Dear Commissioner, 

On the 8th of July 2015 the European Parliament adopted a resolution with the European Parliament’s position on the TTIP negotiations. In this resolution, the EP called for a comprehensive investment chapter focused on achieving sustainable growth, addressing different standards of protection while protecting the right to regulate in the public interest. The investment chapter should also address investor’s responsibilities in line with the OECD Guidelines for Multinational Enterprises and the UN Principles of Business and Human Rights. Investors should be treated in a non-discriminatory fashion, but they should not benefit from greater rights than domestic investors. Most importantly, the ISDS-system should be replaced by a NEW system which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges, in public hearings. This new dispute settlement system would include an appellate mechanism and should ensure consistency of judicial decisions respecting the jurisdiction of European courts.

As the rapporteur for this resolution, I am happy to see that the European Parliament’s concerns have been taken on board in the Commission’s new Investment Court System-proposal. The ISDS-system, which is a system that is derived from commercial arbitration, has come under more and more public scrutiny, not only because of problems related to individual cases, but also because of the role that the ISDS-system has been playing as a system of public international governance without having the institutional structures that in a normal domestic judicial system would go along with it. As you rightly pointed out during your press conference, we need to build a dispute settlement system that citizens can trust in the same way they trust their domestic courts. The newly adopted ICS-proposal, which will be tabled during the TTIP negotiations, is not only an important step forward in addressing these institutional deficiencies of the existing dispute settlement system but it is also an important first building block towards a public International Investment Court.

While I recognize the important progress made with this proposal, in particular with regard to its procedural provisions, some outstanding issues remain. First of all, the EC proposal could be more explicit on the link between the appointment of judges as part of the international court system and the submission of claims (under article 6 and 7) so that it is crystal clear that claims cannot proceed under TTIP if the judges are not nominated. Moreover, it remains to be seen for instance, what the interaction will be between the “right to regulate clause” in
article 2 and the standards of protection enshrined in the provisions on fair and equitable treatment (article 3), in particular the language on “legitimate expectations”, the provisions on (indirect) expropriation (article 5), and the umbrella-clause (Article 7). The umbrella clause elevates contractual commitments of the Parties to the level of an international treaty, which can of course have an important negative impact on the “right to regulate” and which also discriminates against domestic investors who would have to rely on local remedies or the contractual dispute settlement mechanism. As you stated in your intervention in the EP, the ICS-system should build on the existing reforms in CETA. The CETA-text does not include an umbrella clause.

Thirdly, in spite of its reference to principles of national administrative law as guiding principles of interpretation, the ICS-proposal does not make it explicit either that foreign investors should not have greater rights than domestic investors. Last but not least, the ICS-proposal does not appear to sufficiently address the issues of investor obligations, corporate social responsibility, or sustainable development, in spite of the clear request coming from the European Parliament and ideas put forward by international institutions such as UNCTAD. As stated in the EP resolution, sustainable development provisions should be mainstreamed through the agreement (including in the investment chapter) and should be enforceable.

Nevertheless, I would like to express my support for the new approach of the Commission on dispute settlement for investment protection, for TTIP and for all other trade and investment agreements we expect to receive in the European Parliament. I wish you all the best in convincing our trading partners of this new approach and I expect that we will all stand for and defend our principles and values. I look forward to continue engaging with you in order to ensure that the European Parliament's voice and opinion is reflected in any final text.

Sincerely,

Bernd Lange