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Committee on Social Affairs, Health and Sustainable Development

Minutes

of the hearing on "Transatlantic Trade and Investment Partnership (TTIP) and its implications for social rights, public health and sustainable development" held in Strasbourg on Thursday, 13 October 2016, from 2 to 3.30 pm

For the draft minutes relating to other items on the Committee agenda, please refer to PV07.

Transatlantic Trade and Investment Partnership (TTIP) and its implications for social rights, public health and sustainable development
Rapporteur: Mr Geraint Davies, United Kingdom, SOC
[AS/Soc (2016) 31]

The Chairperson welcomed members and participants.

Mr Sam Fowles, Researcher in International Law at the Centre for Commercial Law Studies, Queen Mary University of London, visiting lecturer in Trade Law at the University of London Institute in Paris

Mr Fowles made an introduction stating that he would focus his presentation on several aspects of the three major investment treaties – CETA, TTIP and TiSa, related to the rule of law, legal uncertainty and the transfer of power from accountable to unaccountable institutions, particularly with regards to public policy and the public sector. He stressed that on 18 October 2016, the European Council was scheduled to meet in order to agree on the provisional application of CETA, which would be, in all legal respects, binding on the parties.

Investment treaties imposed four principle clauses upon national governments. The first was related to the scope of expropriation, which was further expanded by the tribunals to cover a wide variety of regulations, compromising the profits of investors. The second was related to the principle of the most favoured nation treatment (MFN), which implied that governments should give all investors the same treatment that they would give to their most favoured trade partner. The third clause required that governments gave others the same treatment as their own nationals. The last one concerned the principle of fair and equitable treatment, meaning that in case a government decided to reverse particular decisions taken by the preceding government, it could be found to be in violation of the treaty.

Mr Fowles strongly believed that the law should be applied equally to everyone. Investment treaties created a different set of laws and separate courts to reinforce those laws, which only international

[1] Draft minutes approved and declassified by the Committee on Social Affairs, Health and Sustainable Development at its meeting on 30 November 2016 in Florence.

investors could access. Such separate courts had originally been conceived in order to encourage foreign investments in states without independent courts, whereas now they were applied to states with independent judiciary systems, thus, they no longer served their original purpose.

The Investment Court System (ICS), proposed in CETA and TTIP, had some improvements in comparison with the Investor-State Dispute Settlement (ISDS), however it was still lacking the doctrine of precedent: tribunals were not bound by any previous decisions and therefore, according to the expert, there was no legal certainty. Unlike the European Court of Human Rights (ECHR) or the Court of Justice of the European Union, ICS tribunals could freely decide on their own procedures.

The expert presented several cases related to the impact of the treaties on public policy issues. Such treaties could bind future governments; in particular, even if it had been decided to withdraw from a treaty, the investment protection provisions would continue to bind governments for a minimum of 20 years. In the case of the provisional application, the investment provisions were binding for a period of 3 years after the denunciation of the treaty.

Above all, the treaties created a set of transnational committees staffed by unelected and unaccountable members, which could decide on the extent of the treaty and could possibly put constraints on governments. Moreover, it was unclear whether the signature and ratification of a free trade agreement was solely within the EU competence or shared between the EU and member States. The legal opinion of the European Court of Justice on the EU-Singapore trade deal would be decisive in this matter. One more uncertainty was related to the extent of the provisional application, meaning that it was impossible to know which parts of the treaty were actually in effect.

Mr Fowles then turned to the Committee's areas of interest. The specific provisions on environmental protection were drafted rather weakly in CETA, and were unlikely to be effective when a case came to a tribunal. The treaties had a strong potential to limit environmental protection, for instance, they could impede the states' commitment to the Paris agreement`s international obligations.

In relation to public health, the proposed treaties would lower standards on the regulations concerning drugs, food and air quality, and chemicals, through the investment protection provisions. The specific provisions in the intellectual property chapters would limit the production of cheap generic drugs and clinical trials disclosure. At the same time, the import of processed foods, which led to obesity and diabetes, disproportionally benefited from such agreements (according to studies conducted in Mexico following the conclusion of the North American Free Trade Agreement (NAFTA)).

The investment treaties would be applied without any legal certainty as to their nature, and would have a chilling effect on the protection of the environment and public health.

Mr Juergen Knirsch, Trade Policy Advisor, Greenpeace, Germany

Mr Knirsch pointed out that the debate on the implications of TTIP for the environment had started in 2013, with the civil society organisations expressing concerns related to the lack of democracy and transparency in the negotiation process, along with the potential of lowering environmental, social and labour standards. During a period of two years, more than 3 million people in 28 EU member States had signed the petition against TTIP and CETA. On 2 May 2016, Greenpeace Netherlands had released 248 pages of consolidated documents, which shed light on the negotiation process between Europe and the USA. A thorough analysis of these texts identified four main threats for the environment. Firstly, the precautionary principle – leading principle in Europe for consumer protection, - was not mentioned either in the chapter on Regulatory Cooperation, or in any other of the 12 obtained chapters. Secondly, no support was shown to the new climate change objectives set in the Paris agreement. Thirdly, there was no mention of the general exception clause, the nearly 70-year-old rule enshrined in the GATT agreement of the World Trade Organization (WTO), which allowed nations to regulate trade "to protect human, animal and plant life or health" or for "the conservation of exhaustible natural resources." Finally, the treaty provided the possibility for business to be part of the regulatory process.

The so-called "consolidated texts" (where the EU and US positions on issues were shown side by side) demonstrated a very low level of agreement or consolidation. Following the TTIP leaks, the EU issued a new revised proposal for the Chapter on Regulatory Cooperation (21 March 2016), yet there was no

mention of the precautionary principle, except for one footnote with a reference to the areas of risk assessment and risk management. In like manner, two new texts appeared on the climate protection issue: the EU textual proposal on Energy and Raw Materials (14 July 2016) with a strong bias towards dirty energies, and the EU textual proposal on "Trade favouring low-emission and climate-resilient development" (14 July 2016).

The expert concluded that Greenpeace was against the investor-state dispute settlement and regulatory cooperation. The organisation recommended to give support to the higher environmental and health protection standards (notably with regard to the precautionary principle), and called for more parliamentary scrutiny.

Mr Grin asserted that a trade agreement must normally correspond to certain principles. These trade agreements demonstrated "the rule of money, the rule of the strongest". He asked the experts about who exactly would benefit from these agreements.

Ms Kalmari was concerned about the possible deregulation in the field of food safety, meaning the uncontrolled usage of hormones, antibiotics, growth promoters, pesticides etc. She wondered whether it was possible for Europe to keep its high standards in this area.

Mr Hunko referred to the provisional application of CETA by the EU Council of Ministers, which would have an irreversible negative effect on the EU. In this context, he mentioned that the German constitutional court had given the green light to CETA's provisional application. He wondered why there was such a pressing need to make it come into force so rapidly and prematurely.

Mr Jónasson enquired about the urgency of the provisional application. The British government was expressing concerns that the jurisdiction of the ECHR in Strasbourg was being extended at the expense of the domestic courts. This said, the creation of separate courts for investors meant giving away jurisdiction in very important fields of economics.

Mr Davies reminded members that on 18 October 2016, a decision was scheduled to be taken on the provisional application of CETA; as a result, it could be binding for at least 3 years. He asked the experts whether the Committee should not act immediately to express its concerns.

Mr Simms referred to the extent of the agreement, underlining its importance. Over the past years, there had been protests against the dispute settlement system. After the legal scrubbing of this agreement, Canada had accepted to draft a chapter on the dispute settlement in a way that ensured the full transparency of court proceedings. The member States, nevertheless, had to ratify the latter chapter. **Mr Simms** asked why it still did not satisfy the experts' objections to this mechanism.

Ms Higgins informed members about a motion to refrain from the provisional application of CETA, which had recently passed in the upper house of the Irish parliament. She wondered whether the court mechanisms were included in the provisional application: the European Commission and the member States had rather different views, and the ruling of the European court of justice on the Singapore case would impact the scope of provisional application. Effectively, there was no legal certainty, as there was no official statement from the European Commission on the exclusion of the ICS or other mechanisms from the provisional application. **Ms Higgins** asked Mr Fowles to elaborate on negative and positive list approaches.

Mr Fowles explained the nature of the provisional application. The European Union had set out that the contentious parts of the treaty should not be included in the provisional application; however, in the expert`s opinion, unless there was a specific provision that excluded them from the application, it was up to the tribunal to decide. The substantive questions were decided in the "Yukos v Russian Federation" case, where Russia had put forward the argument that certain parts of the treaty were not included in the provisional application. The Tribunal had made a decision based on the Vienna Convention on the Law of Treaties and considered the applicability of the *"Pacta sunt servanda"* rule - either the entire treaty was applied provisionally, or it was not applied provisionally at all. Thus, states could not choose which parts of the treaty they wanted to include.

Mr Fowles replied to Mr Simms that the new system did not effectively respond to the problems that had been raised. Since there were no documents of precedent, courts were not bound to follow the

decisions of senior courts made in the past, which made the appeal system fairly irrelevant. The second general objection was related to the unnecessary creation of a special set of laws with preferential principles for investors. In the expert`s opinion, investors` rights were soundly guaranteed in all European legal systems, and reinforced domestically by senior, appeal and supreme courts. The European governments did not influence the decisions of the courts.

Mr Fowles explained the essence of the negative and positive lists approach, which were both related to certain areas of public policy that a government could exclude from the ambit of the treaty. With a positive list, governments set the areas to be covered by the agreement. The negative list approach implied that unless an area or policy was specifically excluded, it would be covered by the treaty, thus the ultimate ambit of the treaty remained unknown.

There was no legal reason for such urgency in signing the provisional application of CETA. The hustle could be rather explained by the foreseen political schedule. He urged members to act immediately in order to have a say in the process.

Mr Knirsch agreed on the need to act without delay. The expert brought up the decision of the German constitutional court allowing for the approval of CETA with several conditions, and recommended that members examine the ruling of the court. There was no urgency in the provisional application, besides the approaching EU-Canada Summit. The expert shared the concerns of Ms Kalmari, related to a possible lowering of standards concerning GMOs, pesticides, antibiotics and hormones, due to the regulatory co-operation provisions. Referring to the comment of Mr Simms, **Mr Knirsch** informed the members that according to the study on the ICS published by Greenpeace, the new investment chapter was not in line with 12 out of 15 selected criteria, set by the European Parliament. The main problem persisted: why should investors have exclusive rights?

Mr Fowles drew the attention of Ms Kalmari to the case St. Marys VCNA, LLC v. Government of Canada, in which a law prohibiting pesticides had been found to be in violation of Chapter 11 of NAFTA. One more violation of the treaty, involving regulations to control dangerous additives to petrol, was acknowledged in the case Ethyl Corporation v. Canada. Regarding the potential economic benefits, the expert referred to a study from the University of Manchester on an economic analysis of TTIP, which stipulated that if the gains were shared equally, each citizen would get approximately £2.5 a week. Additionally, the gains would not be evenly spread out, as those systems would benefit only big investors. Small and medium companies would not have the resources to take advantage of the dispute settlement system, due to its enormous costs (for instance, the average fee for an arbitrator was set at a rate of £7,000 per day).

Ms Barnett wondered whether there were any alternatives to CETA and TTIP? Could they be replaced by partial agreements, for instance?

Mr Whalen underlined that Canada was very interested in this agreement, however the Canadians shared the same concerns. He said that it was rather false to claim that the arbitration system did not already exist, and the appeal court which operated on the principles of law, rather than precedent, had deficiencies. **Mr Whalen** asked whether it would not be better for investors to have access to a high-level specialised court system.

Mr Fowles replied that it was possible to sign partial agreements. Investors could settle disputes according to the law of contracts in their countries, turning to established independent bodies of jurisprudence, open and accessible to all. Every advantage that was expected to be gained from ICS and ISDS was already provided by the European and Canadian domestic courts. Furthermore, commercial disputes were set up for specific contracts between two companies with regard to a very specific commercial relationship. In contrast, the stakes were higher in state disputes, involving broad areas of public policy, particularly regulations, which were passed by the democratically elected governments, responsible to their electorate.

Mr Knirsch stated that TTIP was a very broad treaty covering many spheres. The treaty should also include accountability and responsibility of investors, as well as the precautionary principle, and rights of workers.

Mr Davies informed the members about his background in international companies. He mentioned that the agreement should embrace the Paris Climate Change Agreement objectives, and provide a road map for future actions. At this very moment in time, the agreement resembled a Trojan horse. Companies could sue democratically elected governments for laws they passed to protect the environment, as had happened in the Lone Pine fracking company v Canada case. The most pressing issue was timing, and in light of that, Mr Davies suggested to draft a letter expressing the Committee's concerns. The provisional application of CETA had to be postponed until the decision on the EU-Singapore case.

Ms Kyriakides informed members that according to the rules, it was not possible to send such letter, but the Committee could issue a statement to be published on the Committee's webpage.

Mr Davies wondered why PACE, a champion in human rights, democracy, and the rule of law, should refrain from expressing its concerns at this key moment in time. He suggested reading out the letter and sending it to the EU Council of Ministers.

Ms Kyriakides insisted on issuing a written statement, as advised by the Secretariat.

Mr Hunko welcomed the initiative and underlined the need to act swiftly beforehand.

Mr Jónasson and **Ms Catalfo** supported the decision to address the EU Council of Ministers.

The Committee **decided** to issue a statement, as follows:

Statement issued by the Committee on Social Affairs, Health and Sustainable Development on 13 October 2016

The Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly, meeting in Strasbourg on 13 October 2016, expressed its concern over the planned signing of the Provisional Agreement on the EU-Canada Free Trade Agreement (the Comprehensive Economic Trade Agreement CETA) at the EU Council of Ministers meeting on 18 October 2016.

The Parliamentary Assembly of the Council of Europe has provisionally scheduled a debate on the "Transatlantic Trade and Investment Partnership (TTIP) and its implications for social rights, public health and sustainable development" (Rapporteur: Mr Geraint Davies, United Kingdom, SOC), as well as on "Human rights compatibility of investor–State arbitration in international investment protection agreements" (Rapporteur: Mr Pieter Omtzigt, Netherlands, EPP/CD) for its January 2017 part-session (23-27 January 2017).

At a hearing held on 13 October 2016, the Committee was informed by experts that the Provisional Agreement on CETA would bring into force (with immediate effect) new powers for transnational investor companies to sue EU member states for laws they pass which affect investor profits, including those designed to protect public health, the environment and workers' rights.

The Committee considers that such provisions would unacceptably restrict the powers of national parliaments to adopt legislation on matters within their remit, and thus calls for the postponement of the signing of the Provisional Agreement.

List of decisions

The Committee on Social Affairs, Health and Sustainable Development, meeting in Strasbourg on **Thursday, 13 October 2016, at 2pm** with Ms Stella Kyriakides (Cyprus, EPP/CD), Chairperson, in the chair, as regards:

– ***Transatlantic Trade and Investment Partnership (TTIP) and its implications for social rights, public health and sustainable development*** *(Rapporteur: Mr Geraint Davies, United Kingdom, SOC):* held a hearing with the participation of:

– Mr Sam Fowles, Researcher in International Law at the Centre for Commercial Law Studies, Queen Mary University of London, visiting lecturer in Trade Law at the University of London Institute in Paris;
– Mr Juergen Knirsch, Trade Policy Advisor, Greenpeace, Germany;

and decided to issue a statement on the concerns over the planned signature of the Provisional Agreement on the EU-Canada Free Trade Agreement (the Comprehensive Economic Trade Agreement CETA) foreseen for 18 October 2016.

T. Kleinsorge, A. Ramanauskaite, M. Lambrecht-Feigl, A. Elveriş, R. Mallaina, A. Beliaeva

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cc: Secretary General of the Assembly
Director General, Director and all staff of the Secretariat of the Assembly
Secretaries of National Delegations and of Political Groups of the Assembly
Secretaries of observer and partner for democracy delegations
Secretary General of the Congress
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Committee on Social Affairs, Health and Sustainable Development

Commission des questions sociales, de la santé et du développement durable

List of presence / *Liste de présence*

Chairperson / *Présidente :*

Ms Stella **KYRIAKIDES**		Cyprus / *Chypre*

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Ms Sílvia Eloïsa **BONET**		Andorra / *Andorre*
Mr Ögmundur JÓNASSON		Iceland / *Islande*
Mr Ionuţ-Marian STROE		Romania / *Roumanie*

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9.	Mr Stefaan VERCAMER	Belgium / *Belgique*	Ms Petra **De SUTTER**
10.	Mme Milica **MARKOVIĆ**	Bosnia and Herzegovina / *Bosnie-Herzégovine*	ZZ...
11.	Mr Borislav BORISOV	Bulgaria / *Bulgarie*	Mr Antoni TRENCHEV
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14.	Ms Stella **KYRIAKIDES**	Cyprus / *Chypre*	Ms Christiana EROTOKRITOU
15.	Mme Daniela FILIPIOVÁ	Czech Republic / *République tchèque*	Mr Pavel **HOLÍK**
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45.	M. Jean-Charles ALLAVENA	Monaco	M. Christian BARILARO
46.	Mr Goran TUPONJA	Montenegro / *Monténégro*	ZZ…
47.	Ms Tineke STRIK	Netherlands / *Pays-Bas*	ZZ…
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52.	Mr Andrzej WOJTYŁA	Poland / *Pologne*	Ms Agnieszka POMASKA
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54.	Mme Helena ROSETA	Portugal	ZZ...
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65.	M. Ovidio SÁNCHEZ	Spain / *Espagne*	ZZ...
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77.	Mr Viktor VOVK	Ukraine	Mr Oleksii GONCHARENKO
78.	Mr Mike WOOD	United Kingdom / *Royaume-Uni*	Ms Kelly TOLHURST
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80.	Sir Jeffrey **DONALDSON**	United Kingdom / *Royaume-Uni*	Baroness Margaret **EATON**
81.	Lord George **FOULKES**	United Kingdom / *Royaume-Uni*	Baroness Doreen **MASSEY**

OTHER MPs / *AUTRES MPs*

Ms / *Mme* Pascale CROZON ..... Replaced Mr Damien ABAD, France
..... *Remplaçant de M. Damien ABAD, France*
Ms / *Mme* Anne-Yvonne LE DAIN ..... Replaced Ms Marie-Christine DALLOZ, France
..... *Remplaçant de Mme Marie-Christine DALLOZ, France*
Ms / *Mme* Alice-Mary HIGGINS ..... Ireland / *Irlande*
Ms / *Mme* Milena SANTERINI ..... Replaced Ms Maria Teresa BERTUZZI, Italy
..... *Remplaçant de Mme Maria Teresa BERTUZZI, Italy*
Mr / *M.* Pavlo UNHURIAN..... Replaced Mr Viktor VORK, Ukraine
..... *Remplaçant de M. Viktor VORK, Ukraine*

SPECIAL GUESTS / *INVITES SPECIAUX*

Mr / *M.* Sam FOWLES..... Researcher in International Law at the Centre for Commercial Law Studies,
.....Queen Mary University of London, visiting lecturer in Trade Law
..... at the University of London Institute in Paris /
..... *Chercheur en Droit international au Centre d'Études de Droit commercial,*
.....*Université de Queen Mary de Londres, conférencier invité en droit commercial*
..... *à l'Institut de l'Université de Londres (Paris)*
Mr / *M.* Juergen KNIRSCH ....., Trade Policy Advisor, Greenpeace, Germany/
.....*Conseiller en politiques commerciales, Greenpeace, Allemagne*
.....

OBSERVERS / *OBSERVATEURS*

CANADA

Mr / *M.* Scott SIMMS.....
Mr / *M.* Nick WHALEN .....

EMBASSIES / PERMANENT REPRESENTATIONS AND DELEGATIONS
AMBASSADES / REPRESENTATIONS ET DELEGATIONS PERMANENTES

Ms / *Mme* Alex FOLEY ..... Deputy to the Permanent Representative of Ireland /
.....*Adjointe à la Représentante Permanente d'Irlande*

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SECRETARIAT DE DELEGATION OU DE GROUPE POLITIQUE

Ms / *Mme* Dorthe BAKKE ..... Norway / *Norvège*
Mr / *M.* Serkan GÖKÇE ..... Turkey / *Turquie*
Mr / *M.* Panicos POURGOURIDES ..... Cyprus / *Chypre*
Mr / *M.* Razvan TANASE ..... Romania / *Roumanie*

ALSO PRESENT / *EGALEMENT PRESENTS*

Ms / *Mme* Marina DAVIDASHVILI ..... Senior Policy Officer, EPF – European Parliamentary Forum on Population and Development / *Responsable des politiques, Forum parlementaire européen sur la population et le développement (EPF)*
Mr / *M.* Nicola SPERANZA ..... Policy Officer, Federation of Catholic Family Associations in Europe (FAFCE) / *Responsable des politiques, Fédération des Associations Familiales Catholiques en Europe (FAFCE)*

COUNCIL OF EUROPE STAFF / *SECRETARIAT DU CONSEIL DE L'EUROPE*

NAME / *NOM* **DEPARTMENT / *SERVICE***

Mr / *M.* Jean Jacques REGEBIER ..... Press / *Presse*

Ms / *Mme* Katrin UERPMANN ..... DGI: Directorate General Human Rights and Rule of Law, Committee on Bioethics (DH-BIO)/ *DGI : Direction générale Droits de l'Homme et Etat de droit, le Comité de Bioéthique (DH-BIO),*

PARLIAMENTARY ASSEMBLY / *ASSEMBLÉE PARLEMENTAIRE*

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