Public consultation on modalities for investment protection and ISDS in TTIP

1. RESPONDENT DETAILS	
1.1. Type of respondent -single choice reply-(compulsory)	I am answering this consultation on behalf of a company/organisation
Your details - Companies/Organisations	
1.1.1. My company's/organisation's name may be published alongside my contribution. -single choice reply-(compulsory)	Yes
1.1.2. Company/Organisation name: -open reply-(compulsory)	United States Council for International Business
1.1.3. Contact person - not for publication -open reply-(compulsory)	Shaun Donnelly, Vice President, Investment and Financial Services
1.1.4. Contact details (address, telephone number, email) - not for publication: -open reply-(compulsory)	
United States Council for International Business 1400 K Street, NW, Suite 450 Washington, DC 20005 T: (202) 682-1221 E: sdonnelly@uscib.org	
1.1.5 What is your profile? -single choice reply-(compulsory)	Other
1.1.5.6. If you replied "other", please specify: -open reply-(compulsory)	Trade Association representing major businesses operating in the U.S.
1.1.6. In which country are the headquarters of your company/organisation located? -single choice reply-(compulsory)	In the United States of America
1.2. Your contribution I agree for my contribution to be made public on the European Commission's website -single choice reply-(compulsory)	Yes
1.3. What is your main area/sector of activity/interest? -open reply-(compulsory)	
International Economic Policy	
1.4. Registration: Are you registered in the EU's transparency register? -single choice reply-(compulsory)	No
1.5. Have you already invested in the USA? -single choice reply-(compulsory)	Yes
A. Substantive investment protection provisions	
Question 1: Scope of the substantive investment protection provisions	
Question:	

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?

If you do not want to reply to this question, please type "No comment".

-open reply-(compulsory)

THE DEFINITION OF "INVESTMENT" SHOULD BE BROAD USCIB supports a broad definition of "investment", reflective of the various and wide-ranging forms investment can take in today's and tomorrow's globalized economy, including assets owned or controlled, directly or indirectly, such as: • a company, • shares and other forms of equity participation in that company, • loans and other debt instruments, • futures, options, and other derivatives, • intellectual property rights, and • other tangible or intangible assets such as licenses, authorizations, permits. The scope of investment should include all products and services across all sectors, and any specific product/service or sector-specific exclusions or limitations should be rejected. THE PHRASE "IN ACCORDANCE WITH APPLICABLE LAW" IS TOO BROAD AND POTENTIALLY CONFUSING The term "in accordance with applicable law" can be open to broad interpretation and abuse at the expense of the investor. Where investors in gross violation of the law, as for example in the case of the use of bribes associated with an investment, seek to assert claims against a host State for breach of treaty obligations, there are other defenses the host State may assert. It is not necessary to qualify the concept of covered investments by use of the phrase "in accordance with applicable law." Investor protections should not be denied based on a technicality should an investor, for example, have mistakenly filed for the wrong type of permit. In making investments in the most efficient, effective, and legal manner possible, there are a host of factors, including tax policy, which drive an ultimate determination as to how an investment is funded and through which subsidiary. Investment agreements obligate the host country to ensure any investment is treated fairly, without discrimination, and protected from expropriation without just compensation. The agreement should not condition or qualify how, where, and in what form the investment is planned or made. "INVESTMENT" SHOULD NOT BE QUALIFIED The very small number of cases where individuals or entities seek to invest improperly through shell or "sham" corporations can be effectively addressed through "denial of benefits" provisions, which the United States has relied on in its investment agreements for many years. Specifically, Article 17.2 of the U.S. Model BIT text provides for the ability of a host country to deny the benefits of the agreement to enterprises that lack "substantial business activities" in the territory of their home country and are owned or controlled by nationals of third countries or of the host country. Attempts to go beyond this type of limitation should be rejected as they run counter to the stated goal that investment agreements support an open-investment climate and rule of law.

Question 2: Non-discriminatory treatment for investors

Question:

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.

If you do not want to reply to this question, please type "No comment".

-open reply-(compulsory)

THERE SHOULD NOT BE GENERAL "EXEMPTIONS OR "EXCEPTIONS" TO THE UNIVERSALLY SUPPORTED CORE PROTECTION OF NON-DISCRIMINATORY TREATMENT Non-discriminatory treatment for investors is the most basic and longstanding investment protection afforded to foreign investors. This "pillar protection" should not be undermined or conditioned. Even the harshest critics of investment agreements generally support investment protection against discriminatory treatment. Any exceptions to this general principle of non-discrimination (so-called "non-conforming measures") should be explicitly listed and drawn as narrowly as possible (on a "negative list" basis). Beyond what is specified on this reserved list (and what is commonly included in investment agreements as exceptions to the prohibition on nationality-based discrimination – e.g., exceptions for government procurement and subsidies), all other government measures and sectors of the economy should be open for foreign investment and deserving of protection on the basis of non-discrimination. There should not be any general exceptions, which are highly problematic in the context of investment rules, as they are too easily abused and run the risk of vitiating the underlying obligation. In regulating in the public interest, for example in order to protect the environment, there is no need for governments to discriminate on the basis of the nationality of the investment. Such regulation should typically apply equally to domestic as well as foreign investors. MFN SHOULD NOT BE LIMITED Limiting the application of most-favored nation status is short sighted. It is the fundamental purpose of investment negotiations to liberalize and foster an increasingly open climate that welcomes foreign direct investment. Accordingly, MFN provisions granted by the host country in future agreements should extend to all foreign investors protected by previously negotiated agreements. Governments can effectively advance their policy objectives in areas such as health, environment, and consumer protection without violating core investment protections such as non-discrimination and MFN commitments.

Question 3: Fair and equitable treatment

Question:

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?

If you do not want to reply to this question, please type "No comment".

-open reply-(compulsory)

THE CORE PROVISION OF FAIR AND EQUITABLE TREATMENT SHOULD NOT BE ALTERED Fair and equitable (F&E) treatment is an absolute benchmark for minimum standard of treatment beyond national and MFN treatment, and as such is one of the most basic provisions of investment instruments worldwide. As the Commission itself recognizes, the F&E treatment standard has long been included in most modern investment agreements, including those of EU Member States and the United States. It is also a basic principle in international law that has been recognized from the Havana Charter to the current work of the Organization for Economic Cooperation and Development (OECD). At its core, this provision enshrines in international relations and law the same basic right that European, U.S. and most other governments apply domestically: that property owners have the right to F&E treatment by their government, including but not limited to the basic ideas of due process and protection from “denials of justice.” In European countries and the EU, fairness and equity are basic norms reflected in the law and practice. Given the broad and fundamental recognition of this principle and the importance of this issue for investors in all industries, the final T-TIP agreement should include a strong F&E treatment provision. THE FINAL T-TIP AGREEMENT SHOULD NOT HAVE A “CLOSED LIST” OR LOOK TO CETA FOR GUIDANCE ON THIS MATTER The consultation suggests the primary purpose for the proposal of a “closed list,” illustrated in the sample CETA text, is that there is some undefined concern with varying interpretations over defining what protection is afforded by F&E treatment. It would be erroneous to subscribe to this concern. There is remarkably little evidence to suggest that international arbitrations have had conflicting or competing views over F&E treatment. If clarity is indeed the objective, the CETA text offers little help, with ambiguous terms like “manifest arbitrariness” that could themselves be subject to varying interpretations. In short, the “closed list” adds little understanding as to how to interpret fair and equitable treatment. A “closed list” not only fails to provide clarity where none is really needed, but would also set far too low a standard for the appropriate scope of the F&E treatment provision in the T-TIP. While all the examples set forth in the Commission’s consultation are already included in the F&E treatment scope, they are far too limited a set of activities that should be covered by a strong investment chapter in the T-TIP. Adoption of such a limited F&E treatment provision as the Commission suggests would dramatically undermine the usefulness of this provision in setting forth the strong rule of law and government accountability principles that both the EU and U.S. governments support. It would also put EU and U.S. investors in a much weaker position compared to other foreign investors in each market given that pre-existing EU Member State and U.S. BITs provide much broader coverage to investors in hundreds of other countries. Such a closed-list approach would represent a major and ill-advised step backward from this core provision. We understand that proposals such as the Commission’s and some changes in U.S. practice have been developed in reaction to critiques that a broad application of the fair and equitable treatment standard undermines a government’s right to regulate in the public interest. As the Commission itself has recognized, government regulatory action cannot be taken in a manner that violates fundamental rights. That too is what the fair and equitable standard and other investment standards require.

Question 4: Expropriation

Question:

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.

If you do not want to reply to the question, please type "No comment".

-open reply-(compulsory)

COMPENSATION FOR EXPROPRIATION, INCLUDING INDIRECT EXPROPRIATION, IS ESSENTIAL We strongly believe that expropriations should not occur except for a public purpose, on a non-discriminatory basis, where full due process protection has been afforded, and only upon payment of prompt, adequate, and effective compensation to the investor. Anything less than this in T-TIP would be inconsistent with the democratic traditions of the EU and the member states, and would therefore be unacceptable. Accordingly, including such protection in EU investment agreements is consistent with EU law. It is moreover very important that protection from indirect expropriation be clearly covered under EU investment agreements and entitled to compensation, as it is in no meaningful sense different than direct expropriation. In this regard, the EU approach to covering indirect expropriation is largely consistent with the approach taken by the United States in its model text and should be carried forward in the T-TIP. THERE SHOULD NOT BE A GENERAL EXCEPTION FOR CERTAIN TYPES OF MEASURES The EU proposal to clarify further the treatment of indirect

expropriation to exclude certain measures appears to be very similar to a general exception, which is both unnecessary and contrary to basic European law in this area. Our objection to any “general exception” provision was noted above. It is far preferable to list factors for the ISDS panel to consider in making its determination, including whether the measure is non-discriminatory and whether the measure is manifestly excessive in light of its purpose. The U.S. approach (in Annex B of the U.S. Model BIT text) provides a useful example of this approach in the context of indirect expropriation.

Question 5: Ensuring the right to regulate and investment protection

Question:

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?*

If you do not want to reply to this question, please type "No comment".

-open reply-(compulsory)

INVESTOR PROTECTION HAS NEVER DIMINISHED THE STATE’S RIGHT TO REGULATE Investment protections, from “fair and equitable treatment” to compensation for expropriation, are all longstanding principles of both domestic European and U.S. legal systems, as well as international law. Such standards, like domestic law, provide limited constraints on governments to protect fundamental rights. In negotiating these investment instruments from their earliest days, EU member states and the United States have long ensured their own right as sovereign states to regulate in the public interest. In no way do these obligations undermine a government’s legitimate right to regulate in the public interest, including promoting health, environmental, safety and public welfare objectives. The U.S. model text for investment agreements arguably accomplishes this careful balance of investor protection and the state’s right to regulate. Going beyond these clarifications, however, is unnecessary and we oppose additional efforts as they would upset this balance. Critiques of investment provisions have become louder throughout the last two decades, but they are frequently based on a false premise, which leads to illogical conclusions. Critics of several NAFTA cases, for example, routinely ignore the facts and the outcomes, including that not one single NAFTA case has undermined a government’s legitimate right to regulate in the public interest. Indeed, investment agreements do not require governments to repeal or modify measures found inconsistent with their provisions; they only require monetary compensation in the event of a breach. GENERAL EXCEPTIONS WOULD UNDERCUT THE CORE PROTECTIONS OF AN INVESTMENT AGREEMENT Proposals to exempt public welfare measures through a general exception-type mechanism or blanket exemptions beyond the “except in rare circumstances” language contained in the U.S. model text, would vitiate the entire purpose of the investment protections. Governments are presumed to be regulating on behalf of the public welfare, but need to (and do) follow other basic principles in doing so. In this respect, it is important as well to note that the standard that the United States and EU set in this agreement will be viewed and likely followed by others, including countries with which both the EU and United States are negotiating.

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

Question 6: Transparency in ISDS

Question:

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.

If you do not want to reply to this question, please type "No comment".

-open reply-(compulsory)

TRANSPARENCY, INCLUDING APPROPRIATE SAFEGUARDS, IS INTEGRAL TO THE INTEGRITY OF THE ISDS PROCESS Transparency can, if done appropriately, help build public confidence in and acceptance of government procedures, domestic or international. As such, transparency in the ISDS process and procedures under the T-TIP should be maximized to the extent possible. At the same time, the primary objective of the ISDS process must remain to adjudicate investment disputes fairly and efficiently. Thus, while maximizing transparency, it is also important to ensure appropriate confidentiality for matters, documents, or discussions that either party demonstrates require protection for essential security or commercial reasons. Nothing in the transparency provisions should be interpreted to compel either public or private parties in ISDS to disclose information which merits protection under the confidentiality provisions. Each of the parties to the ISDS process, as well as members or staff of the Tribunal, shall be obligated to fully respect legitimate designations of confidentiality by other parties. Subject to clear rules and procedures to safeguard the legitimate interests of

either party as outlined above, the parties and the Tribunal should make available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions by Non-Disputing Parties or Amicus Submissions (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal. PUBLIC PARTICIPATION THROUGH AMICUS CURIAE SUBMISSIONS IS USEFUL, HOWEVER ABUSE SHOULD NOT BE PERMITTED The authority of an ISDS panel to accept and consider amicus curiae submissions related to a particular dispute that the tribunal determines would be useful to the elucidation of legal questions at issue in the dispute should be generally supported. All of these transparency provisions are already common in the U.S. model text approach as well as under revised UNCITRAL and ICSID procedures. It is important to emphasize that ISDS procedures are, fundamentally, serious undertakings; transparency should not be abused by the parties directly involved or any other parties to detract from or complicate that juridical process. ISDS proceedings should not be politicized. For example, public demonstrations, abuse of the amicus process with peripheral submissions, etc. should not be permitted. USCIB is the U.S. national affiliate of the International Chamber of Commerce (ICC). Through the International Court of Arbitration and the ICC International Centre for ADR, ICC offers a wide range of flexible and effective dispute resolution services.

Question 7: Multiple claims and relationship to domestic courts

Question:

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

If you do not want to repy to this question, please type "No comment".

-open reply-(compulsory)

THERE SHOULD BE NO OPPORTUNITY TO MULTIPLY COLLECT FOR THE SAME TREATY VIOLATION, AND THERE SHOULD BE NO REQUIREMENT TO EXHAUST LOCAL REMEDIES The EU approach appears to largely mirror the U.S. Model BIT text. In that regard, it would not be appropriate for an investor to receive multiple compensation awards for the same alleged treaty violation. Likewise, it would not be appropriate to require that an investor exhaust local remedies through domestic courts before invoking the right under the treaty to have an independent tribunal review whether investment obligations under a governing agreement have been breached. An investor should have the ability to abandon a domestic court proceeding. Some treaties reject the fork-in-the-road approach as it undermines the incentives of an investor to start with the local court system, which the EU favors. To achieve the objective sought, it would be far preferable to allow an investor to be able to proceed in domestic court if it so chose. If it later chose to pursue redress under an international agreement, it would be required to provide a written waiver of its right to continue the domestic proceeding. CETA ARTICLE X.23B (SAMPLE TEXT) IS PROBLEMATIC Further, the sample CETA text Article X.23b is potentially highly problematic. We oppose an approach where the interpretation of the proposed text is intended to instruct a tribunal to stay its findings to wait for the outcome of a proceeding under another international agreement, if that other proceeding is not between the same two parties. Finally, while a cooling-off period can in some circumstances be useful, the suggestion of a 180-day cooling off period is rather excessive in length, unnecessarily prolonging a proceeding, and thus a resolution.

Question 8: Arbitrator ethics, conduct and qualifications

Question:

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 further improvements be envisaged?

If you do not want to reply to this question, please type "No comment".

-open reply-(compulsory)

ARBITRATORS SHOULD BE ETHICAL, AND WE ARE OPEN TO A CODE OF CONDUCT ENSURING ETHICAL CONDUCT Selection of competent, independent, and ethical arbitrators is essential for the operation of an ISDS system and for its acceptance by key players. We reject any premise that the current arbitration process is rife with ethical conflicts and challenges, and do not share any view that recent ISDS decisions, whether the ultimate ruling favored the claimant company or the respondent government, have suffered from unqualified, biased, or unethical arbitrators. However, we would welcome practical suggestions to strengthen (ex. code of conduct) the conduct of arbitrators. Disciplines should be in place to ensure that no arbitrators have a conflict of interest in any case on which they sit

as arbitrators. But we would note that the Commission has avoided supporting any a specific code of conduct, making it difficult for us to support or oppose its development and adoption in the abstract. Further, not all potential breaches in a code of conduct are equally problematic; therefore the suggestion that any potential breach in the code requires reversal of a tribunal's decision is flawed. WE ENDORSE THE SELECTION PROCESS OF EACH SIDE CHOOSING AN ARBITRATOR, AND THOSE TWO ARBITRATORS CHOOSING A THIRD We support the highest ethical standards for ISDS arbitrators and believe that ISDS arbitrators have generally met such standards. We would, of course, be open to well-crafted specific proposals to ensure that arbitrators in ISDS cases under T-TIP are of the highest quality and have relevant experience and stature but would oppose rigid, arbitrary, one-size-fits-all eligibility criteria. The normal approach in ISDS cases whereby each of the two parties designates one arbitrator and then those two arbitrators select a third arbitrator has generally worked well and should be maintained. International investment agreements have clear rules on the selection of arbitrators, including for the appointment of the chairperson if the other two appointed arbitrators cannot agree upon a chairperson. We would have serious concerns over a proposal to limit a party's ability to select an arbitrator by setting restricted lists from which "approved" arbitrators must be drawn. The biggest problem with a restricted list is that the list itself would be approved by the T-TIP governments, not the investor, thus potentially undermining the whole principle of a neutral forum. Arbitrators should absolutely be held to the highest standards of conduct and ethical behavior. Those criteria need to be spelled out in clear detail, however, in order to, inter alia, protect against vague or unsubstantiated attacks against an arbitrator on ethical grounds when the real justification is disagreement with the arbitrator's decision(s) on a particular ISDS case. Ethics and conduct are ethics and conduct; care must be taken to ensure that honest and ethical arbitrators are not subject to unfair personal attacks based on their substantive rulings. EXPERIENCE IN TRADE LAW OR BEING A RETIRED JUDGE SHOULD NOT BE QUALIFICATIONS TO BE AN ARBITRATOR We question the wisdom that arbitrators need to be well-versed in trade law, as it has no direct bearing on investment treaties and the obligations contained within them. Also, the suggested notion that retired judges are naturally good investment arbitrators is similarly flawed, as they will likely have had careers interpreting national law, not international treaties, which are fundamentally different constructions of legal obligations.

Question 9: Reducing the risk of frivolous and unfounded cases

Question:

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.

If you do not want to reply to this question, please type "No comment".

-open reply-(compulsory)

FRIVOLOUS CLAIMS ARE NOT A SIGNIFICANT PROBLEM Expedited dismissal may be appropriate where a claim, on its face and assuming provisionally that the claimant will be able to establish the facts it alleges, plainly falls outside a tribunal's jurisdiction or would not support a remedy in claimant's favor as a matter of law. It is not in the business communities' interest to have claims that facially do not support an award in claimant's favor to be subject to full tribunal proceedings. But we would also note that there is no substantial evidence to suggest that frivolous claims are clogging up the approximately 3,000 ISDS mechanisms established under existing treaties. The U.S. model text also has provisions for expeditiously addressing claims that facially are without legal merit. Moreover, there should be equal concern with regard to "frivolous defenses" put forward by a government to justify its actions, should the government handily lose in a proceeding. In other words, the agreement should deal not only with "frivolous claims" but also with "frivolous defenses." ARBITRATORS SHOULD NOT BE FORCED TO APPLY "LOSER PAYS" RULE The suggested EU approach is to award legal fees against the "losing party." However, it often is difficult to determine who the "losing party" is. Tribunals should have discretion to decide how to allocate fees and costs, as provided for in the UNCITRAL Arbitration Rules. "Loser pays" would be one option available to a tribunal but we oppose any automatic formula on cost allocation which requires flexibility for the Tribunal.

Question 10: Allowing claims to proceed (filter)

Question:

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?***

If you do not want to reply to this question, please type "No comment".

-open reply-(compulsory)

Any exception for “prudential measures” should be clear and narrowly tailored designed to ensure the integrity and stability of a financial system. An overly broad exception would allow discriminatory or other arbitrary actions that would reduce investment protections and not be in the interest of the integrity or stability of financial markets. An exception for prudential measures should only apply in limited circumstances and should not, for example, allow measures to that violate the “free transfers” obligation. The U.S. Model BIT contains a prudential exception that strikes the appropriate balance. That text is narrowly tailored and puts in place appropriate procedural safeguards to ensure that the exception is not abused.

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

Question:

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?

If you do not want to reply to this question, please type "No comment".

-open reply-(compulsory)

The EU approach is directionally correct in assisting tribunals with interpretation issues as they may arise. A very similar approach has already been included in the U.S. Model BIT text. However, substantial concerns have been raised about the use of binding interpretations of agreements that contain such provisions as such interpretations may redefine or go beyond the original text. Moreover, if at all, those binding interpretations of the text should only apply with respect to future, and not to pending, disputes.

Question 12: Appellate Mechanism and consistency of rulings

Question:

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.

If you do not want to reply to this question, please type "No comment".

-open reply-(compulsory)

THERE IS NO ESTABLISHED NEED FOR AN APPELLATE MECHANISM Those who are most vocally in support of an appeals process often are so out of hypothetical concern. Given the current experience with resolved ISDS cases there is not an established fact pattern that suggests the need to establish an appellate mechanism. Should one be established, ISDS cases will result in an appeal by the losing party. As more cases are decided in favor of the state than the investor, the investor is more likely to be the appellant. Accordingly, as a representative of the business community, an appeal mechanism might be in our interest. However, as stated above, we do not see the necessity for such a mechanism. No one should assume an appellate mechanism for international investment agreements would be easy to establish, operate, or fund. Establishing an appellate body to adjudicate disputes arising under 3000+ different bilateral and regional agreements is far more challenging than anything faced by the WTO appellate body overseeing a single set of multilateral commitments. WE ARE OPEN TO THE POTENTIAL INCLUSION OF AN APPELLATE MECHANISM, HOWEVER THE TEXT OF THE EU APPROACH LACKS SUFFICIENT DETAIL TO FULLY COMMENT We are open to the potential inclusion of a carefully constructed appellate-like mechanism, and the U.S. Model BIT text also leaves open the possibility for the future establishment of such an appeals process. As of yet, however, no such process has been formally established. The EU approach, however, fails to provide sufficient detail for us to constructively comment on a proposed process associated with an appeals process. The establishment of an appellate mechanism in T-TIP would be a highly complicated undertaking, including how it would address the ICSID prohibition on appeals from tribunal awards. Detail around a proposed process would be important before we could formally support or oppose its adoption.

C. General assessment

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?

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

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

If you do not want to reply to these questions, please type "No comment".

-open reply-(compulsory)

We appreciate the ability to comment through this consultation as representatives of the United States business community. Our members are active investors in the EU and have a vital interest in the T-TIP, as well as the investment environment across the European Union. We believe that investment access, protection and enforcement through ISDS must be included in T-TIP. Further, we believe it is in the EU's interest to standardize its approach to investment protection and enforcement, irrespective of the EU's negotiating partner. The rules regarding investment protection should not vary from one agreement to another. Investment protection is rule of law. Too much of the debate around investment is driven by emotion, not facts or evidence. There are more than 3,000 investment agreements in force. Of those, the EU member states cover more than 1,400. There is no crisis with respect to investment protection and the use of ISDS, and hypothetical concerns should not drive the public policy process. Should uninformed voices drive the debate, the EU will run the risk of having the protections secured by its 1,400 investment agreements undercut. After all, given that U.S. and EU investment comprises roughly 65% of all FDI in the world, it is in our shared interest to promote a strong rule of law, open investment climate, protection from expropriation, and the freedom of transfers associated with investments. T-TIP offers the opportunity to forge the gold standard for investment protection. The U.S. and EU are the leaders of the international economic system. EU-U.S. agreement in T-TIP on strong investment protection is essential. We at USCIB and our member companies and our colleagues stand ready to support the important negotiating effort.