



Department for Business Innovation & Skills

Transatlantic and International Unit
Department for Business, Innovation &
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Mr Jack Alexander

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Your ref: 15BIS009

7th April 2016

Dear Mr Alexander,

Thank you for your email of 10 February requesting information about the EU-US Transatlantic Trade and Investment Partnership (TTIP), the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the Trade in Services Agreement (TiSA).

Your request relates to statements made by two MPs on their websites that the inclusion of investor-state dispute settlement (ISDS) provisions in TTIP would not allow international investors to successfully sue the Government for losses resulting from decisions taken in the wider public interest.

I would like copies of any research, for example a risk assessment or similar, that has been done to justify this claim.

As your email contains a request for recorded information held by the Department for Business Innovation and Skills (BIS), we are treating this part of your letter as a Freedom of Information request and have set out our response in Section 1. The remaining points you have raised will be treated as a 'normal course of business' enquiry, in Section 2, rather than a formal request for information under the Freedom of Information Act 2000 ('the Act' or FOIA), or Environmental Information Regulations (EIR). This is in accordance with the guidance given on page 6 of the Information Commissioner's Office publication 'Freedom of Information & Environmental Information Regulations – Hints for Practitioners handling FOI/EIR requests'. This publication is available at: <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/>

Section 1 - Request for Information Under the FOI Act

Under the Freedom of Information Act 2000 ('the Act'), you have the right to:

- know whether we hold the information you require
- be provided with that information (subject to any exemptions under the Act which may apply).

We can confirm that the Department holds information falling within the scope of your request. BIS commissioned research from LSE Enterprise into the costs and benefits for the UK of the inclusion of investment protection provisions in a free trade agreement between the EU and US. This was published on 22 November 2013 and copies placed in the House libraries. The report was written before the investment protection provisions included in CETA and those now proposed for TTIP had been developed.

Published information, which is already in the public domain, is exempt under Section 21 of the Act as we are not required to provide information which is already reasonably accessible to you. To assist you, however, I am providing you with a web link to this research:

<https://www.gov.uk/government/publications/costs-and-benefits-to-the-uk-of-an-eu-us-investment-protection-treaty>

Other information held by the Department falling within the scope of your request is exempt under section 42(1) of the Act, which provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.

Section 42(1) is a qualified exemption and I have considered whether the balance of public interest favours our release of this material. TTIP is a trade deal about which there is significant public interest, particularly regarding possible investment protection provisions. I recognise the importance of disclosing information wherever possible. There is a public interest in public authorities being accountable for the quality of their decision making, and ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. Transparency in the decision making process and access to the information upon which decisions have been made can enhance accountability particularly over significant trade deals such as this.

However, this has to be weighed against a strong public interest that Ministers and officials are able to discuss and debate possible options fully and robustly with lawyers. Ministers and officials need space in which to seek candid advice from their lawyers. They are less likely to seek such advice if there is an expectation that it will subsequently be disclosable. In this case, I believe that disclosure would very probably make officials within BIS more cautious about obtaining legal advice in future cases on other sensitive aspects of TTIP, on other trade negotiations, or on the formulation of policy more widely within the Department.

Disclosure of legal advice also has a high potential to prejudice the government's ability to defend its legal interests - both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. Neither of these is in the public interest.

Releasing legal advice on TTIP and possible investment protection provisions while talks are ongoing may also prejudice our legal or negotiating position with the US, within the EU or in the context of future litigation. It would prejudice our ability to make convincing legal arguments at either EU or international level or in legal proceedings. Situations where this could occur

include further negotiations with the US about what the content of TTIP should be, and legal disputes that arise in the future under any of the numerous international trade agreements to which the EU and UK are parties. It is not possible to estimate the likelihood of such prejudice precisely in advance prior to relevant negotiations or litigation. However, I believe that such prejudice would be more likely than not in some form should the legal advice be disclosed.

Taking into account all the circumstances of this case, I have concluded that the balance of the public interest favours withholding this information.

Appeals procedure

If you are dissatisfied with the handling of your request, you have the right to ask for an internal review. Internal review requests should be submitted within two months of the date of receipt of the response to your original request and should be addressed to the Information Rights Unit:

Information Rights Unit
Department for Business, Innovation & Skills
1 Victoria Street
London
SW1H 0ET
Email: FOI.Requests@bis.gsi.gov.uk

Please remember to quote the reference number above in any future communications.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Section 2 - Your concerns about Investor-State Dispute Settlement (ISDS)

Investment protection provisions in both TTIP and CETA have been subject to much debate – both in parliament and in the media. TiSA does not contain an investment component. A key driver of growth is a positive investment climate and investment protections in trade and investment treaties contribute to this. There have been some misunderstandings about what protections are offered to investors, which has given rise to concern about the impact of these treaties on the UK. Investment protections exist to provide UK investors overseas and foreign investors in the UK with a guarantee that they will not be treated unfairly – they protect small and big businesses, individuals and pension funds from discriminatory, disproportionate or unfair treatment by a state. They are not about allowing foreign businesses to sue governments whenever new laws reduce their profits.

ISDS provisions provide a mechanism for international investors to seek legal redress if they think the investment protections in a treaty have been breached, through discriminatory or unfair treatment. They can determine whether a state has breached the obligations set out in a treaty, whether a foreign investor is entitled to compensation and, if so, what amount.

The inclusion of such provisions in TTIP and CETA will not prevent the Government from taking regulatory action to protect the public or the environment, nor will they force the Government to change laws, open markets or privatise public services. The EU Trade Commissioner and US Trade Representative issued a joint statement confirming they share this position:
http://europa.eu/rapid/press-release_STATEMENT-15-4646_en.htm

There has never been a successful ISDS case brought against the UK, nor has the threat of potential claims affected the Government's legislative programme. Conversely, many UK investors overseas who have suffered discrimination, expropriation and lack of due legal process have relied on ISDS.

The European Commission has published its proposal for investment protections in TTIP: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364>. The UK will continue to work with the Commission on the details of these latest proposals. We need investment protections that ensure UK investors are treated fairly overseas by foreign governments. But the UK will make sure that governments can continue to regulate lawfully in the public interest.

Further information about the TTIP negotiations is available on the Gov.UK website: www.gov.uk/bis/ttip and the European Commission's website: <http://ec.europa.eu/trade/policy/in-focus/ttip/>

Yours sincerely,

BIS - Transatlantic and International Unit