

Opinion of the European Economic and Social Committee on ‘The position of the EESC on specific key issues of the Transatlantic Trade and Investment Partnership (TTIP) negotiations’

(own-initiative opinion)

(2016/C 487/05)

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1. Conclusions and recommendations

1.1. The Transatlantic Trade and Investment Partnership (TTIP) negotiations are entering a critical year in 2016. The EU and US chief negotiators stated their commitment to accelerating the talks with the aim of reaching an ambitious and comprehensive political agreement that identifies the possible ‘landing zones’ in all areas before the end of the current US administration. The European Economic and Social Committee (EESC) therefore decided to draw up an own-initiative opinion on specific key issues of the TTIP.

1.2. This opinion does not comment on the possible final agreement that will result from the negotiations between the EU and the US. It is nevertheless important to assess to what extent the positions of European organised civil society, as expressed in particular in previous EESC opinions, have been taken into account in the EU proposals currently available to the public. This will allow the basis for a strengthened partnership between the European Commission and European civil society in developing EU trade policy to be established.

1.3. The EESC, stressing its institutional role, therefore makes the following recommendations.

1.4. *Regulatory cooperation*

1.4.1. The TTIP negotiations are creating new momentum for increased regulatory cooperation with higher expectations. Therefore the Committee notes with satisfaction that the proposed Chapter includes the pursuit of public policy objectives and a high level of protection in a number of identified fields. The EESC also welcomes the explicit clarification that the function and purpose of the institutional structure for regulatory cooperation is to provide support and advice to decision-makers under democratic control and that it will neither have the power to adopt legal acts nor will replace any domestic regulatory procedures.

1.4.2. However the Committee asks for a clearer definition of ‘burdensome’ regulations and stresses that regulations that safeguard consumer, labour and environmental rights should not be considered as ‘burdensome’ per se.

1.4.3. The EESC also calls for the Chapter on good regulatory practices not to limit parties' right to regulate or introduce procedures equivalent to the US notice-and-comment process.

1.4.4. In addition, the EESC asks the European Commission to clarify the arrangements for representative stakeholders' involvement, in particular the social partners and civil society representatives.

1.5. *TBT and SPS*

1.5.1. The EESC considers that the proposals on standardisation, technical regulations, marking and labelling must be considered as important offensive interests of the European Union. It takes note of the important provisions regarding transparency. However, it calls for:

- the concerns of the EU standardisation bodies CEN/Cenelec regarding the risk of mutual recognition of voluntary standards to be taken into account,

- more detailed work in the field of marking and labelling requirements.

1.5.2. Regarding the SPS Chapter, the EESC takes note that it is based on the WTO SPS Agreement, which includes the precautionary principle. However, the EESC calls for further reassurances that EU food legislation will not be changed and that the EU will keep its restrictions on hormones, growth promoters and genetically modified organisms.

1.6. *Customs and trade facilitation*

1.6.1. The EESC recognises the importance of trade facilitation, in particular for small firms, and welcomes the European Commission's proposed Chapter. It calls, however, for further simplification of customs procedures and for clarification of the rules regarding penalties and responsibility for breach of customs legislation.

1.7. *Services*

1.7.1. The EESC welcomes the meaningful commitments made by the EU in the Chapter on services and reiterates its calls for increased market access at federal and state level, for enhanced regulatory cooperation — in the recognition that market access depends also on it — and its request to preserve public services in accordance with the TFEU. The EESC also reiterates that audio-visual services are not part of the mandate and should therefore not be included in any commitments. It also supports the European Commission's decision to put negotiations on financial services market access on hold until US negotiators clearly agree to launch discussions on regulatory cooperation, aiming at increasing levels of protection and financial stability in that sector. The EESC also calls for explicit and detailed wording on a broadly defined public services exemption to ensure that all public services that are subject to outsourcing or are funded by state, private for-profit, or non-profit organisations, would be excluded from the deal.

1.8. *Trade and sustainable development*

1.8.1. The EESC welcomes the comprehensive and detailed scope of the Commission proposal on trade and sustainable development. It recalls, however, that the actual value of these provisions depends primarily on the possibility of effectively enforcing them. The EESC calls for an effective enforcement mechanism and a strong monitoring mechanism via civil society. The EESC is not able to comment on the enforcement measures for the sustainable development chapter of TTIP as the textual proposals for enforcement have been delayed. It is important that the Commission engages with civil society and social partners over these proposals in order to ensure they are designed in a way that is effective in practice. The EESC reserves the option of commenting on these elements when they are made publicly available.

1.9. Investment protection

1.9.1. The EESC welcomes the proposal aiming to reform the investment protection system and the objective of establishing a permanent multilateral investment court that replaces private arbitration tribunals. However, the EESC still sees some critical points of concern as listed in point 8.8 that should be addressed. It also asks the European Commission to draw up an impact assessment covering both the cost and the functioning of the new investment court system.

2. Background

2.1. Since the launch of the TTIP negotiations in June 2013, the EESC has played an important role in formulating the positions of organised EU civil society by drawing up opinions on specific aspects of the TTIP negotiations⁽¹⁾, on investment protection and investor-to-state dispute settlement (ISDS)⁽²⁾ and on the impact of the TTIP on SMEs⁽³⁾. In the meantime, the Commission has published its important Communication 'Trade for All'⁽⁴⁾ that provides the conditions for the upcoming trade and investment treaties. The EESC has supported the approach outlined in the Communication in its opinion⁽⁵⁾. The Committee is also striving, in cooperation with the other EU institutions, to contribute to an informed civil society debate on the TTIP through a number of TTIP-related activities. These include the organisation of hearings and visits of EESC members to the United States.

2.2. The EESC takes note that the TTIP negotiations are being conducted in a more transparent way than previous trade and investment negotiations: they are the first for which the mandate of the Council and the EU's positions and several textual proposals have been published. An Advisory Group was set up that brings together experts representing a broad range of interests — consumers, trade unions, business, environment and public health — to provide EU trade negotiators with high quality advice in the areas being negotiated. However, the EESC regrets, due to its institutional role, not to have been formally included in this specific TTIP Advisory Group⁽⁶⁾. The European Commission has created a TTIP-dedicated webpage that includes factsheets and reading guides, EU position papers (which set out and describe the European Union's general approach to a topic), EU textual proposals (which are the European Union's initial proposals for legal texts on topics in the TTIP), and the EU offer for market access in relation to services. The EESC appreciates the proposal of the European Commission to create a Civil Society Forum which will be composed of representatives of independent civil society organisations, including participants in the domestic advisory groups to conduct a dialogue on the implementation and application of the agreement.

2.3. The present opinion builds on the findings of the previous opinions calling for the benefits of the TTIP to be evenly spread among the business community (including SMEs), workers, consumers and citizens, and making safeguarding the high standards in force in the EU a precondition for the agreement to be accepted. The EESC considers it important to comment on already published EU positions and textual proposals for a selected number of chapters in order to examine to what extent they are in line with those preconditions, and to identify the main points of interest and concern for European civil society. In particular, the EESC has chosen to focus its analysis on the proposals for regulatory cooperation, including good regulatory practices (made publicly available on 21 March 2016), technical barriers to trade (TBT) and sanitary and phytosanitary measures (SPS) (both made publicly available in January 2015), customs and trade facilitation (made available in January 2015 and amended in March 2016), services (made public in July 2015), sustainable development (made public in November 2015) and investment (made public in November 2015). This opinion considers documents published by 14 July 2016.

⁽¹⁾ See EESC own-initiative opinion on *Transatlantic trade relations and the EESC's views on an enhanced cooperation and eventual EU-USA FTA* (OJ C 424, 26.11.2014, p. 9).

⁽²⁾ See EESC own-initiative opinion on *Investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries* (OJ C 332, 8.10.2015, p. 45).

⁽³⁾ See EESC own-initiative opinion on *The TTIP and its impact on SMEs* (OJ C 383, 17.11.2015, p. 34).

⁽⁴⁾ European Commission Communication 'Trade for All — Towards a more responsible trade and investment policy' (COM(2015) 497 final).

⁽⁵⁾ See EESC opinion on *Trade for All — Towards a more responsible trade and investment policy* (OJ C 264, 20.7.2016, p. 123).

⁽⁶⁾ See footnote 5.

2.4. It should be noted that the European Commission published on 14 July 2016 a proposal on the institutional set up of the agreement⁽⁷⁾, which includes the creation of Domestic advisory groups (DAGs), composed of civil society representatives and competent to advise the parties on the application of the agreement. The Committee welcomes the fact that the mandate of DAGs is widened to cover any issue of interest under the agreement, but regrets however that the joint meeting of the two DAGs to be convened on their own initiative is not explicitly mentioned in the EU proposal and that the Civil Society Forum can only be convened by the Joint Committee. The meetings of the Civil Society Forum shall allow the members of the two DAGs to work on joint recommendations to the Parties.

2.5. In this respect, the EESC deeply regrets that when negotiations are eventually conducted on the basis of consolidated texts, the high level of transparency achieved so far will be seriously undermined, unless the US agrees to make these texts available to the public or at least to the EU Advisory Group. Therefore the EESC calls on the Commission to continue to make its best efforts to raise this matter with its counterpart.

3. Regulatory cooperation

3.1. Regulatory cooperation is one of three pillars of the TTIP — the others being market access and rules — and is comprised of four elements: horizontal aspects (which includes a section on ‘regulatory coherence’ or ‘good regulatory practices’ on the one hand, and a section on ‘regulatory cooperation’ among regulators on the other hand), technical barriers to trade (TBTs), food safety and animal and plant health (SPS), and sectoral annexes. The objective of this section is to comment on the first of these elements — horizontal aspects — while the following section will address TBTs and SPS.

3.2. Regulatory cooperation has been identified as one of the TTIP’s core objectives, as it could play an important role in facilitating trade and investment as well as improving the competitiveness of small firms in particular. Small and medium-sized enterprises, in particular, expect new opportunities to open up, given that they do not possess the resources to navigate different regulatory environments on both sides of the Atlantic, unlike large firms. At the same time, greater compatibility of regulatory regimes would create opportunities for large enterprises to take advantage of economies of scale between Europe and the US.

3.3. Efforts towards regulatory cooperation are not new⁽⁸⁾. The TTIP negotiations are creating new momentum for increased regulatory cooperation with higher expectations. The EESC considers that it is not easy to estimate the benefits deriving from increased regulatory cooperation, mainly because they will vary depending on the degree of cooperation to be agreed upon during negotiations. The draft interim technical report prepared by the European Commission on sustainability impact assessment estimates that 76 % of the TTIP’s impact will result from regulatory cooperation, whereas 24 % of its total effect will come from tariff reduction⁽⁹⁾.

3.4. However, the EESC considers it important that protection is put in place to ensure that the process of regulatory cooperation is not used to undermine social, labour, consumer and environmental standards, but rather aims to improve them. If those conditions are met, benefits would not only be economic but might also facilitate the regulators’ task in achieving public policy objectives.

3.5. Safeguarding the EU’s high levels of protection was a fundamental point for the EESC. The current proposal of Article x1b of the Chapter on regulatory cooperation covers the pursuit of public policy objectives and a high level of protection of, inter alia, public health; human, animal and plant life and health; health and safety; working conditions; animal welfare; the environment; consumers; social protection and social security; personal data and cybersecurity; cultural diversity; and financial stability.

⁽⁷⁾ See http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154802.pdf.

⁽⁸⁾ E.g. the Transatlantic Economic Council (TEC) set up in 2007; the High Level Cooperation Forum; the High Level Regulatory Cooperation Forum.

⁽⁹⁾ Ecorys, *Trade SIA on the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA — Draft Interim Technical Report*, p. 18 (<http://www.trade-sia.com/ttip/wp-content/uploads/sites/6/2014/02/TSIA-TTIP-draft-Interim-Technical-Report.pdf>).

3.6. However, the EESC is concerned this may be undermined by Article x1d which states an objective to 'reduce unnecessarily burdensome [...] regulatory requirements' ⁽¹⁰⁾. The EESC is concerned that such language might be interpreted as considering regulations that safeguard consumer, labour and environmental rights to be 'burdensome' per se.

3.7. Therefore, the EESC wants to strongly reaffirm the statements that safeguarding existing high standards is a fundamental requirement and that besides the aim of enhancing trade opportunities, regulatory cooperation should also improve safety, health and the economic and social well-being of people on both sides of the Atlantic. Therefore this commitment should be reaffirmed in very clear and detailed language in the final agreement. The EESC is concerned about the EU proposal on good regulatory practices. Regulatory cooperation should be about improving the dialogue between regulators, not influencing each other's rule-making processes. The EESC asks the European Commission to clarify the good regulatory practices section of its proposal.

3.8. In this sense, the EESC considers that the current proposal for the Chapter on good regulatory practices, which notes that parties will be required to examine 'non-regulatory alternatives (including the option of not regulating) [...] that would achieve the objective of the regulatory act', should not be considered as limiting the parties' right to regulate. For the sake of greater certainty, the text of the agreement should clarify that this provision shall not limit the parties' right to regulate. It also notes that Article 6 of the proposal on stakeholders' consultations should not be considered equivalent to the US notice-and-comment process.

3.9. For the EESC, the development of trade must therefore retain its status of being a central objective. It is important that the TTIP negotiations support the removal of unnecessary barriers to trade ⁽¹¹⁾.

3.10. The EESC welcomes the fact that the current Commission proposal explicitly clarifies that the function and purpose of the institutional structure aims to provide support and advice to decision-makers under the democratic control of the European Parliament and the Council of the EU ⁽¹²⁾. The ordinary law-making process must not be undermined and delays or regulatory chill must be prevented. The EESC welcomes the proposed Article 1, which reaffirms the right both to regulate and to set the levels of protection. However, it is crucial the proposal defines the composition and the rules of proceedings of the different committees and groups. The EESC calls on the European Commission to ensure coherence and consistency between the horizontal regulatory cooperation chapters, the TBT, SPS chapters and the sectoral annexes.

3.11. Dialogue that takes place at the beginning of the regulatory process increases the chance of identifying policy solutions that include cross-border considerations, and shall be provided for. Stakeholders' involvement via a transparent process, which is a core principle of a good rule-making process within the European Union, must be clearly detailed in the Commission proposal. In order for regulatory cooperation to achieve inclusive outcomes and proposals for regulators, there shall be a structured and balanced engagement of stakeholders, and in particular, businesses, consumers, environmental interest groups, and workers.

3.12. In order for specific progress to materialise, early consultations on regulatory activity between the EU and US regulators shall be provided. Discussions at an early stage in the policy-making process are expected to increase the potential for delivering interoperable rules in the future and allowing market participants to comply with both regimes simultaneously. However, regulators must consider the dialogue and the reply to comments from their counterparts or interested persons as voluntary, in order to avoid any regulatory chill effect.

3.13. The EESC asks the European Commission to clarify the arrangements for both the abovementioned dialogue and for representative stakeholders' involvement, in particular the social partners and civil society representatives. There must be a clear guarantee that relevant stakeholders will be able to contribute to a transparent dialogue by means of a well-defined procedure that mandates equal treatment and avoids delays in the regulatory process. On the EU side, the transparency register should be considered when it comes to defining the relevance and representativeness of stakeholders.

⁽¹⁰⁾ Revised EU textual proposal on regulatory cooperation, made public on 21 March 2016 (<http://trade.ec.europa.eu/doclib/html/154377.htm>).

⁽¹¹⁾ Sociaal-Economische Raad (SER), Advisory Report 16/04E on TTIP (<https://www.ser.nl/~media/files/internet/talen/engels/2016/ttip.ashx>).

⁽¹²⁾ See the opinion of the Conseil économique social et environnemental français, 'Les enjeux de la négociation du projet de Partenariat transatlantique pour le commerce et l'investissement (PTCI)' (http://www.lecese.fr/sites/default/files/pdf/Avis/2016/2016_01_projet_partenariat_transatlantique.pdf).

4. TBT and SPS issues

4.1. The EESC is pleased that the WTO agreement on TBTs is integrated as it stands in the proposal. Furthermore, the proposed TBT Chapter addresses technical requirements (technical regulations and standards) and conformity assessment requirements. The EESC is of the view that the proposals on standardisation, technical regulations, marking and labelling must be considered as important offensive interests of the European Union. It is important that these proposals are not used to question regulations necessary for health and safety as well as social protection.

4.2. The EESC takes note of the important provisions on transparency: it reiterates the obligation to notify measures to the WTO, provide information to the other party, offer an opportunity for written comments and provide replies to such comments. It also provides for the publication of all applicable technical regulations, new or existing, by means of a registry, as well as of standards referenced in technical regulations (as the vast majority of standards are used by the industry but are not 'referenced' — used — by regulators in technical regulations).

4.3. Concerning standardisation, the EESC welcomes the cooperation between the standardisation bodies as well as the limited mutual acceptance principles. However the EESC has taken note of the concerns expressed by CEN/Cenelec on the risks of mutual recognition of voluntary standards in the TTIP. The EESC asks the Commission to consider the proposals of the EU standards bodies and to make sure that EU interests are safeguarded. Even the guarantee that all relevant stakeholders could contribute to the development of new standards is important.

4.4. The US and EU standardisation systems are very different from one another. In particular, the principle 'one product, one standard, accepted everywhere' that represents a pillar of the EU single market is not found in the United States. In Europe, when a new standard is adopted, conflicting national standards are withdrawn; in the US, different standards coexist on the market making it difficult for SMEs to understand which one would best suit their product lines. To increase transparency and facilitate small companies, it is essential that a helpdesk is established on the US side that would provide a support service to EU companies willing to export to the US market. These are often small companies with limited resources but with a high level of specialisation in a niche market that is the basis of their competitiveness.

4.5. The EESC regrets that key areas like electrical safety, electromagnetic compatibility, machinery and telecommunications, where the EU has a clear offensive interest, are identified as priority areas for future consideration: these areas should feature among the referenced specific outcomes on conformity assessment resulting from the negotiations.

4.6. The EESC likewise regrets that in the section on marking and labelling, no priority areas are identified for future work and there are no placeholders either for the timeline of the future review of marking and labelling requirements or for including the outcomes resulting from negotiations in particular sectors.

4.7. The proposed SPS Chapter builds on the WTO Agreement on SPS and comments on the EU textual proposal tabled for discussion with the US in the negotiating round of 29 September-3 October 2014 and made public on 7 January 2015.

4.8. The WTO SPS Agreement, which covers the application of food safety, animal and plant health regulations, includes the Precautionary Principle (Article 5(7)), which is now also enshrined in the Lisbon Treaty. This must not be up for negotiation and should therefore not be part of the agreement. The EESC thus strongly welcomes the assurances given by the EU that the TTIP will not change existing food legislation; that the EU will keep its restrictions on hormones and growth promoters in meat; and that the TTIP will not change EU law on genetically modified organisms.

5. Customs and trade facilitation

5.1. As trade in goods covers a large portion of transatlantic trade, any effort to improve customs procedures will have a strong impact on bilateral trade, in particular for small firms.

5.2. The EESC welcomes the additional proposals aiming at facilitating customs procedures, in particular: the establishment of a single window on both sides of the Atlantic, enhanced coordination on international standards, and the development of a trade facilitation partnership programme; data harmonisation and alignment, committing to an assessment of what data should be aligned; expanding the responsibilities of the Joint Customs Cooperation Committee to act as the 'Specialised Customs Committee' in a number of areas still to be defined and advance rulings.

5.3. The EESC calls on the European Commission to clarify the elements that are particularly important to EU firms and that are not yet clear in the available text, such as the *de minimis* value, the removal of all additional fees, and the issue of penalties and responsibility for breaches of customs legislation.

6. Services

6.1. In its service offer, the EU offers meaningful commitments in sectors that are key to fostering Europe's competitiveness and growth (digital and telecom), accelerating the integration of global value chains (transport, courier services, business services, and professional services) or touch on key economic sectors (construction, retail, energy).

6.2. The EESC also notes with satisfaction that the EU proposal puts forward a framework to facilitate a fair, transparent and consistent regime for the mutual recognition of professional qualifications by the parties and sets out the general conditions for the negotiation of mutual recognition agreements, which are of major importance to secure better market access for EU service providers.

6.3. The EESC reiterates three main aspects connected to services: the need to increase market access both at the federal and state level; the recognition that market access depends also on enhanced regulatory cooperation; the request to preserve the specificity of public services in accordance with the TFEU.

6.4. The EESC underlines that the Commission should ensure that, in terms of services, the TTIP goes beyond existing agreements such as GATS and TISA and that specific agreements should be concluded to eliminate many discriminatory barriers that exist in the USA.

6.5. The EESC stresses a particular issue that the Commission should take into account and that concerns unbalanced market access: US companies can benefit from the EU single market whereas EU companies face a fragmented US market as a large number of service sectors are regulated at state level. The EESC draws the attention to the fact that the continued visa requirement imposed by the United States on nationals of some EU Member States, when US citizens do not require a visa to travel to the EU, represents a discriminatory treatment of EU citizens that is detrimental to the bilateral relationship.

6.6. On specific sectors, the EESC wants to make the following comments:

- audio-visual services are not part of the mandate and should therefore not be included in any commitments,
- financial services market access should be put on hold until US negotiators clearly agree to launch discussions on regulatory cooperation. Such regulatory cooperation should have the objective of increasing levels of protection and financial stability,
- public services should be fully protected as they ensure the existing high standards in the provision of essential and sensitive services to citizens. To this end, clear and broadly defined exemptions should be put in place.

6.7. Concerning public services, the EESC opinion 'Trade for All' stated that protection of public services in trade agreements 'can best be done by the use of a positive list with regard to both market access and national treatment'. However, the current EU offer on services in the TTIP adopts an unprecedented 'hybrid' approach to listing services, which could leave substantial uncertainty.

6.8. In Annex III on market access, a positive list is provided with the same wording as in the EU's GATS Schedule where 'public utilities exist in sectors such as related scientific and technical consulting services, R & D services on social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific listing is not practical' ⁽¹³⁾. However, the public utility clause, enabling to keep monopolistic structures, has several shortcomings, including the fact that the scope does not cover limitations such as economic needs tests or quotas. The EESC wants to stress that the public utilities exemption must apply to all modes of supply.

6.9. The EESC calls for explicit and detailed wording on the public utilities exemption in Annex III to ensure that all public services that are subject to outsourcing or are funded by state, private for-profit or non-profit organisations would be excluded from the deal.

6.10. Although the standstill and ratchet clauses do not apply to Annex II, the EESC is concerned that negotiations may result in the EU's reservations currently listed in this Annex being moved to Annex I, therefore preventing liberalisation from being rolled back. In this respect, the EESC supports the statement of the advisory report of the Dutch Social and Economic Council that 'Governments must remain free to declare certain services — according to their own preferences — to be "of general public interest"' ⁽¹⁴⁾.

6.11. The EESC is also concerned that government regulation in any service not listed adequately in Annex I and Annex II will be exposed to potential challenges by the US government through state-to-state dispute proceedings for breaches of national treatment or most favoured nation commitments, or through the investment court system.

6.12. The EESC regrets that compared to other chapters, services market access is neglected and calls on the Commission to step up its efforts to remove the remaining market access barriers in the US. The United States continues to impose a total ban in terms of shipping. There are equity caps such as 25 % in aviation transport and 20 % in telecoms, and significant behind the border barriers such as in telecoms and satellites. There is a very long list of citizenship requirements e.g. in banking, insurance and accounting. Residency requirements exist for legal, accounting, engineering, and insurance services. Local presence requirements exist, for instance, for legal, accounting, and insurance, as well as a legal form requirement in insurance, etc.

7. Sustainable development

7.1. The TTIP offers the parties an opportunity to foster sustainability through trade and to go beyond any other trade agreement concluded by either party with regard to sustainability objectives. In its opinions REX/390 and REX/449 ⁽¹⁵⁾, the EESC called for the inclusion of a robust trade and sustainable development Chapter, defined as an essential component of the agreement, and therefore welcomes the comprehensive and detailed scope of the Commission proposal. However, the EESC believes that the actual value of these provisions depends primarily on the possibility of eventually and effectively enforcing them.

7.2. The opinion REX/390 stated that a strong joint civil society monitoring mechanism must be an essential component of any agreement. The EESC therefore fully supports the statement of Commissioner Malmström that effective enforcement mechanisms are needed in the sustainable development Chapter ⁽¹⁶⁾. The EESC equally supports the recommendations of the advisory report of the Social and Economic Council of the Netherlands and the French Economic and Social Council on 'the ability to impose effective sanctions on the parties where necessary' ⁽¹⁷⁾.

⁽¹³⁾ Services and Investment offer of the European Union (http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf).

⁽¹⁴⁾ See footnote 11.

⁽¹⁵⁾ See footnote 5.

⁽¹⁶⁾ Statement of Commissioner Malmström, 17 November 2015 (http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153968.pdf).

⁽¹⁷⁾ See footnotes 11 and 12.

7.3. The EESC commends the European Commission's far-reaching commitment to high labour and environmental standards. The EESC welcomes that the right to regulate and to set high levels of protection has been reaffirmed in the preamble of the agreement and in a stand-alone article in the sustainable development Chapter.

7.4. The EESC had called for a reaffirmation of the parties' commitment to effectively implementing and enforcing their labour legislation, and of their obligations arising from their membership in the ILO. The EESC therefore welcomes the inclusion of binding provisions on the protection of core labour standards such as freedom of association and the right to collective bargaining by forming and joining trade unions, the elimination of forced or compulsory labour, the effective abolition of child labour, and equality and non-discrimination in respect of employment and occupation. Moreover, the EESC welcomes the additional inclusion of the parties' commitment to ensure decent working conditions, and health and safety at work. In order to make these sustainable development provisions binding, a 'three step approach' needs to be implemented with government consultations, domestic advisory groups and expert panels involving the ILO and the general dispute settlement provision of the agreement.

7.5. As regards environmental aspects, the inclusion of a provision on trade in connection with the environmentally sound management of chemicals and waste aligns well with the concerns of civil society. The EESC therefore approves the inclusion in the agreement of provisions aiming to prevent or minimise adverse effects on human health and the environment in relation to chemicals and waste. Likewise the EESC welcomes the parties' commitment to sustainable forest management and the mutual recognition of the significant negative impact of illegal, unreported and unregulated fishing.

7.6. Cooperation between the parties on trade-related aspects of labour and environmental policies is a welcome provision in the proposal. The EESC supports the recognition of the importance of cooperation in promoting decent work in global supply chains and in elaborating strategies and policies to promote the contribution of trade to resource efficiency, the green economy and the circular economy⁽¹⁸⁾.

7.7. The objective of protecting labour rights and the environment through a code of conduct, standard schemes, labelling, certification, verification and other related corporate policies is supported by the EESC.

7.8. Responsible business conduct such as corporate social responsibility can further strengthen sustainability objectives. The EESC supports the inclusion in the sustainability Chapter of explicit references to the OECD Guidelines for Multinational Enterprises, the UN Global Compact, ISO 26000, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), and the UN Guiding Principles on Business and Human Rights.

7.9. The EESC takes note that the EU textual proposal does not include elements related to dispute settlement, which will be developed at a later stage, and reserves the option of commenting on these elements when they are made publicly available.

7.10. To support the implementation of the parties' commitment to promoting international trade in such a way as to contribute to the objective of pursuing sustainable development, the EESC favours an enforcement mechanism built on social dialogue. The EESC welcomes the Commission's proposals for the establishment of domestic advisory groups comprising a balanced representation of civil society groups representing a balance of business, worker, consumer, environment and public health interests that can submit views or recommendations on the implementation of TTIP⁽¹⁹⁾. Experience with agreements in force shows that to ensure the effectiveness of such monitoring mechanisms, it is important that the recommendations delivered by the monitoring bodies result in investigation by EU institutions and are linked with a process of enforcement.

8. Investment

8.1. The EESC takes note that the Commission has tabled a textual proposal for an investment court system that introduces a procedural reform that establishes a new system to replace the ISDS. It is comprised of two parts, the substantive investment protection provisions and the functioning of the system that settles disputes between investors and states. It also includes an introductory section that provides definitions specific to investment protection.

⁽¹⁸⁾ See EESC own-initiative opinion on *Decent work in global supply chains* (OJ C 303, 19.8.2016, p. 17).

⁽¹⁹⁾ See footnote 7.

8.2. As requested in opinion REX/390, more detailed definitions are provided on the 'right to regulate', 'indirect expropriation' and 'fair and equitable treatment'. These are the conditions that need to be met in order to regulate a dispute settlement procedure between a state and an investor. These clarifications serve the party's right to regulate in the public interest over the protection of the investor.

8.3. The EESC stresses that the definitions in the agreement, in particular the right to regulate, should be clear and should guarantee the right of the state to maintain and introduce high standards, in particular for social, environmental and consumer protection while guaranteeing an adequate and legitimate protection of investors from protectionism and discrimination. The EESC welcomes that a stand-alone article has been included in the body of the agreement in addition to its preamble. The right to regulate in the area of social protection should explicitly mention collective agreements, including tripartite and/or generalised (*erga omnes*) agreements, in order to exclude them from being made subject to interpretation as a breach of an investor's legitimate expectation. Working and wage conditions set in the context of collective agreements may not be considered as a non-tariff barrier to trade.

8.4. The EESC acknowledges, however, that the most significant changes have been made to the procedural aspects of dispute settlement. The arbitration system has been transformed into a judicial system with a tribunal where ad hoc arbitrators appointed by the disputing parties are replaced by judges from a permanent roster that will be appointed by the parties to the Agreement. These changes make it a more institutionalised system. The EESC calls on the parties to make sure that as soon as the treaty is ratified the investment court system is fully operational and that the judges enjoy democratic legitimacy and are appointed in a way that eliminates the risk of a politicised court system, as well as the risk of conflicts of interest.

8.5. The EESC is pleased to underline that a strict code of conduct is introduced to ensure impartiality and to prevent conflicts of interests. An 'appeal tribunal' is also set up to judge the tribunal's awards, addressing what were legitimate criticisms of ISDS. Furthermore, transparency is ensured as UNCITRAL rules would apply to disputes.

8.6. While the EESC welcomes the improvements that have been made with the aim of reforming the system, the EESC still sees critical points of concern that need to be addressed.

8.7. The EESC acknowledges, moreover, that concerns regarding the implementation of the new system remain, and vary according to the stakeholders. The EESC asks the Commission to further consider these concerns in its continuous efforts to improve the system for resolving investment disputes.

8.8. Some of these concerns can be summarised as follows:

- the need to strike the right balance between legitimate public policies and investment protection standards in terms of 'fair and equitable treatment' and 'protection against indirect expropriation', based on clear definitions that reduce the risk of broad interpretation,
- a very limited list of legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or promotion and protection of cultural diversity which are linked to the right to regulate,
- no explicit exclusion of regulations applying to the organisation or provision of public services,
- the total exclusion of loss of profit when calculating compensation for investments that have been made,
- implementation of the 'loser pays principle' may prevent a company, and in particular a SME, from using the system,
- the need for references to investor obligations under the ILO Multinational Enterprises Declaration, UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises,

- some lack of clarity on how awards will be recognised and executed by the domestic courts and what the relationship is with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the relevant ICSID rules. This should be made clear as investors are already confronted in the current system with enforcement problems,
- the need to carefully assess the compatibility of the ICS with the EU legal framework,
- the lack of real independence of judges as, in the new proposal, they are still allowed in some cases to work as corporate lawyers,
- the need to consider the recommendation of the SIA draft interim technical report on the TTIP to exclude the possibility of public services being challenged under the ICS ⁽²⁰⁾.

The EESC calls for the Commission to engage civil society and the European legal community to address these concerns.

8.9. In addition, some stakeholders question the need for a separate investment arbitration system in properly functioning and highly developed domestic legal systems ⁽²¹⁾.

8.10. In conclusion, the EESC considers that the European Commission's proposal for the ICS is a step in the right direction but must be further improved in a number of areas in order to function as an independent international judicial body. The Committee regrets that the system was proposed without a full and proper consultation process and prior to an impact assessment covering both the costs of the system and its functioning, and calls upon the Commission to draw up such an impact assessment.

Brussels, 21 September 2016.

The President
of the European Economic and Social Committee
Georges DASSIS

⁽²⁰⁾ Ecorys, *Trade SIA on the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the USA — Draft Interim Technical Report*, p. 144 (<http://www.trade-sia.com/ttip/wp-content/uploads/sites/6/2014/02/TSIA-TTIP-draft-Interim-Technical-Report.pdf>).

⁽²¹⁾ E.g. ETUC Position on Commission's proposal for an Investment Court System in TTIP and CETA (<https://www.etuc.org/documents/etuc-position-commissions-proposal-investment-court-system-ttip-and-ceta#.V2xn19KNhHg>).