GMB is also seriously concerned about the negotiators’ ambition to include all public services in the agreement, as revealed in recently leaked documents, paving the way for even more liberalisation, privatisation and outsourcing of vital services (such as waste and water management).⁴ Only by remaining in accountable local authority control will these services maintain high levels of quality, safety, affordability, user rights and universal access. Liberalising public services also risks exacerbating the effects of the financial crisis for the 120 million Europeans who are living in poverty or at risk of poverty and rely on these vital services, and could even push more people into poverty and social exclusion.

ISDS also threatens public procurement policies Member States and local authorities have put in place for the good of the public and based on quality, fairness and sustainability – not on the lowest costs, which will only lead to a race to the bottom in terms of the quality of services and working conditions. Progressive public procurement policies, for example to promote employment of vulnerable groups in society, could be subject to ISDS claims of discrimination, especially given the incompatibility of EU and US public procurement legislation. We know that the US will not accept new EU public procurement social and environmental clauses.

GMB is also sceptical of EU Commission assurances that public policy legislation, such as on the minimum wage, will be protected under ISDS, when the EU Commission goes on to say that it will only protect public policy that is “legitimate” and “proportional”. GMB is concerned about who will determine what is “legitimate” or “proportional”, and what is “frivolous”. Corporations will have more say in deciding on these definitions than we and public authorities will, and

³ TTIP will open the door to for-profit US education providers to access the EU market, and ISDS will ensure there will be little Member States can do to regulate these companies, the teaching quality or their exorbitant tuition fees, according to the European Trade Union Committee for Education. See ‘Trade deal under fire from teachers – leaked EU TTIP offer on services opens door to privatisation’ (June 2014) – http://etuce.homestead.com/Statements/2014/TRADE_DEAL_UNDER_FIRE_FROM_TEACHERS.pdf

⁴ European Federation of Public Service Unions, ‘Leaked documents TTIP reveal substantial EU commitments, public services not excluded’ (June 2014) – <http://www.epsu.org/a/10558>

we have no doubt they will abuse definitions and any other loopholes they can find to claim an ISDS case against public authorities' right to regulate.

Furthermore, unaccountable, private-sector corporate arbitrators will determine how such definitions should be applied, including the definition of 'investment' itself, without the possibility of an appeal.

It is for all these reasons that many countries around the world are refusing to include ISDS provisions in their trade deals or are repealing existing trade deals including the provisions. Australia, for example, fought to have the mechanism excluded from its 2005 deal with the US and has not included it in any deal since 2011, and South Africa, Indonesia, and several countries in Latin America are exiting existing deals which include ISDS. Controversies around TTIP and the Trans-Pacific Partnership Agreement that the US is also currently negotiating have sparked unprecedented public concern and debate on ISDS, and the power trade negotiations more generally give to unaccountable corporate interests. The threat of ISDS is clearly recognised and the EU Commission needs to respond to these concerns by removing ISDS.

2. Non-discriminatory treatment for investors

Taking into account the above explanations and the text provided in annex as a reference, what is your opinion of the EU approach to non-discrimination in relation to the TTIP? Please explain.

The EU Commission says it wants to stop discrimination, but discrimination is embedded in TTIP and the ISDS mechanism. The concept of non-discrimination seems to apply only to foreign corporate investors, who themselves will be given free rein to discriminate against the general public by stopping democratically elected governments and local authorities from providing public services or legislating in the public interest.

A report from the London School of Economics (LSE) commissioned by the UK Government's Department for Business, Innovation and Skills⁵ highlights how the public sector has already been one of the main victims of ISDS claims. Poland and Slovakia have both been sued under ISDS for bringing parts of their health services back into public control⁶ and at least 15 different EU Member States have already faced investor-state challenges. By allowing corporations to block the provision of public services which workers and their families are relying on more and more since the financial crisis, ISDS has the potential to increase and aggravate inequalities.

⁵ J. Bonnitcha, J. Webb Yackee, L. Skovgaard Poulsen, 'Costs and Benefits of an EU-USA Investment Protection Treaty' (April 2013) – <http://www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf>

⁶ C. Gerstetter and N. Meyer-Ohlendorf, 'Investor-state dispute settlement under TTIP – a risk for environmental regulation?' (December 2013) – http://www.boell.org/downloads/HBS-ttip_2.pdf

The EU Commission also states that foreign investors “are not always guaranteed” the same rights as local investors, but the LSE report highlights that there is no evidence that US or EU investors face discrimination in the other country. Tellingly, the report then goes on to warn the UK against the inclusion of ISDS in TTIP, as this would lay the country open to costly legal challenges and limit its ability to pursue public policy goals. This does not seem like the “level playing field” the EU Commission says it will put in place.

The EU Commission notes that “exceptions” will be applied to “protected” areas in the fields of “health, the environment, consumers, etc”, but is silent on whether this would be a closed or open list, and on whether or not other crucial rights and protections, for example in the field of social and employment or health and safety, would be included. The lack of legal clarity leaves the door wide open for investors to abuse the system, with corporate lawyers given the main responsibility for defining what constitutes ‘discrimination’ and ‘exceptions’. The negative list with annexes is insufficient to protect key public and health services. Only outright exclusion can provide protection.

Ordinary Europeans also risk being discriminated by TTIP more widely. With half of US States denouncing trade union rights and freedoms by being ‘right-to-work’ states, and with the generally lower social and employment standards and protections in the US (a country which has not even ratified the most basic ILO conventions on labour standards or trade union rights and freedoms), GMB has little confidence that TTIP will ‘level up’ standards. Rather, we believe we will see a race to the bottom as companies relocate to the US to take advantage of these lower working conditions – leaving thousands of Europeans out of work.

Will the ISDS model proposed by the EU Commission ensure the right for workers to defend collectively agreed terms and conditions and trade union rights? Although the Commission says it will protect public policy decisions on the minimum wage, it is silent on what public policy attacks it would deem “frivolous”, and which public policies it considers ‘non-legitimate’ or “disproportionate”. It is equally silent on where ‘living wage’ policies would stand, which is a key objective of GMB. We are not optimistic that these would be protected from corporate creep.

National legal systems already legislate on the basis of non-discrimination and equal treatment, and it should be under these systems that any investor challenge should be brought.

3. Fair and equitable treatment

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the approach to fair and equitable treatment of investors and their investments in relation to the TTIP?

The fair and equitable treatment clause is one of the most dangerous features in investment protection provisions. It has been one of the most relied-on clauses within ISDS disputes, where it has been dangerously abused time and time again to advance claims against regulations and procedures that had been established democratically and in the public interest (as recognised by the EU Commission itself).

The EU Commission has itself noted that the lack of clarity in establishing what exactly constitutes 'fair and equitable treatment' has fuelled large numbers of ISDS claims – but only corporate and unaccountable ISDS arbitrators have been left to interpret the meaning. Why seek to develop a mechanism that is so obviously flawed?

National courts already protect both foreign and domestic investors from arbitrary, unjust, offensive or otherwise unacceptable treatment, in a transparent and impartial manner and without putting the right to regulate in the public interest at risk. There is therefore no way to justify the introduction of ISDS and give unprecedented powers to foreign investors over domestic investors and over national courts, democratically elected public bodies, and citizens. Under no circumstance can a government or public authority's right to regulate be called into question by private and unaccountable corporations.

The EU Commission should be honest about how difficult it will be to curb corporate power even in a modified ISDS system.

4. Expropriation

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the approach to dealing with expropriation in relation to the TTIP? Please explain.

GMB is concerned with the lack of a clear definition of "expropriation" and the fact that any state measure or policy (even general and not intentionally discriminatory) which may potentially impact on profits, future profits or even just potential profits could be considered 'expropriation' and open to an ISDS claim. The process is unjustifiably skewed in favour of foreign investors, operating in secret through private corporate courts. This is inequitable and undemocratic.

Dutch company Achmea has launched an ISDS case along these lines against Slovakia, demanding it compensate the company and does not implement draft legislation which would establish a single public health insurance scheme. ISDS has allowed this corporation to undermine a democratically elected government's right to regulate, before a law has even been implemented, or the company has suffered any actual damages. Meanwhile, Slovakia must waste valuable time and resources to challenge the claim. It has already had to pay Achmea \$22 million in compensation under another ISDS health-related case. It is clear that corporate

interests circle like vultures on states they deem to be 'soft targets', bleeding them dry. This is completely unacceptable.

Public interest regulations, from labour rights to healthcare and environmental provisions, all risk being challenged by investors as 'indirect expropriation', forcing democratically elected governments and local authorities to use disproportionately large sums of taxpayers' money to cover legal fees and eventual investor compensation.

The EU Commission says "legitimate public purposes" will be exempt from expropriation claims, but fails to define what exactly a 'non-legitimate' public policy is or when it could be deemed "manifestly excessive" and thus open to an ISDS claim. Rather than leaving democratically elected bodies to regulate in the public interest as mandated by the people they represent, through ISDS the EU Commission wants to give the final say on public policy and expropriation to unaccountable corporate lawyers, whose interests are served by siding with business, rather than public authorities or ordinary people. This leaves the mechanism open to abuse and manipulation, and public authorities vulnerable and reticent in pursuing progressive public interest policy objectives.

GMB already finds it indicative that the EU Commission does not list social or employment legislation in its examples of a legitimate public policy, even though there is a worrying trend of workers' rights legislation being termed as indirect expropriation in corporate ISDS claims: French company Veolia has sued Egypt for increasing the minimum wage and American steel company Nobel Ventures has sued Romania for failing to stop workers from going on strike.

Cases such as these will only increase if ISDS is included in TTIP and other global trade agreements, and GMB doubts the commitment of the EU Commission to protect social and workers' rights, given its failure to support and promote the development of Social Europe for the past decade.

5. Ensuring the right to regulate and investment protection

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion with regard to the way the right to regulate is dealt with in the EU's approach to TTIP?

Governments and local authorities have been granted the right to regulate in the public interest through a democratic voting process. It is absurd for ISDS to put this democratically mandated right at risk from vested private sector corporate interests.

The EU Commission claims it wants to find a balance between protecting investors and ensuring the right to regulate in the public interest, but this guarantee is only mentioned in TTIP's preamble and is not binding. Furthermore, the EU Commission's list of public policy issues is far too limited and does not,

for example, include fundamental areas such as employment, social, human and trade union rights, education, care, financial market regulation, or regional, industrial or tax policy.

What the EU Commission conversely refuses to acknowledge is that in reality, faced with billion dollar ISDS lawsuits, especially in these times of crisis and austerity, many Member States will simply feel they have no other choice but not to regulate in the public interest so as to avoid the wrath of corporate giants. Giving such unprecedented powers to unaccountable corporations completely undermines governments' democratically mandated right to protect and serve their citizens and will at best lead to a so-called 'chilling-effect' on policy making, or at worst block and get rid of altogether social, employment and environmental rights and protections workers and trade unions have spent decades building and fighting for.

As the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) notes, trade deals and investment chapters by their very nature give corporations the right to pursue maximum profit whilst removing and undermining restrictions which seek to regulate corporate activities in the interest of public health, worker and consumer health and safety, public services and the environment.⁷

GMB also has serious concerns about the EU Commission's apparent intention to take a negative-list approach and the so-called 'ratchet clause' this would create – binding future governments to past liberalisation measures and stopping them from introducing new regulatory initiatives or from reversing privatisations, even when this is in response to new and unanticipated threats, for example at the social or environmental level. The right to regulate must be fully protected and under no circumstance undermined by provisions to protect corporate investors or liberalisation, as ISDS seeks to do.

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

6. Transparency in ISDS

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on whether this approach contributes to the objective of the EU to increase transparency and openness in the ISDS system for TTIP. Please indicate any additional suggestions you may have

⁷ International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations, 'Trade Deals that Threaten Democracy' (2014) – http://www.iuf.org/w/sites/default/files/TradeDealsThatThreatenDemocracy-e_0.pdf

The EU Commission refuses to accept that a growing body of public and governmental opinion does not want *any* form of ISDS, so asking us what *kind* we would like is a non-question.

Attempts to improve transparency within ISDS will not solve its fundamental flaws nor make it acceptable to the general public. The bottom line is that foreign investors should never be granted privileged rights nor allowed to bypass transparent and impartial domestic courts in favour of unaccountable private corporate arbitrators. ISDS allows these arbitrators – whose impartiality must be called into question, and who earn a significant income from these disputes – to make decisions behind closed doors and determine what corporate information can still be kept secret. Only by ensuring that claims are pursued in public through domestic courts can full transparency and openness be assured.

On a wider level, GMB has frequently raised serious concerns about the lack of transparency and consultation in the TTIP negotiations as a whole, and on ISDS discussions in particular. Neither lawmakers nor the general public have been given full access to TTIP papers, and yet corporate leaders and lobbyists have been invited to the table from the very conception of the trade deal, helping to draft and share the negotiating texts. This inequality of voice in the process is startling, and trade unions and NGOs are not seriously seen as ‘interested parties’ by the EU Commission.

The civil society dialogue process shows that concerns are being raised but that the EU Commission is not listening.

Meanwhile, backroom talks continue with TTIP’s corporate sponsors, on an ISDS ‘light’ that the EU Commission will no doubt try to quickly usher into the EU-Canada (CETA) agreement as a precedent. There is nothing democratic about this consultation and EU Commission assurances on transparency are becoming harder and harder to swallow as the cards remain stacked in corporate hands.

As the economist Joseph Stiglitz points out, “When negotiations are secret, there is no way that the democratic process can exert the check and balances required to put limits on the negative effects of these agreements.”⁸ The same is true of ISDS – only by allowing investors recourse solely through domestic courts can full transparency and independence of rulings be guaranteed.

7. Multiple claims and relationship to domestic courts

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on the effectiveness of this approach for balancing access to ISDS with possible recourse to domestic courts and for avoiding conflicts between domestic remedies and ISDS in relation to the TTIP.

⁸ J. Stiglitz, ‘On the Wrong Side of Globalisation’ (March 2014) – http://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization/?_php=true&_type=blogs&r=0

Please indicate any further steps that can be taken. Please provide comments on the usefulness of mediation as a means to settle disputes

GMB believes that every investor invests in a foreign country at its own risk. If it wants to launch legal proceedings, it can do so through domestic courts, as local investors must do, and can always take out additional investment protection should it deem this necessary. The EU Commission tries to suggest that national courts can be “biased”⁹, yet there is absolutely no evidence proving that either EU or US investors would be discriminated in this way. There is no justification therefore for an ISDS mechanism which gives unaccountable corporations unprecedented powers and special privileges to bypass domestic courts and national jurisprudence. Indeed, France and Germany are arguing against ISDS on the grounds that investors already have enough protections in national EU courts.

Yet amazingly, the EU Commission appears unconcerned about the very real and well documented bias of ISDS courts, and seems oblivious to the regularity with which they find in favour of corporate interest on the most spurious and undemocratic challenges of legitimate and worthy public interest policy.

ISDS does not *per se* stop investors from bringing their claim to a domestic court, but the proposed EU Commission reforms do nothing to encourage companies to do so. With privileged corporate rights under ISDS, it is obvious companies will choose this route instead. They are not even obliged to enter mediation before starting the arbitration process, as the EU Commission proposals on this subject are non-binding.

What is more, if a claim is filed through ISDS first, it cannot go through a domestic court later. However, if an investor does not like the conclusions of the domestic courts, it will be allowed to appeal via ISDS, giving it unjustified and boundless rights, whilst further undermining domestic jurisprudence and any potential appeal process. This is perverse and unacceptable.

The EU Commission’s proposals could also open the door to parallel ISDS and domestic court proceedings being launched at the same time by a parent company on the one hand and shareholders on the other – allowing the corporation once again to choose which verdict suits it best.

8. Arbitrator ethics, conduct and qualifications

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on these procedures and in particular on the Code of Conduct and the requirements for the qualifications for arbitrators in relation to the TTIP agreement. Do they improve the existing system and can

⁹ European Commission, ‘Factsheet: The investor-state dispute settlement mechanism ‘ (March 2013) – http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150801.pdf

further improvements be envisaged?

The EU Commission states it wants to ensure that ISDS arbitrators “are independent and act ethically”, but this can never be fully regulated or guaranteed as long as ISDS arbitrators continue to be chosen from a small elite of private sector, specialist corporate lawyers who work for international, commercial law firms. With these proposals, the EU Commission is effectively putting the fox in charge of the chicken coop.

Furthermore, the EU Commission’s proposals on reforming the ethics, conduct and qualifications of the arbitrators within a code of conduct are only non-binding recommendations, with no legal validity. This is not acceptable and will not work as a deterrent.

ISDS is a lucrative industry and its corporate arbitrators will always have a fundamental conflict of interest, with their independence and impartiality called into question. Paid by corporate interests to represent them, they stand to earn a significant amount of money from settling disputes in the corporation’s favour and generating more cases for themselves in the future.

Even with the questionable code of conduct (which would in any case apparently only cover a broad mandate, though it has yet to be made available for public scrutiny), these arbitrators would still be publically unaccountable, with no compulsory knowledge of the domestic legal system. They also exercise sole discretion on the allocation of costs and amount of compensation to be paid, which are invariably eye-watering and obscene.

9. Reducing the risk of frivolous and unfounded cases

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on these mechanisms for the avoidance of frivolous or unfounded claims and the removal of incentives in relation to the TTIP agreement. Please also indicate any other means to limit frivolous or unfounded claims.

The fact that the EU Commission has to put in a clause within its ISDS provisions against “frivolous and unfounded” claims shows just how inadequate the mechanism is and how corporations will seek to abuse it.

Even if a corporation’s case cannot be justified, it can still force the State to use valuable resources and taxpayers’ money to justify its democratic right to regulate. The costs of arbitration proceedings under ISDS are disproportionately high (around \$6-8 million on average), turning the filing of claims, including the frivolous and unfounded ones, into a booming business for corporate lawyers.

The EU Commission itself acknowledges that ISDS cases “take up time and money” and could have an effect on the policy choices made by states,¹⁰ but it still refuses to abolish ISDS altogether. Vague interpretations of how to define “frivolous and unfounded” cases leave ISDS riddled with loopholes for businesses to take advantage of, in collusion with the corporate arbitrators, who have the sole responsibility of deciding on these definitions and are skilled enough to be able to portray public policy as discriminatory expropriation.

Even the right-wing US-based Cato Institute has stated that “ISDS is ripe for exploitation by creative lawyers.”¹¹

The EU Commission should admit that it knows it cannot reduce the risk of frivolous and unfounded cases, and stop patronising the respondents to this consultation.

10. Allowing claims to proceed (filter)

Some investment agreements include filter mechanisms whereby the Parties to the agreement (here the EU and the US) may intervene in ISDS cases where an investor seeks to challenge measures adopted pursuant to prudential rules for financial stability. In such cases the Parties may decide jointly that a claim should not proceed any further. Taking into account the above explanation and the text provided in annex as a reference, what are your views on the use and scope of such filter mechanisms in the TTIP agreement?

As in our response to question 9 above, there are recurring problems with definitions – what is a “prudential reason” for intervening in an ISDS case?

The EU Commission states it wants to use a filter mechanism within ISDS to “protect the right to regulate in the financial sector”, but what about the right to regulate in the public sector, or in protecting workers’ social and employment rights? Investors already have more than enough protection, so why does the EU Commission not concentrate on enabling government and public authority action in favour of employment and social policies, and protecting these from spurious corporate ISDS claims?

ISDS has already been abused by financial speculators in crisis-hit countries such as Greece, Cyprus and Spain – which are facing claims from speculative investors totalling more than €1.7 billion and jeopardising the very financial stability the EU Commission pretends it wants to protect. In Cyprus for example, a Greek private equity investor is seeking €823 million in compensation for

¹⁰ European Commission, ‘Fact sheet: Investment Protection and Investor-to-State Dispute Settlement in EU agreements’ (November 2013) – http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf

¹¹ Cato Institute, ‘A Compromise to advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement’ (March 2014) – <http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state>

“losses” from the re-nationalisation of Cyprus’ Laiki Bank.¹² Yet the EU Commission seems to turn a blind eye to this.

Adequate regulation of the financial markets can never be assured under ISDS. The fact that the EU Commission foresees a special filter mechanism for ISDS claims against rules relating to financial stability is in itself an acknowledgment that the mechanism is dangerous, arbitrary and cannot be regulated.

Furthermore, there is not even any international-level agreement on what a “prudential measure” within financial services regulation could constitute, making this clause even more open to varying interpretations and vulnerable to corporate attack.

11. Guidance by the Parties (the EU and the US) on the interpretation of the agreement

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on this approach to ensure uniformity and predictability in the interpretation of the agreement to correct the balance? Are these elements desirable, and if so, do you consider them to be sufficient?

Not content with allowing ISDS to bypass publically accountable national courts, the EU Commission now seeks to overrule national jurisprudence altogether by allowing impartial and unaccountable ISDS rulings to become de facto binding international law across the US and EU Member States. This is not acceptable as a concept.

The fact that a private company can launch an ISDS claim via private corporate lawyers who have no duty of public accountability will also lead to further unpredictability in the interpretation of global trade agreements.

12. Appellate Mechanism and consistency of rulings

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on the creation of an appellate mechanism in TTIP as a means to ensure uniformity and predictability in the interpretation of the agreement

Although the EU Commission claims the introduction of an appeals mechanism would render ISDS rulings more legitimate and uniform, in reality this would be

¹² Corporate Europe Observatory, ‘Profiting from the Crisis: How corporations and lawyers are scavenging profits from Europe’s crisis countries’ (March 2014) – http://corporateeurope.org/sites/default/files/profitting-from-crisis_0.pdf

quite the opposite as the appeal would only be valid within individual trade agreements (and not in all ISDS cases across the board) and could see different interpretations being issued by different arbitrators in different cases – leading to more confusion, fragmentation, and arbitrary decisions within ISDS case law.

C. General assessment

13. 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?

ISDS is a biased and undemocratic mechanism, led by corporations and corporate lawyers, and giving unprecedented power and privileged status to foreign investors (without any matching responsibilities) to threaten and undermine the democratic mandate of governments and local authorities and block them from regulating in the public interest – and all this whilst bypassing domestic courts and legal systems.

GMB is dismayed that although mounting public pressure against ISDS pushed the EU Commission into launching this consultation, it has failed to honour a serious and unbiased consultation process. This is disrespectful to those responding. It is clear that, as far as the EU Commission is concerned, the inclusion of ISDS within TTIP (a blueprint for all future global trade agreements), is already a foregone conclusion. GMB clearly states its fundamental opposition to ISDS in *any* form, in *any* trade agreement. We know the EU Commission will receive a substantial number of responses saying the same, and we urge it to acknowledge and act on this view.

As we have already stated, ISDS is an extremely dangerous mechanism and no amounts of tinkering with its wording and processes can make it any less of a threat to the democratic process, to our public services and to governments' and local authorities' right to regulate in the public interest.

Furthermore, despite EU Commission assurances, there is no reliable evidence to indicate that TTIP will create jobs and economic prosperity. In our experiences of restructuring within trade agreements, we should expect job losses. Even the Centre for Economic Policy Research's pro-TTIP study estimates only 0.48% growth of GDP for the entire EU over 10-20 years – about 0.04% growth a year.¹³ Moreover, the negative effects of TTIP on health, environment and social protection will far outweigh any doubtful benefits.

¹³ Centre for Economic Policy Research, 'Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment' (March 2013) – http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf

The case for jobs and growth has not been made for TTIP; positive estimates are unsubstantiated, and we only have to look at NAFTA for the reality: 1 million jobs were promised in the US and Mexico, but many more ended up being lost instead.

GMB is even less optimistic about TTIP delivering improved labour standards, wages and social dialogue, and is incredulous that the EU would even enter into negotiations with the US when it has not even ratified the most basic ILO conventions on labour standards and trade union rights and freedoms, and in which half of its states practice 'right-to-work' rules, gagging trade unions and their members. For the GMB, this makes pursuing the negotiations completely untenable.

GMB is also concerned at the lack of a real strategy from the EU Commission on how to proceed following the conclusion of this consultation.

Do you see other ways for the EU to improve the investment system?

ISDS is an inherently flawed mechanism, run by corporations, for corporations. The only way to ensure a truly transparent and well-functioning dispute mechanism is to go through national courts, and national courts only.

ISDS therefore must not be included in *any* trade agreement.

Are there any other issues related to the topics covered by the questionnaire that you would like to address?

GMB does not accept ISDS as a model in any trade agreement, and we urge the EU not to bounce any ISDS model into CETA as a precedent for inclusion in TTIP, behind closed doors and in the face of massive opposition.

There is wide suspicion that this is what the EU Commission is planning to do. EU public opinion on the EU institutions is already low – this would lead to a complete meltdown.

GMB is also unhappy with the EU Commission's decision to allow responses to this public consultation to be made only through the online format, which is limited both in terms of questions asked and room provided to respond.

GMB confirms this PDF document we have attached to our online submission is our definitive response to the public consultation and should be regarded as such by the European Commission.