Written evidence submitted by the European Federation for Investment Law and Arbitration (EFILA) (TTI 12)

Introduction of EFILA
The European Federation for Investment Law and Arbitration (EFILA) is a think tank and the main voice of the community for users and participants in investment treaty arbitration in Europe. EFILA pools expertise in investment law and arbitration in a non-profit, non-governmental organization. EFILA has been established to promote the knowledge about the use of arbitration as a dispute resolution mechanism in investor-State disputes and to serve as a platform for a meaningful discussion on relevant and timely issues vital to the development of the European market. As such, its purpose is to contribute to the more favourable investment climate in Europe and beyond through a dialogue with the European policy makers, stakeholders and the society at large. It should be noted that all EFILA Executive Board and Advisory Board members strictly serve in their personal capacity and are completely independent from the organizations in which they are employed or hold mandates. More information about EFILA can be found here: http://efila.org/about-efia/

In July 2014, EFILA participated in the European Commission's public consultation on ISDS in TTIP, which can be found on EFILA's website:
On 23 January 2015, EFILA held its inaugural conference in London at Senate House. A report of the conference can be found on EFILA’s website: http://efila.org/events/inaugural-conference/

Submission to TTIP Inquiry
EFILA would like to thank the BIS Committee for the opportunity to make a submission for the ongoing inquiry into investment protection and ISDS in the TTIP. EFILA recognizes that investment protection and ISDS is a significant point of discussion amongst the broader community of stakeholders and notes that the subject of ISDS has dominated the past four oral evidence sessions of the Committee’s inquiry since November. In particular, EFILA hopes that it will prove helpful for the Committee to receive evidence from professionals and experts that are members of the investment treaty arbitration community in Europe.

A comparable inquiry into TTIP by the House of Lords, Select Committee on the EU, External Affairs (Sub-Committee C) did receive oral and written evidence by Lord Goldsmith QC, which proved to be helpful for the Lords Committee’s report on TTIP. There are a number of significant issues raised in relation to both investment protection and ISDS in the TTIP and EFILA is at the BIS Committees disposal to give oral evidence on all questions regarding ISDS and TTIP.
The following written observations on the specific issues of (i) provisions on frivolous claims in TTIP and the costs of international arbitration, and (ii) a filter mechanism in ISDS that allows for the different treatment of the financial services sector.

**Frivolous Claims**

EFILA noted that the Committee considered in its evidence sessions provisions on frivolous claims in TTIP (claims unfounded as a matter of law, and "claims manifestly without legal merit").

a) Investment claims are rarely “frivolous”

As a general remark, EFILA would like to underline that it does not believe that there is a no need to introduce procedural mechanisms to prevent so called "frivolous claims". The investor’s decision to bring a claim is significant and is not reached lightly. It should be stressed that the initiation of arbitral proceedings is costly for the investor and takes several years to conclude. Indeed, a recent study of 221 awards has shown that the average length of investment proceedings from the request for arbitration to final award is 3 years and 8 months with a cost to the claimant of USD 4,437,000 approx. (excluding tribunal’s costs). This does not account for the internal management and other costs of bringing a claim. These obstacles are a sufficient deterrent to instituting proceedings without merits. Thus, EFILA considers that "frivolous claims" are likely to be very rare. Moreover, there is considerable reputational risk to an investor in bringing a claim, not only in the host state but also in relation to other states in which the investor has interests, or wishes to invest.

b) Problems with a provision on frivolous claims

The concept of "frivolous claims" has not been defined and it is extremely difficult to assess whether a claim is or is not unfounded from the outset and without the parties having exchanged documents and without an oral hearing.

To ensure legitimacy and to avoid undermining access to justice, a summary dismissal procedure must afford both the claimant (and respondent) proper opportunity to be heard. This will require oral and written submissions by both parties to be made to the tribunal. Taking ICSID Rule 41(5) as an example, the tribunal (ICSID Case No. ARB/09/11) observed: "There may be cases in which a tribunal can come to a clear conclusion on a Rule 41(5) objection, simply on the written submissions, but they will be rare, and the assumption must be that, even then, the decision will be one not to uphold the objection, rather than the converse".

Additionally, "manifestly without legal merit" is not a universally recognized standard and is open to interpretation. It is difficult to see how tribunals would assess whether a claim is "manifestly without legal merit" without reaching conclusions on the facts at the same time. Whilst the draft CETA text

---

states that, in determining whether a claim is manifestly without legal merit, a tribunal shall "assume the alleged facts to be true", the likelihood is that the facts will be both considerable and in controversy. To the extent that a tribunal accepts one version of the alleged facts for the purposes of reaching a decision, it would necessarily have to be the facts alleged by the investor. The instances in which a claim would be dismissed as frivolous would undoubtedly be extremely rare, and the process would therefore cause additional costs and delay, for the claimant. EFILA submits that a provision in TTIP (or any other investment protection treaty) dealing with so-called "frivolous claims" in this way therefore lacks effectiveness.

The current practice shows that arbitral tribunals are very well equipped at the appropriate stage of the arbitration, to discern "frivolous claims" from the material ones and already have imposed costs on parties who institute frivolous claims. Therefore, the determination on whether a claim is "frivolous", and thus the decision on which party should bear the costs, should be left entirely to the tribunal.

c) Potential deleterious effects of a provision on frivolous claims

Jurisdictional challenges in ISDS are frequent and take considerable time to be resolved (with both parties incurring significant costs). There is a risk that a State party will argue that the claim is "unfounded", or manifestly lacks legal merit, as a matter of course. This will add a further layer of procedure, causing delay and costs, thereby undermining ISDS legitimacy process. After determination in favour of a claimant, there is the possibility that the claimant would thereafter face a jurisdictional challenge, before the tribunal determines the merits of the claim.

Further, a provision which provides a procedural gateway in which a State can allege that a claim was frivolous could have the effect of unduly politicizing resolution of a dispute and, in many instances, may prevent access to justice.

In sum, EFILA does not agree that a summary procedure for frivolous claims is warranted. However, to the extent that such a procedure is introduced in TTIP, it should tackle the cost allocation issue to avoid inconsistency between awards of costs (shown in the cases brought using Rule 41(5) of the ICSID Rules). Further, as noted above, there is a risk that a summary procedure could be abused by states, notwithstanding the high hurdle which it poses, adding additional costs and delay to the ISDS process. Without facing the risk of bearing the costs of such a process, there is no deterrent for the State seeking to have a claim thrown out at this early stage.

Cost of International Arbitration

EFILA does not agree with the Commission’s approach and considers that the introduction of cost allocation provisions with the purpose of deterring claims is unnecessary. As noted above, investment claims are not brought lightly. Investors appreciate the significant monetary and non-monetary costs of the proceeding.
EFILA recognizes that there has been a degree of inconsistency in the jurisprudence of investment tribunals concerning cost allocation. This unpredictability benefits neither investors nor States. To the extent that a provision on costs allocation is designed to increase predictability of tribunal decision-making in relation to costs, it is welcome. However, the CETA text does not achieve this aim. It introduces a presumption that the losing party bears the full cost of the proceedings. Whilst the focus in the EU Commission’s Consultation on this provision is on the effect as against the Claimant, this presumption could operate against a claimant, or a State which is unsuccessful in defending a claim (including a claim, for example, where the State disputes not the violation of its obligations, but the quantum of the claim). The approach does not accommodate the domestic and administrative laws of a number of states, which mandate the state to defend vigorously all claims. The discretion to allow apportionment of costs in “exceptional circumstances” could provoke lengthy (and expensive) submissions, and will likely bring in existing jurisprudence as to where the costs should fall.

**Financial Services Filter**

EFILA further noted that in its evidence sessions up to this point the Committee has not dealt with the proposed financial services filter in TTIP.

EFILA is of the opinion that introducing the filter mechanism into investment arbitration will set a very dangerous precedent, which will inevitably open the door to potential abuses of the system by Contracting Parties. While, the main purpose of ISDS is to reduce political risks, the filter mechanism will inevitably politicize disputes by increasing the direct involvement of Contracting Parties. Moreover, it will create an inherent incentive for Contracting Parties to interfere in order to thwart any claims, including those well founded. EFILA submits that any interference into arbitral proceedings by Contracting Parties should always be avoided. Whereas ISDS promotes legal certainty and rule of law by guaranteeing access to independent and impartial tribunals, which nowadays constitute a basic human right enshrined in the ICCPR and the ECHR, the European Commission proposes to establish panels composed of state officials equipped with the power to make determinations without giving any opportunity to the investor to present its case.

Paragraph 4 of the example to Article 10 states that ‘In a referral under paragraph 3, the Financial Services Committee or the CETA Trade Committee as the case maybe, may make a joint determination on whether and to what extent Article 15.1 (Prudential Carve-Out/Exceptions) is a valid defence to the claim (…) If such joint determination concludes that Article 15.1 (Prudential Carve-Out/Exceptions) is a valid defence to all parts of the claim in their entirety, the investor shall be deemed to have withdrawn its claim and proceedings shall be discontinued in accordance with Article X-32 (Discontinuance).’ The proposed solution risks undermining access to justice and may therefore
constitute a violation of international human rights as well as the breach of the contracting States’ constitutions.

EFILA believes that introducing exceptions and carving out certain areas from investment protection and ISDS is not a desirable way forward as it may not only lead to more disputes relating to the extent and real meaning of the exceptions, but it can also give incentive to Contracting Parties to expand the list of exceptions and in so doing to defeat the very idea behind ISDS. Moreover, investors should always have the right to compensation; this entails access to independent tribunals composed of independent and impartial arbitrators (which have the power to determine their own jurisdiction) in an increasingly transparent process, and not state officials who can interpolate in proceedings.

Bearing this in mind, EFILA opposes the different treatment of the financial sector for the purpose of ISDS. Investors in the financial sector should have the same right to pursue their claims, to determine the composition of arbitral tribunals and to receive just compensation as any other investors in any other sector. If the measures are taken for reasons which are permitted under the chapter, then it is not clear why an investor-state claim should be precluded. In such circumstances, the tribunal would find in favour of the State and the investor would bear the costs under the EU's proposals. If the right to regulate is appropriately defined (consistently with the protections granted in the TTIP), there should be no requirement for a filter.

Dr. Nikos Lavranos, LL.M.
Secretary-General of EFILA
Brussels, 5 February 2015