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EDRi and Vrijschrift thank JURI for issuing a [Draft Opinion](#) on TTIP.

In line with [EDRi's redlines](#) on TTIP, we would like to make some comments on selected proposed paragraphs below and suggest amendments to the text.

For ease of reading, ~~deletions~~ are strike-through and **amendments** are highlighted in bold. *Comments* in each case are provided when relevant.

(...)

- A. ~~whereas investment protection provisions and investor state dispute settlement are an essential tool in international economic relations and are very important for investment activity,~~ and whereas a balanced relationship between the necessary and effective protection of investors, the right of States to regulate and an appropriate dispute settlement procedure is fundamental;

*Comments:* We propose these changes because there are various possibilities to protect investments:

Major international investments are almost always accompanied by contracts negotiated between governments and the investor, which often include their own dispute settlement mechanism and are tailored to the situation, and therefore do not create excessive risks for states. Furthermore, investors may take out political risk insurance and, overall, local courts and state to state arbitration complement the abovementioned negotiated contracts. Put simply, ISDS is not essential.

(...)

- ~~C. whereas international agreements are a basis for legal certainty and predictability and whereas there have been many cases in which the EU and other States have brought legal action against the USA under the aegis of the WTO because the USA was believed to have failed to comply with its international obligations;~~

*Comments:* We propose the deletion of this paragraph because this paragraph relates to state-to-state dispute settlement under the WTO. Both for bilateral agreements and WTO rules, the EU can resort to state to state arbitration to ensure the implementation of treaty obligations under US law. Accordingly, we propose a new recital C:

(new) **C. Both for bilateral agreements and WTO rules, the EU can resort to state to state arbitration to ensure the implementation of treaty obligations under US law.**

(...)

- a. Considers that the Commission's proposals for reform initiatives relating to investment protection **do not** accord with the European Parliament resolution on the future European international investment policy (2010/2203(INI)); observes, ~~however,~~ that the reservations felt by the public should be taken into account in these reforms;

*Comments:* The reforms in CETA are not in line with the Resolution (2010/2203(INI)). For instance, in paragraph 31, the Parliament believed that dispute settlement regimes should include an "opportunity for parties to appeal" and an "obligation to exhaust local judicial remedies", among others and these are not included in CETA.

- b. Observes that the reforms incorporated in CETA for mechanisms for the settlement of disputes between States and investors **do not** represent the right approach and must **not** be developed further for TTIP;

*Comments:* We note that the dispute settlement proposals for CETA lack conventional institutional safeguards for independence such as tenure, fixed salary and prohibition of outside remuneration. Institutional safeguards for independence are essential to avoid reasonably perceived bias. The consultation launched by the European Commission was based on the CETA text. In this sense, over 110 scholars submitted a joint response offering a long list of flaws (cf. [https://www.kent.ac.uk/law/isds\\_treaty\\_consultation.html](https://www.kent.ac.uk/law/isds_treaty_consultation.html)). More recently, more than 100 US legal scholars urged the US government to exclude ISDS from both the TTIP and the TPP (cf. <http://www.afj.org/press-room/press-releases/more-than-100-legal-scholars-call-on-congress-administration-to-protect-democracy-and-sovereignty-in-u-s-trade-deals>).

(new paragraph) **Notes that multinationals from the US and other countries will be able to use CETA and EUSFTA ISDS mechanisms if included in these trade agreements.**

*Comments:* Unless these agreements are changed, the European Union would leave the door open for forum shopping, as multinationals can afford to start substantial business activities in Canada or Singapore.

(new paragraph) **deplores that Article 52.3 of the International Centre for Settlement of Investment Disputes (ICSID) convention gives the President of the World Bank the right to appoint all three the arbitrators in annulment procedures.**

*Comments:* The ICSID is the most forum for ISDS cases. Until now, the President of the World Bank has always been a US candidate, who, among other things, plays a role in appointing arbitrators. In that sense, the US would have an unfair procedural advantage over the EU or its Member States. For more information about the issues related to ICSID, see <https://blog.ffii.org/white-house-defends-isds/>.

- c. ~~Observes that existing dispute settlement mechanisms work well but also display weaknesses and that therefore improvements are needed and they must be modernised in order to improve their legitimacy and the institutionalisation of mechanisms for the settlement of disputes between States and investors, so that they can then also be taken as a model for other partnerships;~~

*Comments:* ISDS places companies at the same level as states and gives foreign investors greater procedural rights than local investors.

- d. Calls on the Commission, in this context, to take account of and to supplement, ~~firstly, the constructive contributions made by the public consultation on TTIP, and, secondly, the dispute settlement mechanisms incorporated in CETA,~~ in order to establish clear structures, impartial procedures, a lawful pool of judges selected by States and a code of conduct for judges, to increase the transparency and legitimacy of such dispute settlement procedures, to limit the scope for legal action in order to prevent forum shopping, to maintain the democratic legitimacy of national and European legislatures for amendments to legislation with defined standards and levels and to assess the feasibility of establishing a permanent court and a multilateral appeal system in TTIP;

*Comments:* the reforms in CETA are not sufficient, as the public consultation revealed.

(new paragraph) **stresses that conventional institutional safeguards of independence, such as tenure, fixed salary, prohibition of outside remuneration, and neutral appointment of cases; avoidance of financial interests, avoidance of procedural rules which give the US an unfair advantage and avoidance of procedural advantages for foreign investors, are essential to avoid the perception of bias.**

*Comments:* We propose this amendment because institutional safeguards for independence are essential to avoid the perception of bias.

- e. Calls on the Commission to ensure that investors from the EU are not disadvantaged in the USA, ~~including in relation to investors from other third States (such as Canada, Mexico, China, India and TPP States), which already now, or in future on the basis of negotiations currently under way, enjoy investor protection and have access to mechanisms for the settlement of disputes between States and investors;~~

*Comments:* ISDS does not avoid reasonably perceived bias. The paragraph as it was would also invoke reciprocal possibilities against the EU.

(new paragraph) **calls on the European Commission to remove the ISDS sections from all trade and investment agreements.**

*Comments:* ISDS places companies at the same level as states and gives foreign investors greater procedural rights than local investors have.

(...)

- g. Calls on the Commission to ensure that clearly defined rules on regulatory coherence are comprehensively incorporated in TTIP, **and do not prioritise trade over public interests;**

*Comments:* Without this addition, this paragraph would not include any safeguards against the prioritisation of trade over public interests.

- h. Calls on the Commission to ensure that the adoption of national legislation continues to be performed exclusively by legitimate legislative bodies of the EU and the USA ~~and that the Regulatory Cooperation Body is not assigned any legislative powers but serves purely for purposes of cooperation, information exchange and supervision of the implementation of TTIP provisions;~~

*Comments:* There is a risk that a Regulatory Cooperation Body will prioritise trade over other public interests. Therefore, the European Parliament should not call for the creation of such a body. It would affect the Parliament's rights and prerogatives.

- i. ~~Notes that TTIP gives contracting parties the option of increasing protection of intellectual property, including in relation to third States.~~

*Comments:* Strengthening Intellectual property rights locks in the EU and causes access to knowledge issues abroad. Instead, we propose the following amendment:

(new paragraph) **Stresses that, while neither EU Member States nor the EU have adopted a decision on a comprehensive harmonisation of Intellectual Property Rights, including copyright, trademarks and patents, the European Commission should not discuss these issues in TTIP;**

*Comments:* The inclusion of such provisions could harm our rights to culture and free expression. Previous proposals for international trade agreements, such as [ACTA](#), which was rejected by the European Parliament in 2012, increased the privileges of certain economic operators at the expense of consumers and society in general. Provisions related to Intellectual Property Rights shall be discussed within democratic institutions, not rewritten in the course of a trade agreement, which is mainly focused on trade.

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