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on the Recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)

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EXPLANATORY STATEMENT

The European Union has built up diverse experience in the course of its development, particularly in establishing a common 'trade and investment area' of its own, the common European internal market. For this purpose, two preconditions always had to be met:

1. Trade and investment from another Member State had to be free from arbitrary State action, so that discrimination against them was not permitted, and

2. Provision had to be made for submitting disputes for judicial settlement.

This may seem obvious, and yet in fact – even in the European internal market – there have been recurrent cases of damaging treatment which called for a judicial solution. It is not right that this should only apply to us among ourselves. The same arrangements must also apply to us in international free trade and investment agreements, and therefore in relation to the USA.

Private investment in other States is undertaken only if the investor can be sure that his investment will not go to waste because of arbitrary action by the State. The EU and the European Parliament therefore also have a strong interest in ensuring that European investors and their investments – in the case of TTIP – are protected in the USA. From the USA's point of view, the converse will apply in every respect. Investment protection provisions and dispute settlement mechanisms in free trade and investment agreements therefore possess decisive added value and – as our own experience confirms – are of the utmost importance and mandatory, as well as according with our rule-of-law traditions.

In TTIP too, therefore, care must be taken to ensure that, both in the USA and in the EU, domestic and foreign investors are treated equally and are subject to fair and common rules and standards and a level playing field. A balance therefore needs to be struck here which will ensure firstly that national laws cannot be retroactively and arbitrarily amended to the detriment of investors – that investors are not at the mercy of arbitrary action by States, therefore – and secondly that the national legislature is not prevented from altering existing standards and levels, for example in the fields of environmental protection, social security, labour law, protection of employees, protection of health, consumer protection, public utilities, public services, cultural establishments and cultural diversity in whatever way it sees fit, as required for its democratic legitimacy, without giving investors any legal remedy against this.

The public debate and the concerns which have been expressed in it concerning investment protection and dispute settlement should therefore be taken into account along these lines.

The question now arises as to how investor-State disputes involving a private person can be appropriately settled while taking account of the above points:

1. Not to agree a dispute settlement mechanism would be neither desirable nor, for the above reasons, appropriate. Moreover, it would have the consequence that the dispute settlement mechanisms for which the nine existing bilateral agreements between the USA and Member States provide would continue to be applied, with the consequence that uniform application of the law would no longer be possible and that different laws would apply within the EU.
2. It would not be permissible to use existing international courts to settle disputes, as investors are private persons and therefore have no standing before those courts, before which only States may bring actions.

3. Courts, tribunals or other dispute settlement mechanisms established by international multilateral agreements, such as the Energy Charter Treaty, which vests powers in a tribunal, are permissible only for certain fields and are therefore not available for others: in other words, the scope of a free trade and investment protection agreement could not be covered in full, so that such arrangements would not be a solution for an agreement of this kind.

4. Nor would inter-State dispute settlement be an effective alternative, as such procedures are geared to dealing with significant and systematic infringements of the rules, which could influence the whole trade sector and are therefore appropriate only in cases of particular commercial interest. Disputes over investment often entail firm-specific aspects, which tend to be linked to one-off special measures, primarily of an administrative nature, which affect the operation of the firm, such as the revocation of licences. Only a few individual decisions which affect an investor are fundamentally sufficient to be dealt with in an inter-State dispute settlement procedure. If inter-State dispute settlement procedures were seen as the preferred option, disputes would again become the central focus of our political relations and would inevitably lead to cases being selected which were of particular economic significance, so that SMEs would be left without protection. Moreover, inter-State dispute settlement procedures of the kind which is familiar from the WTO system may encourage a State to introduce amendments to the law in order to solve disputes which are of general and fundamental interest, applying the provisions of TTIP. Investment-related dispute settlement procedures are intended purely to tackle a specific problem about which an individual investor complains and can therefore, at best, result in a one-off payment of financial compensation. From the point of view of the rapporteur, moreover, it seems questionable from the constitutional angle for a State, which has a duty to act in the public interest, to set itself up as the agent of a private person.

5. The proposal which has frequently been put forward during the public debate that disputes should be settled through the national courts disregards – besides other arguments – the legal framework on which this option would be based, and would not provide an appropriate solution to all disputes:

(a) National courts are no alternative to the schemes which have existed hitherto (ISDS), but play a supplementary role, as each system adheres to a different set of rules, at both national and international level. International agreements, for example under the auspices of the WTO, or other free trade agreements do not form part of the USA's law. Thus US courts can only apply national law, even if this conflicts with international agreements concluded by the USA. The same applies to the EU: international agreements and free trade agreements likewise do not form part of EU law.

(b) National courts ought ideally to be the first port of call for foreign undertakings if they are affected by a State measure (which applies to them individually), but the point is that national law does not always include adequate provisions on the investment standards laid down in the agreement, such as the prohibition on arbitrary treatment, denial of justice or the outlawing of discrimination. US law, for example, does not specifically prohibit discrimination against foreigners, so that such discrimination would presumably be permissible.

(c) National courts could not always resolve conflicts between international free trade and investment protection agreements. In most cases, national courts do not recognise

international free trade and investment agreements as a legal basis, so that investors could not even bring an action and would be denied access to justice. Many States have dubious judicial systems, so that actions brought in those countries would be doomed to failure from the outset and TTIP would not be available as a model here.

(d) Bringing an action against a State before a national court in that State would be a protracted business, unlike resorting to a dispute settlement mechanism specially agreed in a free trade agreement, and – quite apart from bureaucratic, and in many cases linguistic, barriers – would also be governed by the law of which the investor was complaining. Such a dispute settlement procedure would not be in the investor's interest, because it would not be sufficiently effective, quick and targeted.

(e) Requiring disputes to be settled only before the national courts would also have the effect that European agreements would no longer be subject to uniform application. The rapporteur believes that such a system-break in European law might even constitute a breach of European law. The European internal market therefore rightly has a common court at its disposal, which ensures the uniform application of European law.

6. The establishment of such a common court, namely a common (or later even international) commercial court (with a court of appeal), on the other hand, would be a solution which, as it took its place in the legal panoply alongside international law, European law and national law, would be appropriate, and such a court would therefore be institutionally comparable to the European Court of Justice in Luxembourg. A solution along these lines would be conceivable and desirable in the medium and long term and would have the major advantage of establishing a judicial system which would best meet standards regarding the rule of law (procedures, jurisdiction, transparency, etc.) in the 'investor state constellation', and would do so in all respects. However, there are associated questions to be resolved (location, operating costs, procedures, costs of procedures, evidence, appeal system, objection procedures, etc.), which could not be done in time for the conclusion of the TTIP negotiations. In his opinion, the rapporteur has therefore asked the Commission to assess the possibility of establishing a commercial court. If such an international commercial court were to be founded, it would have the additional advantage, as a model, that, thanks to the application of rule-of-law principles, legal certainty would prevail even in States with questionable judicial systems.

7. Weighing up the above points, the rapporteur concludes therefore that ISDS mechanisms are an accepted instrument of international public law and often constitute not only the last resort but the best and most appropriate option for resolving disputes of this kind. The rapporteur therefore advocates that TTIP include a clause concerning ISDS, until such time as it is possible to establish a common commercial court (as proposed in Paragraph 6 above).

Since the Lisbon Treaty, the EU has been competent to negotiate investment protection agreements. This being so, there is an opportunity to reform existing investment protection provisions and the arrangements for dealing with investor-state disputes in order to take account of the concerns discussed in the public debate and to increase confidence in arrangements of this kind. The Commission has already made proposals for improving investment protection rules and the functioning of the dispute settlement system and has included initial improvements in the free trade agreement with Canada (CETA). These could be further supplemented: a list of suggestions may be found in Paragraph 4(d) of the opinion,

with the aim of bringing the special character of such dispute settlement even more into line with rule-of-law principles and counteracting the impression that it involves a kind of 'chance decision'. Dispute settlement under TTIP requires even better provision for a transparent structure for the system and for predictability, even if the system which has prevailed to date is not open to contestation on the grounds of the rule of law. In the long term, the revision of the EU's investor protection standards should have the aim of harmonising existing rules and working towards a uniform investor protection system, so that all existing and future investment partnerships between the EU and third States can be based on these rules and standards.

Regulatory coherence should reduce further barriers to trade and investment. Goods imported from the EU into the USA and vice versa must therefore comply with the rules of the other trading partner. However, these rules may differ and give rise to red tape and financial costs, which could particularly harm SMEs. In order to reduce or even eliminate these obstacles in future, it would be beneficial if both sides were to work together to gradually adjust these disparate standards. In doing so, it must be ensured that our EU standards, for example in the field of health, consumer protection, environmental protection, etc., are preserved and that no adverse impact on public goods is possible. The Commission proposes setting up a Regulatory Cooperation Body to increase regulatory coherence. The Body's tasks would be confined purely to cooperation, and it would not be assigned any legislative or decision-making functions.