European Commission – Speech – [Check against delivery]

Opening remarks: Discussion on Investment in TTIP

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Honourable Members,

We're here today to talk about investment in the Transatlantic Trade and Investment Partnership. Of all the issues in TTIP it has received the most attention and raised the most concern.

In some ways that's surprising. Over 60 years, national governments in the EU negotiated 1400 bilateral investment treaties without any outcry. That network helped European companies become the largest foreign investors in the world. And the investments they made helped create the wave of prosperity that swept Europe in the post-war decades. Moreover, for the countries we partnered with, the deals encouraged much needed capital inflows and created employment.

But the reality is that people's concerns are not surprising at all.

The context for international investment agreements has changed. Part of the reason for our current debate is because the European Union, not national governments, is now in charge of our international investment policy. That has raised broader awareness and brought more openness.

Moreover, with deepening cross-border economic ties, the overall number of agreements has risen and the nature of some disputes has changed. Whereas disputes in the past were mostly on straightforward investment issues, in some cases companies have now sought to push the boundaries of interpretation. That has led to situations that do surprise reasonable people, including me.

On closer examination, of course, we find that the reality is often less dramatic than the headline:

- The most controversial cases are still not decided.
- In general investors lose more cases than they win.
- And in many cases, excessive requests are flatly rejected.

But what many of these disputes make clear is that there is a problem with the investment agreements of the past: they were drafted more with the investor in mind than the state's right to regulate.

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That fact has made this one of the most hotly debated European issues of recent years.

Because of the intensity of that debate, the Commission last year chose to launch a public consultation on our approach to investment protection in TTIP. We announced our detailed analysis of the results in January so I won't go into them again here.

Suffice it to say, the vast majority of the individual responses rejected either TTIP in its entirety or ISDS more specifically. But the responses from interest groups representing groups of people were more mixed.

Let me be clear on how we interpret those results. The consultation was not a referendum even if the responses showed huge scepticism and concerns about the system.

What the consultation did do is allow us to understand the main concerns about the system and give us ideas for how to address them.

And I am happy to say that we in the Commission share most of the concerns that have been raised.

Since we got the competence for investment our view has been clear: the current network of agreements in place is not fit-for-purpose in the 21st century. We want the rule of law, not the rule of lawyers. If we are to continue with investment protection and international arbitration, it will need to be a very different animal. And that is why we started to reform ISDS already in the Canadian agreement, CETA.

That is what I would like to talk to you about today. I am not here to present a final proposal. Instead, I want to open a dialogue around some preliminary ideas for a way forward. I look forward to the discussion we will have.

Let me start by stating what is perhaps obvious. The Commission's assessment is that we need to negotiate rules on investment protection and ISDS in TTIP. I know that some members of this house believe otherwise, for various reasons.

But my view is that we should, and for the following reasons:

First, there are issues to be addressed in the US specifically.

Some believe that there is no problem in the US that ISDS can solve. "The US has a fully functioning legal system," they say. "So what are we worried about?"

It is true that the risks of expropriation and discrimination are much lower in the US than in other parts of the world. But the fact remains that no US law prohibits discrimination against foreign investors. Putting investment in the deal would close that gap, but only if the commitments are enforceable.

ISDS is the only way to enforce them effectively:

- International law cannot be invoked in US courts.
- And state-to-state dispute settlement would effectively cut off small companies from the system, since the EU will only be able to pursue a limited number of very big cases, as happens in the WTO today.

It's also important to be aware our main competitors on the US market, Canada and Japan have or will have access to investment protection, while without including it in TTIP, Europe will not.

Second, nine Member States already have functioning investment protection deals with the US. Those deals haven't stopped those countries from implementing the entire EU acquis before 2004. But they're problematic because they don't incorporate the reforms I believe are necessary to

rebalance the system in favour of the democratic process. Absent new rules in TTIP, these old-style, unsatisfactory BIT's will remain in place. This is a situation we need to change.

Third, the US is the indispensable starting point for a reform of the existing 3000 international investment agreements around the world. Between us, we account for the lion's share of existing agreements and the lion's share of global foreign direct investment. The US also shares many of our goals of protecting the right to regulate. A new reformed approach in TTIP will be a strong starting point for reform of our 1400 European deals with other partners, including our other ongoing negotiations.

Among those, however, Canada is different. It is already concluded. And it already incorporates many of the good ideas from Members of this House:

- First and foremost, there is, for the first time ever, a reference to the right to regulate.
- By better defining and narrowing key concepts like "fair and equitable treatment" and "indirect expropriation", we are narrowing the scope for abuse.
- We gave governments, not arbitrators, ultimate control over interpretation of the rules. If the EU and Canada don't agree with an arbitrator's determination we can issue a legally binding statement of how we want it to be interpreted.
- We included, for the first time, a code of conduct for arbitrators.
- We opened the door to a future appeal mechanism.
- We included clear requirements for the transparency of the tribunal process.
- And we obliged investors to drop cases in national courts if they want to pursue ISDS.

We will propose any further changes we collectively agree on in TTIP to the Canadian government. But I do not want to raise anyone's hopes. From Canada's perspective this is a done deal. Moreover, the overall economic results are very good for Europe. Unravelling the results we have would be a serious mistake. In any case, there are review clauses in the deal that will allow us to revisit the issue in future, and Canada shares our view of the importance of guaranteeing the right to regulate.

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For all these reasons, I believe the question about putting investment in TTIP is not whether we should do it but how we can do it right. Can we design a new form of investment arbitration that keeps the benefits but avoids the negatives? I believe the answer is yes. And that with CETA as a baseline, the four sets of further reforms I'm suggesting today will be an excellent way of doing so. But let me stress again: these are preliminary ideas, the start of a discussion, not our final answer.

First, the most substantive concern expressed by respondents to the survey is that investment arbitration in TTIP will be a barrier to Europe's noble tradition of high quality regulation. Some worry that existing ISDS arrangements give companies too much leeway to attack regulation they deem is not in their interests. Others worry that the mere existence of a possibility of cases chills regulators' activities. These are real concerns that any new investment arbitration system will need to address.

Our idea is that this could be done in two ways. We would like to include a full article in the text that makes clear that governments are free to pursue public policy objectives and they can choose the level of protection that they deem appropriate.

Another possible change would address the argument sometimes made that investors can sue just because the regulatory environment changes. Some respondents to the consultation were concerned about text in investment agreements that says that investors can expect a "stable business environment". The feeling was that it would open the door to cases based simply on a change in regulation. Our idea is a clause that says that investment protection rules offer no guarantee for investors that the legal regime under which they have invested will stay the same.

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The second way that the Commission suggests to improve the system concerns the way the tribunals work. Many are concerned that the system creates conflicts of interest because arbitrators are also lawyers and might expect to get business from the investors in future.

Our idea here is for governments, long before any actual cases are launched, to nominate a limited list of trustworthy arbitrators who would decide on all TTIP investment cases. To get onto the list, the arbitrators would have to be sufficiently qualified. For example, they would have to be eligible to be judges in their home systems.

Of course, this does not go the whole way to creating a permanent investment court, with permanent judges who would have no temptation to think about future business opportunities.

I know some have suggested this and I support the idea. In fact I have already instructed my staff to start working towards it. However, I believe that we should aim for a court that goes beyond TTIP. A multilateral court would be a more efficient use of resources and have more legitimacy. That makes it a medium-term objective to be achieved in parallel to our negotiations with the United States. I hope for Parliament's support and advice as we try to achieve it.

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Third, appeals. The fact that ISDS tribunals don't have appeal mechanisms is one of the things that united business and NGO respondents to the consultation. It's a concern we want to address. Our suggestion here is to include an appeal body, with permanent members, directly within TTIP. It would ensure consistency of interpretation and review of decisions. We will also be proposing an appeal mechanism to our other negotiating partners, including in Canada. As with the permanent court, however, there are strong efficiency and legitimacy reasons to aim for a multilateral appeal mechanism. So we will begin to work on this in parallel.

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Finally, we believe we should address the question of the relationship between domestic legal systems and ISDS. If anything contributes to the perception of ISDS as unfair, it's the notion that investors have a second chance to overrule the decisions of national courts. There are two possible ways to address this. One would be to force investors to choose between national courts and ISDS from the outset. They would not be allowed to use ISDS once a case had begun in national courts. However, that might have the negative side-effect of encouraging companies to avoid national courts altogether.

A second option might therefore be to provide that investors have to abandon any proceedings they have started in national courts if they launch an ISDS case. Recourse to investment arbitration would not, however, be possible if the investor has decided to exhaust local remedies.

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Honourable Members

These are some of the ideas we have so far. I want to stress again that they are preliminary ideas. We want to discuss them with you. That is why I am here today. We want to discuss them with the Council. I will do that at the informal meeting in Riga next week. And we want to come to a common EU position on how to move forward.

I hope you will see them for what they are: a serious attempt to grapple with a complex issue.

I hope we can have a constructive discussion on this basis.

And I look forward to your views.