

## 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) GMB

1.1.5 What is your profile? -single choice reply- (compulsory) Trade union/organisation representing EU trade unions

1.1.5.1. If you are a company, what is the size of your company? -single choice reply- (compulsory)

1.1.5.2. If you are a non-governmental organisation, how many members does your organisation have? -single choice reply- (compulsory)

1.1.5.3. If you are a trade association, how many members does your association have? -single choice reply-(compulsory)

1.1.5.4. If you are a trade association representing businesses, please provide information on your members (number, names of organisations). -open reply- (compulsory)

1.1.5.5. If you are an organisation representing several non-governmental organisations, please provide information on your members (number, names of organisations). -open reply- (compulsory)

1.1.5.6. If you replied "other", please specify: -open reply- (compulsory)

1.1.6. In which country are the headquarters of your company/organisation located? -single choice reply- (compulsory) In one of the EU28 Member States

1.1.6.1. Please specify which Member State: -single choice reply- (compulsory) United Kingdom

1.1.6.2. If you replied "other", please specify: -open reply- (compulsory)

### Your details - Individuals

1.1.1. My name may be published alongside my contribution -single choice reply- (compulsory)

1.1.1.1. Contact person -open reply- (compulsory)

1.1.2. If you are answering as a citizen/individual, please specify: -single choice reply- (compulsory)

1.1.2.1. If you replied "EU citizen", please specify from which Member State: -single choice reply- (compulsory)  
1.1.2.1. If you replied "other", please specify: -open reply- (compulsory)

Yes

1.2. Your contribution  
I agree for my contribution to be made public on the European Commission's website -single choice reply- (compulsory)

1.3. What is your main area/sector of activity/interest? -open reply- (compulsory)  
GMB is the UK's third largest trade union with approximately 628,000 members across a wide range of sectors, both public and private. We confirm that this response is on behalf of our GMB members. GMB has long been active in campaign work around EU and international trade issues and has been critical of the increasing number of bilateral trade deals and deals between groups of countries and the EU that are being agreed as negotiations for comprehensive global agreements through the World Trade Organisation (WTO) have broken down. More and more of these agreements are increasing and entrenching corporate power, pushing for ever more deregulation to boost company profits, whilst forgetting that these very regulations exist for a reason: to protect the social, employment and environmental rights of workers and their families. In particular, GMB has major concerns about the EU and US Transatlantic Trade and Investment Partnership (TTIP) currently being negotiated and the threat it poses to our members and the wider UK, EU and global economies on a number of levels. As the biggest ever international trade deal, the stakes could not be higher. Its impact will be huge, and it will act as the blueprint influencing all other future global trade agreements. The proposed inclusion of an Investor-State Dispute Settlement (ISDS) is particularly alarming as this extremely dangerous mechanism will effectively limit, weaken and undermine the power of democratically elected national governments and public authorities to legislate in the public interest, whilst giving unelected and unaccountable foreign businesses and investors unprecedented control to challenge directly state actions which they perceive to be a threat to their profit-making. It also poses a major threat to public services and labour standards. We believe ISDS is unnecessary and impinges on state sovereignty in any trade agreement. Moreover, the EU and US have more than adequate legal systems to deal with disputes.

1.4. Registration: Are you registered in the EU's transparency register? -single choice reply- (compulsory)

Yes

1.5. Have you already invested in the USA? -single choice reply- (compulsory)

No

## 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)

GMB is dismayed that the EU Commission has restricted the ISDS consultation only to TTIP and that it has skewed the questions, asking only what kind of ISDS should be in TTIP rather than whether or not it should be in at all. The Commission knows there is growing opposition to ISDS in any trade deals, which led to the launch of the consultation originally. ISDS directly impinges on state sovereignty and is unnecessary when trade partners have more than adequate legal systems to deal with disputes. There is no evidence companies invest less in countries without ISDS provisions. GMB has long campaigned against ISDS as it gives unprecedented powers to unaccountable and often tax-dodging corporate investors to sue public authorities for vast sums of money for denting their profit-making abilities by legislating in the public interest. Faced with multibillion dollar law suits, many States are wary of regulating in the public interest. The Czech Republic had to compensate Central European Media Enterprises \$354mn in an ISDS case – equalling the country's entire health budget. ISDS undermines democratic accountability of authorities elected on policy manifestos, who lose control over public services and policy and over their ability to promote social, employment and environmental

rights and protections. Corporations know the ‘chilling effect’ even the threat of an ISDS lawsuit can have and are using ISDS to challenge legitimate public policy. Yet ISDS does not tie investors to respect obligations on human rights and social justice. The impact of ISDS across a range of sectors cannot be underestimated – jobs in manufacturing, chemicals and pharmaceuticals, transport, utilities, health (including corporate take-over of key NHS services) and education are all at risk. GMB opposed the negotiators’ aim to include all public services in the deal, revealed in recently leaked documents. This will mean more liberalisation, privatisation and outsourcing of vital services, whereas services under accountable local authority control maintain high levels of quality, safety, affordability, user rights and universal access. Liberalising these risks exacerbating the effects of the financial crisis for the 120mn Europeans living in poverty or at risk of poverty and who rely on these vital services. ISDS threatens the public procurement policies that public authorities have put in place based on quality, fairness and sustainability, not on lowest costs, to avoid undermining service quality and working conditions. ISDS could undermine progressive procurement policies, e.g. promoting employment of vulnerable groups, especially given the incompatibility of EU and US procurement legislation. We know the US will not accept new EU public procurement social and environmental clauses. The Commission claims public policy legislation, e.g. on the minimum wage, will be protected under ISDS yet it only commits to protecting public policy that is “legitimate” and “proportional”. Who will determine what is legitimate, proportional and frivolous? Corporations will decide on these definitions and will manipulate them and other loopholes to force ISDS cases against public authorities’ right to regulate. Moreover, corporate arbitrators will determine how definitions are applied, including that of ‘investment’ itself, with no possibility to appeal. Small wonder many countries are refusing to include ISDS in trade deals or are repealing existing deals with the provision. Australia pushed for the mechanism to be excluded from its deal with the US and has not included it in any trade deal since 2011. South Africa, Indonesia and many Latin American countries are exiting deals with ISDS. Controversy around TTIP and the Trans Pacific Partnership Agreement has ignited public concern and debate on ISDS and the power trade deals hand to unaccountable corporate interests. The Commission must respond to this widespread concern about ISDS and remove it.

## **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)

The EU Commission says it wants to stop discrimination, but discrimination is embedded in TTIP and the ISDS mechanism. The concept of non-discrimination seems to apply only to foreign corporate investors, who themselves will be given free rein to discriminate against the general public by stopping democratically elected governments and local authorities from providing public services or legislating in the public interest. A report from the London School of Economics (LSE) commissioned by the UK Government’s Department for Business, Innovation and Skills highlights how the public sector has already been one of the main victims of ISDS claims. Poland and Slovakia have both been sued under ISDS for bringing parts of their health services back into public control and at least 15 different EU Member States have already faced investor-state challenges. By allowing corporations to block the provision of public services which workers and their families are relying on more and more since the financial crisis, ISDS has the potential to increase and aggravate inequalities. The EU Commission also states that foreign investors “are not always guaranteed” the same rights as local investors, but the LSE report highlights that there is no evidence that US or EU investors face discrimination in the other country. Tellingly, the report then goes on to warn the UK against the inclusion of ISDS in TTIP, as this would lay the country open to costly legal challenges and limit its ability to pursue public policy goals. This does not seem like the “level playing field” the EU Commission says it will put in place. The EU Commission notes that “exceptions” will be applied to “protected” areas in the fields of “health, the environment, consumers, etc”, but is silent on whether this would be a closed or open list, and on whether or not other crucial rights and protections, for example in the field of social and employment or health and safety, would be included. The lack of legal clarity leaves the door wide open for investors to abuse the system, with corporate lawyers given the main responsibility for defining what constitutes ‘discrimination’ and ‘exceptions’. The negative list with annexes is insufficient to protect key public and health services. Only outright exclusion can provide protection. Ordinary Europeans also risk being discriminated by TTIP more widely. With half of US States denouncing trade union rights and freedoms by being ‘right-to-work’ states, and with the generally lower social and employment standards and protections in the US (a country which has not even ratified the most basic ILO conventions on labour standards or trade union rights and freedoms ), GMB has little confidence that TTIP will ‘level up’ standards. Rather, we believe we will see a race to the bottom as companies relocate to the US to take advantage of these lower working conditions – leaving thousands of Europeans out of work. Will the ISDS model proposed by the EU Commission ensure the right for workers to defend collectively agreed terms and conditions and trade union rights? Although the Commission says it will protect public policy decisions on the minimum wage, it is silent on what public policy attacks it would deem “frivolous”, and which public policies it considers ‘non-legitimate’ or “disproportionate”. It is equally silent on where ‘living wage’ policies would stand, which is a key objective of GMB. We are not optimistic that these would be protected from corporate creep. National legal systems already legislate on the basis of non-discrimination and equal treatment, and it should be under these systems that any investor challenge should be brought.

## **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 fair and equitable treatment clause is one of the most dangerous features in investment protection provisions. It has been one of the most relied-on clauses within ISDS disputes, where it has been dangerously abused time and time again to advance claims against regulations and procedures that had been established democratically and in the public interest (as recognised by the EU Commission itself). The EU Commission has itself noted that the lack of clarity in establishing what exactly constitutes ‘fair and equitable treatment’ has fuelled large numbers of ISDS claims – but only corporate and unaccountable ISDS arbitrators have been left to interpret the meaning. Why seek to develop a mechanism that is so obviously flawed? National courts already protect both foreign and domestic investors from arbitrary, unjust, offensive or otherwise unacceptable treatment, in a transparent and impartial manner and without putting the right to regulate in the public interest at risk. There is therefore no way to justify the introduction of ISDS and give unprecedented powers to foreign investors over domestic investors and over national courts, democratically elected public bodies, and citizens. Under no circumstance can a government or public authority’s right to regulate be called into question by private and unaccountable corporations. The EU Commission should be honest about how difficult it will be to curb corporate power even in a modified ISDS system.

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

### **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 reply to this question, please type "No comment".*

-open reply- (compulsory)

GMB believes that every investor invests in a foreign country at its own risk. If it wants to launch legal proceedings, it can do so through domestic courts, as local investors must do, and can always take out additional investment protection should it deem this necessary. The EU Commission tries to suggest that national courts can be “biased”, yet there is absolutely no evidence proving that either EU or US investors would be discriminated in this way. There is no justification therefore for an ISDS mechanism which gives unaccountable corporations unprecedented powers and special privileges to bypass domestic courts and national jurisprudence. Indeed, France and Germany are arguing against ISDS on the grounds that investors already have enough protections in national EU courts. Yet amazingly, the EU Commission appears unconcerned about the very real and well documented bias of ISDS courts, and seems oblivious to the regularity with which they find in favour of corporate interest on the most spurious and undemocratic challenges of legitimate and worthy public interest policy. ISDS does not per se stop investors from bringing their claim to a domestic court, but the proposed EU Commission reforms do nothing to encourage companies to do so. With privileged corporate rights under ISDS, it is obvious companies will choose this route instead. They are not even obliged to enter mediation before starting the arbitration process, as the EU Commission proposals on this subject are non-binding. What is more, if a claim is filed through ISDS first, it cannot go through a domestic court later. However, if an investor does not like the conclusions of the domestic courts, it will be allowed to appeal via ISDS, giving it unjustified and boundless rights, whilst further undermining domestic jurisprudence and any potential appeal process. This is perverse and unacceptable. The EU Commission’s proposals could also open the door to parallel ISDS and domestic court proceedings being launched at the same time by a parent company on the one hand and shareholders on the other – allowing the corporation once again to choose which verdict suits it best.

### **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)

The EU Commission states it wants to ensure that ISDS arbitrators “are independent and act ethically”, but this can never be fully regulated or guaranteed as long as ISDS arbitrators continue to be chosen from a small elite of private sector, specialist corporate lawyers who work for international, commercial law firms. With these proposals, the EU Commission is effectively putting the fox in charge of the chicken coop. Furthermore, the EU Commission’s proposals on reforming the ethics, conduct and qualifications of the arbitrators within a code of conduct are only non-binding recommendations, with no legal validity. This is not acceptable and will not work as a deterrent. ISDS is a lucrative industry and its corporate arbitrators will always have a fundamental conflict of interest, with their independence and impartiality called into question. Paid by corporate interests to represent them, they stand to earn a significant amount of money from settling disputes in the corporation’s favour and generating more cases for themselves in the future. Even with the questionable code of conduct (which would in any case apparently only cover a broad mandate, though it has yet to be made available for public scrutiny), these arbitrators would still be publically unaccountable, with no compulsory knowledge of the domestic legal system. They also exercise sole discretion on the allocation of costs and amount of compensation to be paid, which are invariably eye-watering and obscene.

## 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)

The fact that the EU Commission has to put in a clause within its ISDS provisions against “frivolous and unfounded” claims shows just how inadequate the mechanism is and how corporations will seek to abuse it. Even if a corporation’s case cannot be justified, it can still force the State to use valuable resources and taxpayers’ money to justify its democratic right to regulate. The costs of arbitration proceedings under ISDS are disproportionately high (around \$6-8 million on average), turning the filing of claims, including the frivolous and unfounded ones, into a booming business for corporate lawyers. The EU Commission itself acknowledges that ISDS cases “take up time and money” and could have an effect on the policy choices made by states, but it still refuses to abolish ISDS altogether. Vague interpretations of how to define “frivolous and unfounded” cases leave ISDS riddled with loopholes for businesses to take advantage of, in collusion with the corporate arbitrators, who have the sole responsibility of deciding on these definitions and are skilled enough to be able to portray public policy as discriminatory expropriation. Even the right-wing US-based Cato Institute has stated that “ISDS is ripe for exploitation by creative lawyers.” The EU Commission should admit that it knows it cannot reduce the risk of frivolous and unfounded cases, and stop patronising the respondents to this consultation.

## 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)

As in our response to question 9 above, there are recurring problems with definitions – what is a “prudential reason” for intervening in an ISDS case? The EU Commission states it wants to use a filter mechanism within ISDS to “protect the right to regulate in the financial sector”, but what about the right to regulate in the public sector, or in protecting workers’ social and employment rights? Investors already have more than enough protection, so why does the EU Commission not concentrate on enabling government and public authority action in favour of employment and social policies, and protecting these from spurious corporate ISDS claims? ISDS has already been abused by financial speculators in crisis-hit countries such as Greece, Cyprus and Spain – which are facing claims from speculative investors totalling more than €1.7 billion and jeopardising the very financial stability the EU Commission pretends it wants to protect. In Cyprus for example, a Greek private equity investor is seeking €823 million in compensation for “losses” from the re-nationalisation of Cyprus’ Laiki Bank. Yet the EU Commission seems to turn a blind eye to this. Adequate regulation of the financial markets can never be assured under ISDS. The fact that the EU Commission foresees a special filter mechanism for ISDS claims against rules relating to financial stability is in itself an acknowledgment that the mechanism is dangerous, arbitrary and cannot be regulated. Furthermore, there is not even any international-level agreement on what a “prudential measure” within financial services regulation could constitute, making this clause even more open to varying interpretations and vulnerable to corporate attack.

## 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)

Not content with allowing ISDS to bypass publically accountable national courts, the EU Commission now seeks to overrule national jurisprudence altogether by allowing impartial and unaccountable ISDS rulings to become de facto binding international law across the US and EU Member States. This is not acceptable as a concept. The fact that a private company can launch an ISDS claim via private corporate lawyers who have no duty of public accountability will also lead to further unpredictability in the interpretation of global trade agreements.

## 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)

Although the EU Commission claims the introduction of an appeals mechanism would render ISDS rulings more legitimate and uniform, in reality this would be quite the opposite as the appeal would only be valid within individual trade agreements (and not in all ISDS cases across the board) and could see different interpretations being issued by different arbitrators in different cases – leading to more confusion, fragmentation, and arbitrary decisions within ISDS case law.

## **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)

ISDS is a biased and undemocratic mechanism, led by corporations and corporate lawyers, and giving unprecedented power and privileged status to foreign investors (without any matching responsibilities) to threaten and undermine the democratic mandate of governments and local authorities and block them from regulating in the public interest – and all this whilst bypassing domestic courts and legal systems. GMB is dismayed that although mounting public pressure against ISDS pushed the EU Commission into launching this consultation, it has failed to honour a serious and unbiased consultation process. This is disrespectful to those responding. It is clear that, as far as the EU Commission is concerned, the inclusion of ISDS within TTIP (a blueprint for all future global trade agreements), is already a foregone conclusion. GMB clearly states its fundamental opposition to ISDS in any form, in any trade agreement. We know the EU Commission will receive a substantial number of responses saying the same, and we urge it to acknowledge and act on this view. As we have already stated, ISDS is an extremely dangerous mechanism and no amounts of tinkering with its wording and processes can make it any less of a threat to the democratic process, to our public services and to governments' and local authorities' right to regulate in the public interest. Furthermore, despite EU Commission assurances, there is no reliable evidence to indicate that TTIP will create jobs and economic prosperity. In our experiences of restructuring within trade agreements, we should expect job losses. Even the Centre for Economic Policy Research's pro-TTIP study estimates only 0.48% growth of GDP for the entire EU over 10-20 years – about 0.04% growth a year. Moreover, the negative effects of TTIP on health, environment and social protection will far outweigh any doubtful benefits. The case for jobs and growth has not been made for TTIP; positive estimates are unsubstantiated, and we only have to look at NAFTA for the reality: 1 million jobs were promised in the US and Mexico, but many more ended up being lost instead. GMB is even less optimistic about TTIP delivering improved labour standards, wages and social dialogue, and is incredulous that the EU would even enter into negotiations with the US when it has not even ratified the most basic ILO conventions on labour standards and trade union rights and freedoms, and in which half of its states practice 'right-to-work' rules, gagging trade unions and their members. For the GMB, this makes pursuing the negotiations completely untenable. GMB is also concerned at the lack of a real strategy from the EU Commission on how to proceed following the conclusion of this consultation. ISDS is an inherently flawed mechanism, run by corporations, for corporations. The only way to ensure a truly transparent and well-functioning dispute mechanism is to go through national courts, and national courts only. ISDS therefore must not be included in any trade agreement. GMB does not accept ISDS as a model in any trade agreement, and we urge the EU not to bounce any ISDS model into CETA as a precedent for inclusion in TTIP, behind closed doors and in the face of massive opposition. There is wide suspicion that this is what the EU Commission is planning to do. EU public opinion on the EU institutions is already low – this would lead to a complete meltdown. GMB is also unhappy with the EU Commission's decision to allow responses to this public consultation to be made only through the online format, which is limited both in terms of questions asked and room provided to respond. GMB confirms this PDF document we have attached to our online submission is our definitive response to the public consultation and should be regarded as such by the European Commission.