

KEI Europe Submission: European Commission's Public consultation on modalities for investment protection and ISDS in TTIP

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Knowledge Ecology International Europe (KEI Europe) is a non-profit organization focusing on the management of knowledge, including innovation and access to knowledge goods. More about KEI Europe is available at: <http://keieurope.org>.

KEI Europe is opposed to an ISDS provision in the TTIP, and our responses to the questions in public consultation on modalities for investment protection should be read with that caveat.

As an additional caveat, and to be clear about our overall views on the TTIP, note that KEI Europe has broader concerns with the TTIP, and even the elimination of ISDS from the TTIP will not in itself overcome these other concerns and reservations we have about the negotiation. For example, KEI Europe is concerned about the potential negative impacts of TTIP provisions in the areas of intellectual property, the reimbursements of medicines, electronic commerce, and regulatory harmonization, among others. KEI Europe also objects to the asymmetric secrecy surrounding the negotiations, which for several issues includes fairly extensive disclosures to well-connected corporate insiders, such as the members of the USTR trade advisory boards, and high degrees of secrecy as regards the general public. In this regard, we are grateful for the European Commission's consultation process for ISDS, but note that in the end, periodic and timely access to the actual negotiating texts is quite essential for the public, and for the legitimacy of any negotiation, so this should be perceived as a beginning, and not the end of transparency on the ISDS negotiation.

The following are KEI Europe comments on questions presented by the European Commission in its "Public consultation on modalities for investment protection and ISDS in TTIP." ISDS stands for Investor State Dispute Settlement. TTIP stands for the proposal Trans Atlantic Trade and Investment Partnership agreement.

KEI Europe has responded to Questions 1, 3, 4, 5 and 6.

Question 1: Scope of the substantive investment protection

The definition of "investment" should not include intellectual property rights.

Based upon the leaked EU proposals, and the standard 2012 U.S. Model Bilateral Investment Treaty, one can anticipate efforts to include intellectual property rights, subject to some limits on the application of ISDS.

The 2012 USTR Model Bilateral Investment Treaty (the 2012 Model BIT) defines investment to include: “Intellectual property rights” in Article 1(f), and also makes reference to the WTO the Agreement on Trade-Related Aspects of Intellectual Property (the TRIPS).

The 2012 USTR Model BIT Article 6 on Expropriation and Compensation provides an exception in paragraph (5), which reads as follows:

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.

The 2012 US Model BIT’s Article 8, on Performance Requirements, also provides an important exception for intellectual property rights regarding patents and proprietary information.¹

(b) Paragraphs 1(f) and (h) do not apply:

(i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

For the US BIT, the exceptions are welcome, but are not as broad and as necessary as an exclusion. Quite specially, the exceptions are both based upon exceptions that are “in accordance with” or “consistent with” obligations in the TRIPS Agreement. An ISDS mechanism changes who can litigate the meaning of the TRIPS Agreement, and who will decide what the TRIPS Agreement means. Without ISDS, only member states can litigate these issues. If left to the European Union and the United States government, one might expect some restraint regarding regarding such litigation, and even hope for reasoned outcomes. But when the litigation is initiated by Viacom, Disney, Monsanto, Pfizer, Novartis, AstaZeneca, Pearson publishing, Random House, Reed Elsevier, Thompson Publishing, Microsoft, Nokia, General Electric, Qualcomm, Unilever, Philip Morris International or Japan Tobacco and countless patent trolls, a lot can change.

Here are just a few issues that could be litigated under the 2012 USTR model BIT:

- * The application of and interpretation of the three-step tests for copyright (Article 13), trademarks (Article 17), industrial designs (Article 26.2), patents (Article 30).
- * What constitutes “adequate remuneration” for a compulsory license on a patent?
- * Does TRIPS Article 27 require the granting of patents for software, business methods, genes, and new uses of medicines, and how broad or narrow is the TRIPS exclusion of “diagnostic, therapeutic and surgical methods for the treatment of humans or animals?”

¹ Noting the model BIT refers to “proprietary” and the TRIPS refers to “undisclosed information.”

- * How to interpret the Article 31 of the TRIPS obligation for prior “efforts to obtain authorization from the right holder on reasonable commercial terms and conditions.”
- * What constitutes “unfair commercial use” under Article 31 of the TRIPS, as regards pharmaceutical test data? And, does this extent to efforts by governments to requires by governments to require the “disclosure of proprietary information” on results from clinical trials?

Note that in Annex B on Expropriation, the 2012 US Model BIT states:

The Parties confirm their shared understanding that:

4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action . . . (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.

According to the leaked version of the EU's July 2, 2013 proposals for investment in the TTIP (<http://keionline.org/node/1969>), and European Commission has proposed a similar provision, including in Article 12: Treatment of Investment, which creates a claim based upon:

f. A breach of legitimate expectations of investors arising from a government's specific representations or investment-inducing measures;

Since all intellectual property rights can be described as “investment-inducing measures,” this creates endless opportunities for litigating the question of what are “legitimate expectations of investors.”

KEI Europe finds these provisions a recipe for attacks on measures to curb abuses or limit rights of holders of intellectual property. The provisions create claims by investors that patents should be granted and all intellectual property rights should be enforced with vigor, despite compelling reasons to the contrary.

KEI Europe notes the asymmetry between (1) the rights given to investors to obtain and enforce intellectual property rights, and (2) the rights of the public to be free from undue limits on our freedom to acquire and use knowledge goods. The European Commission proposed a mechanism to enforce (1), but not (2), even though each are related to each other, and (1) creates a prejudice for (2).

Question 3: Fair and equitable treatment

The problems with the lack of a definition of “fair and equitable treatment” is set out in the the Commission questionnaire:

The FET standard is **present in most international investment agreements**. However, in many cases the standard is **not defined**, and it is usually **not limited or clarified**. Inevitably, this **has given arbitral tribunals significant room for interpretation**, and the interpretations adopted by arbitral tribunals have varied from very narrow to very broad, leading to much controversy about the precise meaning of the standard. This lack of clarity has fueled a large number of ISDS claims by investors, some of which have raised concern with regard to the states' right to regulate. In particular, in some cases, the standard has been understood to encompass the protection of the legitimate expectations of investors in a very broad way, including the expectation of a stable general legislative framework.

Efforts to narrow the application are welcome, but unlikely to address the more general concerns that ISDS is often tied to investor "expectations", which often lie outside of the broader public understanding of what constitutes "fair and equitable," and create unwanted roadblocks to reforms and changes in government policies.

In the area of intellectual property, we note that Article 17 on exceptions to the rights of trademark holders are bound by a standard that recognizes "the legitimate interests of the owner of the trademark and of third parties." In the context of patent exceptions, the WTO had ruled that third parties include the interests of consumers. The term "legitimate expectations of investors" could at a minimum be modified to be "legitimate expectations of investors and third parties," with an explicit rejection of the troublesome suggestion that investors have a right to a "stable" legislative framework, by noting, simply and directly, that "nothing in his agreement gives investors a right to a stable legislative framework." One might also the following language:

"Moreover, nothing shall in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Question 4: Expropriation

The EC's questionnaire begins with the statement that "The right to property is a human right, enshrined in the European Convention of Human Rights, in the European Charter of Fundamental Rights as well as in the legal tradition of EU Member States."

The relevant provision in the European Convention of Human Rights is Article 1 in the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Paris, 20.III.1952, which states:

ARTICLE 1 Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Here, the Commission might want to reference both paragraphs in this Article, not only the first paragraph.

In our response to question 1, KEI Europe objects to the proposal that private investors be given an opportunity bring private actions to interpret allowed exceptions and limitations to intellectual property rights under the TRIPS Agreement. If either the US or the EU is believes the other party is not complying with the TRIPS Agreement, they should resolve the dispute in the WTO or in bilateral discussions, and not delegate these disputes to investor suits. Investor suits over intellectual property rights will predictably be used to expand the grant of intellectual property rights, including in particular but not limited to patents, and to limit exceptions or measures to curb abuses or rights to protect the public interest.

It is also a spectacularly bad idea to give investors a right to sue if government decisions to reimburse medicines or regulate prices disappoint the expectations of investors.

Question 5: Right to regulate

In the questionnaire, the Commission notes:

Indirect expropriation has been a **source of concern** in certain cases where regulatory measures taken for legitimate purposes have been subject to investor claims for compensation, on the grounds that such measures were equivalent to expropriation because of their significant negative impact on investment. Most investment agreements **do not provide details or guidance in this respect**, which has inevitably left arbitral tribunals with significant room for interpretation. . . . The objective of the EU is **to clarify** the provisions on expropriation and to **provide interpretative guidance** with regard to indirect expropriation in order to **avoid claims against legitimate public policy measures**. The EU wants to make it clear that non-discriminatory measures taken for legitimate public purposes, such as to protect **health or the environment**, **cannot be considered equivalent to an expropriation**, unless they are manifestly excessive in light of their purpose. The EU also wants to clarify that the simple fact that a measure has an **impact on the economic value** of the investment does not justify a claim that an indirect expropriation has occurred.

At a certain point, one asks, what is the point of the ISDS mechanism for a US/EU agreement, if not to limit the right to regulate? The ISDS creates a private right to question the legitimacy of regulations, and this will predictably chill efforts to regulate unfair and exploitative business practices, or protect the public interest. Can the Commission fix this with safeguards? To some extent, yes, and to some extent no.

KEI Europe notes that the “right to regulate” is an inherent right of sovereign nations and not a right granted in trade agreements.

Recognizing KEI Europe is opposed to the ISDS mechanism, and using ISDS to challenge the legitimacy of regulations, we will suggest some proposed language that would improve the safeguards.

For example, the US 2012 Model BIT, Annex B Expropriation, in paragraph 4(b) now reads:

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

This could be written as:

(b) Regulatory actions by a Party that are designed and applied to protect public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

Question 6: Transparency

According to the Commission questionnaire:

In most ISDS cases, no or little information is made available to the public, hearings are not open and third parties are not allowed to intervene in the proceedings. This makes it difficult for the public to know the basic facts and to evaluate the claims being brought by either side. This **lack of openness** has given rise to **concern and confusion** with regard to the causes and potential outcomes of ISDS disputes. **Transparency is essential** to ensure the legitimacy and accountability of the system. It enables stakeholders interested in a dispute to be informed and contribute to the proceedings. It fosters accountability in arbitrators, as their decisions are open to scrutiny. It contributes to consistency and predictability as it helps create a body of cases and information that can be relied on by investors, stakeholders, states and ISDS tribunals. Under the rules that apply in most existing agreements, both **the responding state and the investor need to agree to permit the publication** of submissions. If either the investor or the responding state does not agree to publication, documents **cannot be made public**. As a result, most ISDS cases take place behind closed doors and no or a limited number of documents are made available to the public. The EU's aim is to ensure transparency and openness in the ISDS system under TTIP. The EU will include provisions to guarantee that hearings are open and that all documents are available to the public. In ISDS cases brought under TTIP, all **documents will be publicly available** (subject only to the protection of confidential information and business secrets) **and hearings will be open to the public**. Interested parties from **civil society will be able to file submissions** to make their views and arguments known to the ISDS tribunal.

To this end, the leaked text of the European Commission proposal on investments states:

The system of investor-state dispute settlement should have the following features:

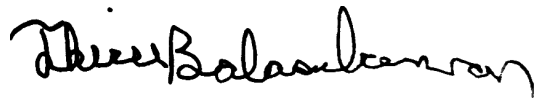
13) disputes under the agreement will be subject to a high standard of transparency, subject only to protection of genuinely confidential information (i.e. documents will be publicly available, hearings will be open) and amicus curiae will be able to make submissions. The other Party to the Agreement will also be able to file submissions. The applicable rules will be those set out in the UNCITRAL Arbitration Rules on Transparency (expected to be adopted in July 2013);

To the extent that the EU wants to formalize the transparency requirements, the could provide that disputes and pleadings be available in Internet accessible archives, with text in searchable format, accessible also to

persons with disabilities, be available timely, and that standards for exceptions for transparency, including claims regarding confidential information, be narrow, not undermine the ability of the public to understand, monitor and evaluate the ISDS proceedings, and most useful, be no more restrictive as regards transparency as the FOIA and open records laws in the United States and Europe.

The Commission could also propose that ISDS could not be used to enforce norms that were not themselves developed in secret, without public review during the norm setting process, since logically, the concerns about transparency also apply to the norms themselves.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thiru Balasubramaniam', written in a cursive style.

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