

Public consultation on modalities for investment protection and ISDS in TTIP

"How to complete this consultation"

Given the length of this consultation we strongly recommend that you print out the consultation notice and the consultation document and prepare your answers off-line before completing the questionnaire.

It is not technically possible to save your answers in the questionnaire and come back to it later. Your session on-line will remain open for 90 minutes for you to fill out your answers.

For each reply, there is a limit of 4000 characters (1.5 page), spaces included.

The consultation will be available online in English as of today. The deadline for submissions will be three months from the date at which the consultation is available in all official EU languages. Accordingly, the deadline will be updated in the consultation webpage.

- **Download the Privacy statement**
- **Download the Consultation notice**
- **Download the Consultation document**

Questions marked with an asterisk * require an answer to be given.

1. RESPONDENT DETAILS

Transparency and confidentiality

To ensure that our public consultation is open and transparent, the Contributions Report published on the DG Trade's website will include a **list of the names** of **all** the **companies/organisations** from which we have received contributions.

Individuals/citizens who reply to the consultation **can decide** if they want to have their name published in this list by ticking the appropriate box.

In addition, we will also publish **the contributions** of those companies/organisations **and** individuals that have agreed to this publication. Please indicate your preference:

1.1. Type of respondent *

- ☐ I am answering this consultation on behalf of a company/organisation
- ☐ I am answering this consultation in my own name (as a citizen/individual)

Your details - Companies/Organisations

Details are compulsory for companies/organisations.

1.1.1. My company's/organisation's name may be published alongside my contribution. *

☐ Yes

☐ No



1.1.2. Company/Organisation name: *



1.1.2. Company/Organisation name - not for publication: *



1.1.3. Contact person - not for publication *



1.1.4. Contact details (address, telephone number, email) - not for publication:

*



1.1.5 What is your profile? *

- | | | |
|---|---|--|
| <input type="radio"/> Academic | <input type="radio"/> Law Firm | <input type="radio"/> Umbrella non-governmental organisation |
| <input type="radio"/> Company | <input type="radio"/> Non-governmental organisation | <input type="radio"/> Think tank |
| <input type="radio"/> Consultancy firm | <input type="radio"/> Trade association representing EU businesses | <input type="radio"/> Other |
| <input type="radio"/> Government institution/regulatory authority | <input type="radio"/> Trade union/organisation representing EU trade unions | |



1.1.5.1. If you are a company, what is the size of your company? *

- | | |
|---|--|
| <input type="radio"/> Large company (more than 250 employees) | <input type="radio"/> Small company (less than 50 employees) |
| <input type="radio"/> Medium company (between 50 and 250 employees) | <input type="radio"/> Micro company (less than 10 employees) |



1.1.5.2. If you are a non-governmental organisation, how many members does your organisation have? *

- | | | |
|--------------------------------|-------------------------------------|---------------------------|
| <input type="radio"/> 1 - 25 | <input type="radio"/> 100 - 500 | <input type="radio"/> n/a |
| <input type="radio"/> 25 - 100 | <input type="radio"/> more than 500 | |



1.1.5.3. If you are a trade association, how many members does your association have? *

- | | | |
|--------------------------------|-------------------------------------|---------------------------|
| <input type="radio"/> 1 - 25 | <input type="radio"/> 100 - 500 | <input type="radio"/> n/a |
| <input type="radio"/> 25 - 100 | <input type="radio"/> more than 500 | |



1.1.5.4. If you are a trade association representing businesses, please provide information on your members (number, names of organisations). *



1.1.5.5. If you are an organisation representing several non-governmental organisations, please provide information on your members (number, names of organisations). *



1.1.5.6. If you replied "other", please specify: *




1.1.6. In which country are the headquarters of your company/organisation located? *

☐ In one of the EU28 Member States ☐ In the United States of America ☐ Other

 1.1.6.1. Please specify which Member State: *

- | | | |
|--------------------------------------|-----------------------------------|--------------------------------------|
| <input type="radio"/> Austria | <input type="radio"/> Belgium | <input type="radio"/> Bulgaria |
| <input type="radio"/> Croatia | <input type="radio"/> Cyprus | <input type="radio"/> Czech Republic |
| <input type="radio"/> Denmark | <input type="radio"/> Estonia | <input type="radio"/> Finland |
| <input type="radio"/> France | <input type="radio"/> Germany | <input type="radio"/> Greece |
| <input type="radio"/> Hungary | <input type="radio"/> Ireland | <input type="radio"/> Italy |
| <input type="radio"/> Latvia | <input type="radio"/> Lithuania | <input type="radio"/> Luxembourg |
| <input type="radio"/> Malta | <input type="radio"/> Netherlands | <input type="radio"/> Poland |
| <input type="radio"/> Portugal | <input type="radio"/> Romania | <input type="radio"/> Slovakia |
| <input type="radio"/> Slovenia | <input type="radio"/> Spain | <input type="radio"/> Sweden |
| <input type="radio"/> United Kingdom | | |


 1.1.6.2. If you replied "other", please specify: *

Your details - Individuals

1.1.1. My name may be published alongside my contribution

*

- ☐ Yes
- ☐ No

 1.1.1.1. Contact person *



1.1.1.1. Contact person - not for publication *



1.1.1.2. Contact details (address, telephone number, email) - not for publication:

*



1.1.2. If you are answering as a citizen/individual, please specify:

*

☐ EU citizen

☐ US citizen

☐ Other



1.1.2.1. If you replied "EU citizen", please specify from which Member State: *

☐ Austria

☐ Belgium

☐ Bulgaria

☐ Croatia

☐ Cyprus

☐ Czech Republic

☐ Denmark

☐ Estonia

☐ Finland

☐ France

☐ Germany

☐ Greece

☐ Hungary

☐ Ireland

☐ Italy

☐ Latvia

☐ Lithuania

☐ Luxembourg

☐ Malta

☐ Netherlands

☐ Poland

☐ Portugal

☐ Romania

☐ Slovakia

☐ Slovenia

☐ Spain

☐ Sweden

☐ United Kingdom



1.1.2.1. If you replied "other", please specify: *

1.2. Your contribution

I agree for my contribution to be made public on the European Commission's website *

☐ Yes

☐ No

1.3. What is your main area/sector of activity/interest? *

1.4. Registration: Are you registered in the EU's transparency register? *

☐ Yes

☐ No

1.5. Have you already invested in the USA? *

☐ Yes

☐ No

2. VIEWS ON THE PROPOSED TEXT TO BE USED AS THE BASIS FOR INVESTMENT NEGOTIATIONS WITH THE US

A. Substantive investment protection provisions

INTRODUCTION

Investment protection provisions consist of a limited number of standards guaranteeing that governments will respect certain

fundamental principles of treatment that a foreign investor can rely upon when making a decision to invest. These fundamental principles of treatment are reflected in the rights that democratic governments grant to their own citizens and companies (such as no expropriation without compensation, access to justice, protection against coercion and harassment, non-discrimination), but they are not always guaranteed for foreigners or foreign companies. At the same time foreign investors, just as domestic ones, must fully respect the domestic legal regime of the host country.

The overall purpose of international investment agreements is to ensure that the country hosting an investment treats foreign investors in accordance with these fundamental principles, while maintaining the right to take measures for the public good according to the level of ambition that they deem appropriate.

The specific EU objective in our trade and investment agreements, or in the investment protection section of the TTIP, is to strengthen the balance between investment protection and the right to regulate, through clarifying and improving the substantive investment protection provisions while at the same time preserving the right of States to take measures for legitimate public policy objectives.

More precisely, the EU is introducing modern and innovative provisions clarifying the meaning of those investment protection standards that have raised concerns in the past, notably: fair and equitable treatment (which in the EU's approach will be limited to a closed list of basic rights for investors) and indirect expropriation (which in the EU's approach will ensure that measures taken for legitimate public policy objectives cannot be considered to be an indirect expropriation). Under the EU's approach, the right to regulate is confirmed as a basic underlying principle. The EU also wants to ensure that all necessary exceptions and safeguards are in place, thus retaining essential public policy space for example to deal with a financial crisis.

The EU approach is further explained through the following background information and questions. For each relevant issue, we invite your comments and suggestions. Each issue is illustrated using reference texts as examples, taken from other investment agreements and from the approach developed in the EU-Canada (CETA) negotiations, which is the most recent text negotiated by the EU.

Question 1: Scope of the substantive investment protection provisions

Explanation of the issue

The scope of the agreement responds to a key question: *What type of investments and investors should be protected?* Our response is that investment protection should apply to those **investments** and to **investors** that **have made** an investment in accordance with the laws of the country where they have invested.

Approach in most investment agreements

Many international investment agreements have broad provisions defining “investor” and “investment”.

In most cases, the definition of “investment” is **intentionally broad**, as investment is generally a complex operation that may involve a wide range of assets, such as land, buildings, machinery, equipment, intellectual property rights, contracts, licences, shares, bonds, and various financial instruments. At the same time, most bilateral investment agreements refer to “investments made in accordance with applicable law”. This reference has worked well and has allowed ISDS tribunals to **refuse to grant investment protection** to investors who **have not respected the law of the host state** when making the investment (for example, by structuring the investment in such a way as to circumvent clear prohibitions in the law of the host state, or by procuring an investment fraudulently or through bribery).

In many investment agreements, the **definition of “investor”** simply refers to natural and juridical persons of the other Party to the agreement, without further refinement. This has allowed in some cases so-called **“shell” or “mailbox” companies**, owned or controlled by nationals or companies not intended to be protected by the agreement and having no real business activities in the country concerned, to make use of an investment agreement to launch claims before an ISDS tribunal.

The EU's objectives and approach

The EU wants to avoid abuse. This is achieved primarily by improving the definition of “investor”, thus eliminating so-called “shell” or “mailbox” companies owned by nationals of third countries from the scope: in order to qualify as a legitimate investor of

a Party, a juridical person must have substantial business activities in the territory of that Party.

At the same time, the EU wants to **rely on past treaty practice** with a proven track record. The reference to “investments made in accordance with the applicable law” is one such example. Another is the clarification that protection is only granted in situations where investors have already committed substantial resources in the host state - and not when they are simply at the stage where they are planning to do so.

[Link to reference text](#)

Question:

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the objectives and approach taken in relation to the scope of the substantive investment protection provisions in TTIP?

If you do not want to reply to this question, please type "No comment".

★

Question 2: Non-discriminatory treatment for investors

Explanation of the issue

Under the standards of non-discriminatory treatment of investors, a state Party to the agreement commits itself to treat foreign investors from the other Party in the same way in which it treats its own investors (national treatment), as well in the same way in which it treats investors from other countries (most-favoured nation treatment). This ensures a **level playing field** between foreign investors and local investors or investors from other countries. For instance, if a certain chemical substance were to be proven to be toxic to health, and the state took a decision that it should be prohibited, the state should not impose this prohibition only on foreign companies, while allowing domestic ones to continue to produce and sell that substance.

Non-discrimination obligations may apply after the foreign investor has made the investment in accordance with the applicable law (**post-establishment**), but they may also apply to the conditions of access of that investor to the market of the host country (**pre-establishment**).

Approach in most existing investment agreements

The standards of national treatment and most-favoured nation (MFN) treatment are considered to be **key provisions** of investment agreements and therefore they have been consistently included in such agreements, although with some variation in substance.

Regarding **national treatment**, many investment agreements do not allow states to discriminate between a domestic and a foreign investor once the latter is **already established** in a Party's territory. Other agreements, however, allow such discrimination to take place in a limited number of sectors.

Regarding **MFN**, most investment agreements do not clarify whether foreign investors are entitled to take advantage of procedural or substantive provisions contained in other past or future agreements concluded by the host country. Thus, investors

may be able to claim that they are entitled to benefit from any provision of another agreement that they consider to be more favourable, which may even permit the application of an entirely new standard of protection that was not found in the original agreement. In practice, this is commonly referred to as "**importation of standards**".

The EU's objectives and approach

The EU considers that, as a matter of principle, **established investors should not be discriminated** against after they have established in the territory of the host country, while at the same time recognises that in certain rare cases and in some very specific sectors, discrimination against already established investors **may need to be envisaged**. The situation is different with regard to the right of **establishment**, where the Parties **may choose whether or not to open certain markets or sectors**, as they see fit.

On the "**importation of standards**" issue, the EU seeks to clarify that MFN **does not allow procedural or substantive provisions to be imported from other agreements**.

The EU also includes **exceptions** allowing the Parties to take measures relating to the protection of health, the environment, consumers, etc. Additional carve-outs would apply to the audio-visual sector and the granting of subsidies. These are typically included in EU FTAs and also apply to the non-discrimination obligations relating to investment. Such exceptions allow differences in treatment between investors and investments where necessary to **achieve public policy objectives**.

[Link to reference text](#)

Question:

Taking into account the above explanations and the text provided in annex as a reference, what is your opinion of the EU approach to non –discrimination in relation to the TTIP? Please explain.

If you do not want to reply to this question, please type "No comment".

Question 3: Fair and equitable treatment

Explanation of the issue

The obligation to grant foreign investors fair and equitable treatment (FET) is **one of the key investment protection standards**. It ensures that investors and investments are protected against treatment by the host country which, even if not expropriatory or discriminatory, is still unacceptable because it is **arbitrary, unfair, abusive**, etc.

Approach in most investment agreements

The FET standard is **present in most international investment agreements**. However, in many cases the standard is **not defined**, and it is usually **not limited or clarified**. Inevitably, this **has given arbitral tribunals significant room for interpretation**, and the interpretations adopted by arbitral tribunals have varied from very narrow to very broad, leading to much controversy about the precise meaning of the standard. This lack of clarity has fueled a large number of ISDS claims by investors, some of which have raised concern with regard to the states' right to regulate. In particular, in some cases, the

standard has been understood to encompass the protection of the legitimate expectations of investors in a very broad way, including the expectation of a stable general legislative framework.

Certain investment agreements have narrowed down the content of the FET standard by linking it to concepts that are considered to be part of **customary international law**, such as the minimum standard of treatment that countries must respect in relation to the treatment accorded to foreigners. However, this has also resulted in a wide range of differing arbitral tribunal decisions on what is or is not covered by customary international law, and has not brought the desired greater clarity to the definition of the standard.

An issue sometimes linked to the FET standard is the respect by the host country of its legal obligations towards the foreign investors and their investments (sometimes referred to as an "umbrella clause"), e.g. when the host country has entered into a contract with the foreign investor. Investment agreements may have specific provisions to this effect, which have sometimes been interpreted broadly as implying that every breach of e.g. a contractual obligation could constitute a breach of the investment agreement.

EU objectives and approach

The main objective of the EU is **to clarify the standard**, in particular by incorporating key **lessons learned from case-law**. This would **eliminate uncertainty** for both states and investors.

Under this approach, a state could be held responsible for a breach of the fair and equitable treatment obligation **only for breaches of a limited set of basic rights**, namely: the denial of justice; the disregard of the fundamental principles of due process; manifest arbitrariness; targeted discrimination based on gender, race or religious belief; and abusive treatment, such as coercion, duress or harassment. This list may be extended only where the Parties (the EU and the US) specifically agree to add such elements to the content of the standard, for instance where there is evidence that new elements of the standard have emerged from international law.

The "**legitimate expectations**" of the investor may be taken into account in the interpretation of the standard. However, this is possible **only where clear, specific representations have been made by a Party** to the agreement in order to convince the investor to make or maintain the investment and upon which the investor **relied**, and that were subsequently **not respected** by that Party. The intention is to make it clear that an investor cannot legitimately expect that the general regulatory and legal regime will not change. Thus the EU intends to ensure that the standard is **not understood to be a "stabilisation obligation"**, in other words a guarantee that the legislation of the host state will not change in a way that might negatively affect investors.

In line with the general objective of clarifying the content of the standard, the EU shall also strive, where necessary, to provide protection to foreign investors in situations in which the host state uses its sovereign powers to avoid contractual obligations towards foreign investors or their investments, without however covering ordinary contractual breaches like the non-payment of an invoice.

[Link to reference text](#)

Question:

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the approach to fair and equitable treatment of investors and their investments in relation to the TTIP?

If you do not want to reply to this question, please type "No comment".

★

Question 4: Expropriation

Explanation of the issue

The **right to property is a human right**, enshrined in the European Convention of Human Rights, in the European Charter of Fundamental Rights as well as in the legal tradition of EU Member States. This right is **crucial to investors and investments**. Indeed, **the greatest risk** that investors may incur in a foreign country is the risk of having their investment **expropriated without compensation**. This is why the guarantees against expropriation are placed at the core of any international investment agreement.

Direct expropriations, which entail the outright seizure of a property right, do not occur often nowadays and usually do not generate controversy in arbitral practice. However, arbitral tribunals are confronted with a much more difficult task when it comes to assessing whether a regulatory measure of a state, which does not entail the direct transfer of the property right, might be considered **equivalent to expropriation** (indirect expropriation).

Approach in most investment agreements

In investment agreements, expropriations are permitted if they are for a **public purpose, non-discriminatory**, resulting from the **due process of law** and are accompanied by prompt and effective **compensation**. This applies to both **direct expropriation** (such as nationalisation) and **indirect expropriation** (a measure having an effect equivalent to expropriation).

Indirect expropriation has been a **source of concern** in certain cases where regulatory measures taken for legitimate purposes have been subject to investor claims for compensation, on the grounds that such measures were equivalent to expropriation because of their significant negative impact on investment. Most investment agreements **do not provide details or guidance in this respect**, which has inevitably left arbitral tribunals with significant room for interpretation.

The EU's objectives and approach

The objective of the EU is **to clarify** the provisions on expropriation and to **provide interpretative guidance** with regard to indirect expropriation in order to **avoid claims against legitimate public policy measures**. The EU wants to make it clear that non-discriminatory measures taken for legitimate public purposes, such as to protect **health or the environment**, **cannot be considered equivalent to an expropriation**, unless they are manifestly excessive in light of their purpose. The EU also wants to clarify that the simple fact that a measure has an **impact on the economic value** of the investment does not justify a claim that an indirect expropriation has occurred.

[Link to reference text](#)

Question:

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion of the approach to dealing with expropriation in relation to the TTIP? Please explain.

If you do not want to reply to the question, please type "No comment".

*

Question 5: Ensuring the right to regulate and investment protection

Explanation of the issue

In democratic societies, the **right to regulate of states is subject to principles and rules** contained in both domestic legislation and in international law. For instance, in the **European Convention on Human Rights**, the Contracting States commit themselves to guarantee a number of civil and political rights. In the EU, the **Constitutions** of the Member States, as well as EU law, ensure that the actions of the state cannot go against fundamental rights of the citizens. Hence, public regulation must be based on a legitimate purpose and be necessary in a democratic society.

Investment agreements reflect this perspective. Nevertheless, wherever such agreements contain provisions that appear to be very broad or ambiguous, there is always a **risk** that the arbitral tribunals interpret them in a manner which may be perceived as a threat to the state's right to regulate. In the end, **the decisions of arbitral tribunals are only as good as the provisions that they have to interpret and apply.**

Approach in most investment agreements

Most agreements that are focused on investment protection are **silent about how public policy issues, such as public health, environmental protection, consumer protection or prudential regulation, might interact with investment.** Consequently, the relationship between the protection of investments and the right to regulate in such areas, as envisaged by the contracting Parties to such agreements is not clear and this creates uncertainty.

In more recent agreements, however, **this concern is increasingly addressed** through, on the one hand, **clarification** of the key investment protection provisions that have proved to be controversial in the past and, on the other hand, carefully drafted **exceptions** to certain commitments. In complex agreements such as free trade agreements with provisions on investment, or regional integration agreements, the inclusion of such safeguards is the usual practice.

The EU's objectives and approach

The objective of the EU is to achieve a **solid balance** between the **protection of investors** and the Parties' **right to regulate.**

First of all, the EU wants to make sure that the Parties' **right to regulate is confirmed as a basic underlying principle.** This is important, as arbitral tribunals will have to take this principle into account when assessing any dispute settlement case.

Secondly, the EU will introduce **clear and innovative provisions** with regard to investment protection standards that have raised concern in the past (for instance, the standard of fair and equitable treatment is defined based on a closed list of basic

rights; the annex on expropriation clarifies that non-discriminatory measures for legitimate public policy objectives do not constitute indirect expropriation). These improvements will ensure that investment protection standards cannot be interpreted by arbitral tribunals in a way that is detrimental to the right to regulate.

Third, the EU will ensure that **all the necessary safeguards and exceptions are in place**. For instance, foreign investors should be able to **establish** in the EU only under the terms and conditions defined by the EU. A list of horizontal exceptions will apply to non-discrimination obligations, in relation to measures such as those taken in the field of environmental protection, consumer protection or health (*see question 2 for details*). Additional carve-outs would apply to the audiovisual sector and the granting of subsidies. Decisions on competition matters will not be subject to investor-to-state dispute settlement (ISDS). Furthermore, in line with other EU agreements, nothing in the agreement would prevent a Party from taking measures for **prudential reasons**, including measures for the protection of depositors or measures to ensure the integrity and stability of its financial system. In addition, EU agreements contain general exceptions applying in **situations of crisis**, such as in circumstances of serious difficulties for the operation of the exchange rate policy or monetary policy, balance of payments or external financial difficulties, or threat thereof.

In terms of the procedural aspects relating to ISDS, the objective of the EU is to build a system capable of adapting to the states' right to regulate. Wherever greater clarity and precision proves necessary in order to protect the right to regulate, the Parties will have the possibility to **adopt interpretations** of the investment protection provisions which will be **binding on arbitral tribunals**. This will allow the Parties to oversee how the agreement is interpreted in practice and, where necessary, to influence the interpretation.

The procedural improvements proposed by the EU will also make it clear that an arbitral tribunal **will not be able to order the repeal of a measure**, but only compensation for the investor.

Furthermore, **frivolous claims will be prevented** and investors who bring claims unsuccessfully will **pay the costs** of the government concerned (*see question 9*).

[Link to reference text](#)

Question:

Taking into account the above explanation and the text provided in annex as a reference, what is your opinion with regard to the way the right to regulate is dealt with in the EU's approach to TTIP?

If you do not want to reply to this question, please type "No comment".

★

B. Investor-to-State dispute settlement (ISDS)

INTRODUCTION

Investor-to-state dispute settlement (ISDS) is a legal instrument that allows investors to bring a claim before an arbitration tribunal that the host state has not respected the investment protection rules under TTIP. Domestic remedies would be preferable, but TTIP

provisions cannot be invoked directly in front of a national court. Despite the general solidity of developed court systems such as the US and the EU, it is possible that investors will not be given effective access to justice, e.g. if they are denied access to appeal or due process, leaving them without any effective legal remedy. ISDS is therefore necessary to allow legitimate claims to be pursued. In such cases, the investors would have to prove that the measures have breached the investment protection provisions and that it caused them damage.

The possibility for investors to resort to ISDS is a standard feature of virtually all the 3000 investment agreements in existence today, including the 1400 signed by EU Member States. Most of these agreements contain a standard paragraph stating that investors can go to ISDS in case of a breach of the investment protection provisions. The agreements themselves do not contain any precise procedural framework for how an ISDS case should be handled by a tribunal. The ISDS tribunal must work on the basis of international arbitration rules that set a general procedural framework. The most common are the rules of the International Centre for the Settlement of Investment Disputes ("ICSID", a World Bank body) or those of the United Nations Commission for International Trade Law ("UNCITRAL"). However, these rules only partially address the problems which have come to light over the last years with the ISDS system, notably on transparency, the conduct of arbitrators and the absence of any appeal mechanism.

The EU is working to develop an efficient and modern ISDS mechanism which is equipped to deal with these problems. The EU will improve the ISDS mechanism under TTIP compared to existing investment agreements. The improvements are explained in the questions that follow where we ask you to comment and make suggestions. Through these improvements, the EU aims to ensure a transparent, accountable and well-functioning ISDS system that reflects the public interest and policy objectives. The EU will encourage the amicable settlement of disputes, through a required period for consultations, and the possibility of mediation. The EU also aims to enhance consistency of rulings, including by the establishment of an appeal mechanism and by allowing for the governments to provide guidance and interpretation so that their intentions are respected. A further consideration is how to avoid frivolous or unfounded claims; the EU will introduce mechanisms to allow for a quick dismissal of such claims. Transparency and the possibility for stakeholders to make their views heard in the process underpin these improvements and are essential for an accountable and credible ISDS system.

Question 6: Transparency in ISDS

Explanation of the issue

In most ISDS cases, no or little information is made available to the public, hearings are not open and third parties are not allowed to intervene in the proceedings. This makes it difficult for the public to know the basic facts and to evaluate the claims being brought by either side.

This **lack of openness** has given rise to **concern and confusion** with regard to the causes and potential outcomes of ISDS disputes. **Transparency is essential** to ensure the legitimacy and accountability of the system. It enables stakeholders interested in a dispute to be informed and contribute to the proceedings. It fosters accountability in arbitrators, as their decisions are open to scrutiny. It contributes to consistency and predictability as it helps create a body of cases and information that can be relied on by investors, stakeholders, states and ISDS tribunals.

Approach in most existing investment agreements

Under the rules that apply in most existing agreements, both **the responding state and the investor need to agree to permit the publication** of submissions. If either the investor or the responding state does not agree to publication, documents **cannot be made public**. As a result, most ISDS cases take place behind closed doors and no or a limited number of documents are made available to the public.

The EU's objectives and approach

The EU's aim is to ensure transparency and openness in the ISDS system under TTIP. The EU will include provisions to guarantee that hearings are open and that all documents are available to the public. In ISDS cases brought under TTIP, all **documents will be publicly available** (subject only to the protection of confidential information and business secrets) and **hearings will be open to the public**. Interested parties from **civil society will be able to file submissions** to make their views and arguments known to the ISDS tribunal.

The EU took a leading role in establishing **new United Nations rules on transparency**^[1] in ISDS. The objective of transparency will be achieved by incorporating these rules into TTIP.

^[1] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
<http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>

[Link to reference text](#)

Question:

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on whether this approach contributes to the objective of the EU to increase transparency and openness in the ISDS system for TTIP. Please indicate any additional suggestions you may have.

If you do not want to reply to this question, please type "No comment".

✱

Question 7: Multiple claims and relationship to domestic courts

Explanation of the issue

Investors who consider that they have grounds to complain about action taken by the authorities (e.g. discrimination or lack of compensation after expropriation) often have different options. They may be able to go to domestic courts and seek redress there. They or any related companies may be able to go to other international tribunals under other international investment treaties.

It is often the case that protection offered in investment agreements **cannot be invoked before domestic courts** and the applicable **legal rules are different**. For example, discrimination in favour of local companies is not prohibited under US law but is prohibited in investment agreements. There are also concerns that, in some cases domestic courts may **favour the local government** over the foreign investor e.g. when assessing a claim for compensation for expropriation or may deny due process rights such as the effective possibility to appeal. Governments may have **immunity from being sued**. In addition, the remedies are often different. In some cases government measures can be reversed by domestic courts, for example if they are illegal or unconstitutional. ISDS tribunals **cannot order governments to reverse measures**.

These different possibilities raise important and complex issues. It is important to make sure that a government **does not pay more** than the correct compensation. It is also important to ensure **consistency between rulings**.

Approach in most existing investment agreements

Existing investment agreements **generally do not regulate or address** the relationship with domestic courts or other ISDS tribunals. Some agreements require that the investor chooses between domestic courts and ISDS tribunals. This is often referred to as **"fork in the road"** clause.

The EU's objectives and approach

As a matter of principle, the EU's approach **favours domestic courts**. The EU aims to provide incentives for investors to pursue claims in domestic courts or to seek **amicable solutions** – such as mediation. The EU will suggest different instruments to do this. One is to prolong the relevant time limits if an investor goes to domestic courts or mediation on the same matter, so as not to discourage an investor from pursuing these avenues. Another important element is to make sure that investors **cannot bring claims on the same matter at the same time in front of an ISDS tribunal and domestic courts**. The EU will also ensure that companies **affiliated with the investor cannot bring claims** in front of an ISDS tribunal and domestic courts on the same matter and at the same time. If there are other relevant or related cases, ISDS tribunals must take these into account. This is done to **avoid any risk that the investor is over-compensated** and helps to **ensure consistency** by excluding the possibility for parallel claims.

[Link to reference text](#)

Question:

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on the effectiveness of this approach for balancing access to ISDS with possible recourse to domestic courts and for avoiding conflicts between domestic remedies and ISDS in relation to the TTIP. Please indicate any further steps that can be taken. Please provide comments on the usefulness of mediation as a means to settle disputes.

If you do not want to reply to this question, please type "No comment".

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Question 8: Arbitrator ethics, conduct and qualifications

Explanation of the issue

There is **concern** that arbitrators on ISDS tribunals do not always act in an **independent and impartial manner**. Because the individuals in question may not only act as arbitrators, but also as lawyers for companies or governments, concerns have been expressed as to potential bias or **conflicts of interest**.

Some have also expressed concerns about the **qualifications of arbitrators** and that they may not have the necessary qualifications on matters of public interest or on matters that require a balancing between investment protection and e.g. environment, health or consumer protection.

Approach in existing investment agreements

Most existing investment agreements **do not address the issue** of the conduct or behaviour of arbitrators. International rules on arbitration address the issue by allowing the responding government or the investor to challenge the choice of arbitrator because of concerns of suitability.

Most agreements allow the investor and the responding state to select arbitrators but **do not establish rules on the qualifications** or a list of approved, qualified arbitrators to draw from.

The EU's objective and approach

The EU aims to establish clear rules to **ensure that arbitrators are independent and act ethically**. The EU will introduce specific requirements in the TTIP on the ethical conduct of arbitrators, including a **code of conduct**. This code of conduct will be binding on arbitrators in ISDS tribunals set up under TTIP. The code of conduct also establishes procedures to identify and deal with any conflicts of interest. Failure to abide by these ethical rules will result in the **removal of the arbitrator** from the tribunal. For example, if a responding state considers that the arbitrator chosen by the investor does not have the necessary qualifications or that he has a conflict of interest, the responding state can challenge the appointment. If the arbitrator is in breach of the Code of Conduct, he/she will be removed from the tribunal. In case the ISDS tribunal has already rendered its award and a breach of the code of conduct is found, the responding state or the investor **can request a reversal** of that ISDS finding.

In the text provided as reference (the draft EU-Canada Agreement), the Parties (i.e. the EU and Canada) have agreed for the first time in an investment agreement to include rules on the conduct of arbitrators, and have included the possibility to improve them further if necessary. In the context of TTIP these would be directly included in the agreement.

As regards the qualifications of ISDS arbitrators, the EU aims to set down detailed requirements for the arbitrators who act in ISDS tribunals under TTIP. They must be **independent and impartial**, with **expertise** in international law and international investment law and, if possible, **experience** in international trade law and international dispute resolution. Among those best qualified and who have undertaken such tasks will be retired **judges**, who generally have experience in ruling on issues that touch upon both trade and investment and on societal and public policy issues. The EU also aims to set up a **roster**, i.e. a list of qualified individuals from which the Chairperson for the ISDS tribunal is drawn, if the investor or the responding state cannot otherwise agree to a Chairperson. The purpose of such a roster is to ensure that the EU and the US have agreed to and vetted the arbitrators to ensure their abilities and independence. In this way the responding state chooses one arbitrator and has vetted the third arbitrator.

[Link to reference text](#)

Question:

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on these procedures and in particular on the Code of Conduct and the requirements for the qualifications for arbitrators in relation to the TTIP agreement. Do they improve the existing system and can further improvements be envisaged?

If you do not want to reply to this question, please type "No comment".

★

Question 9: Reducing the risk of frivolous and unfounded cases

Explanation of the issue

As in all legal systems, cases are brought that have little or no chance of succeeding (so-called "**frivolous claims**"). Despite eventually being rejected by the tribunals, such cases take up **time and money** for the responding state. There have been concerns that protracted and frequent litigation in ISDS could have an **effect on the policy choices** made by states. This is why it is important to ensure that there are mechanisms in place to weed out frivolous disputes as early as possible.

Another issue is the **cost of ISDS proceedings**. In many ISDS cases, even if the responding state is successful in defending its

measures in front of the ISDS tribunal, it may have to pay substantial amounts to cover its own defence.

Approach in most existing investment agreements:

Under existing investment agreements, there are generally **no rules** dealing with frivolous claims. Some **arbitration rules** however do have provisions on frivolous claims. As a result, there is a risk that frivolous or clearly unfounded claims are allowed to proceed. Even though the investor would lose such claims, the long proceedings and the implied questions surrounding policy can be problematic.

The issue of **who bears the cost** is also **not addressed** in most existing investment agreements. Some international arbitration rules have provisions that address the issue of costs in very general terms. In practice, ISDS tribunals have often decided that the investor and responding state pay their own legal costs, regardless of who wins or loses.

The EU's objectives and approach

The EU will introduce several instruments in TTIP to **quickly dismiss frivolous claims**.

ISDS tribunals will be required to dismiss claims that are obviously without legal merit or legally unfounded. For example, this would be cases where the investor is not established in the US or the EU, or cases where the ISDS tribunal can quickly establish that there is in fact no discrimination between domestic and foreign investors. This provides an early and effective filtering mechanism for frivolous claims thereby avoiding a lengthy litigation process.

To further discourage unfounded claims, the EU is proposing that **the losing party should bear all costs** of the proceedings. So if investors take a chance at bringing certain claims and fail, they have to pay the full financial costs of this attempt.

[Link to reference text](#)

Question:

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on these mechanisms for the avoidance of frivolous or unfounded claims and the removal of incentives in relation to the TTIP agreement. Please also indicate any other means to limit frivolous or unfounded claims.

If you do not want to reply to this question, please type "No comment".

✱

Question 10: Allowing claims to proceed (filter)

Explanation of the issue

Recently, concerns have been expressed in relation to several ISDS claims brought by investors under existing investment agreements, relating to measures taken by states affecting the financial sector, notably those taken **in times of crisis in order to protect consumers or to maintain the stability and integrity of the financial system**.

To address these concerns, some investment agreements have introduced mechanisms which grant the regulators of the Parties to the agreement the possibility to intervene (through a so-called “**filter**” to ISDS) in particular ISDS cases that involve measures ostensibly taken for prudential reasons. The mechanism enables the Parties to decide whether a measure is indeed taken for prudential reasons, and thus if the impact on the investor concerned is justified. On this basis, the Parties may therefore agree that a claim should not proceed.

Approach in most existing investment agreements

The majority of existing investment agreements privilege the original intention of such agreements, which was to **avoid the politicisation of disputes**, and therefore do not contain provisions or mechanisms which allow the Parties the possibility to intervene under particular circumstances in ISDS cases.

The EU's objectives and approach

The EU like many other states considers it **important to protect the right to regulate in the financial sector** and, more broadly, the overriding need to **maintain the overall stability and integrity of the financial system**, while also recognizing the speed needed for government action in case of financial crisis.

[Link to reference text](#)

Question:

*Some investment agreements include filter mechanisms whereby the Parties to the agreement (here the EU and the US) may intervene in ISDS cases where an investor seeks to challenge measures adopted pursuant to prudential rules for financial stability. In such cases the Parties may decide jointly that a claim should not proceed any further. **Taking into account the above explanation and the text provided in annex as a reference, what are your views on the use and scope of such filter mechanisms in the TTIP agreement?***

If you do not want to reply to this question, please type "No comment".

★

Question 11: Guidance by the Parties (the EU and the US) on the interpretation of the agreement

Explanation of the Issue

When countries negotiate an agreement, they have a **common understanding** of what they want the agreement to mean. However, there is a risk that any tribunal, including ISDS tribunals **interprets the agreement in a different way**, upsetting the balance that the countries in question had achieved in negotiations – for example, between investment protection and the right to regulate. This is the case if the agreement **leaves room for interpretation**. It is therefore necessary to have mechanisms which will allow the Parties (the EU and the US) to clarify their intentions on **how the agreement should be interpreted**.

Approach in existing investment agreements

Most existing investment agreements **do not permit** the countries who signed the agreement in question to take part in proceedings nor to give directions to the ISDS tribunal on issues of interpretation.

The EU's objectives and approach

The EU will make it possible for the non-disputing Party (i.e. the EU or the US) to **intervene in ISDS proceedings** between an investor and the other Party. This means that in each case, the Parties can explain to the arbitrators and to the Appellate Body **how they would want the relevant provisions to be interpreted**. Where both Parties agree on the interpretation, such interpretation is a very powerful statement, which ISDS **tribunals would have to respect**.

The EU would also provide for the Parties (i.e. the EU and the US) to adopt **binding interpretations on issues of law**, so as to correct or avoid interpretations by tribunals which might be considered to be against the common intentions of the EU and the US. Given the EU's intention to give clarity and precision to the investment protection obligations of the agreement, the scope for undesirable interpretations by ISDS tribunals is **very limited**. However, this provision is an **additional safety-valve** for the Parties.

[Link to reference text](#)

Question:

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on this approach to ensure uniformity and predictability in the interpretation of the agreement to correct the balance? Are these elements desirable, and if so, do you consider them to be sufficient?

If you do not want to reply to this question, please type "No comment".

✱

Question 12: Appellate Mechanism and consistency of rulings

Explanation of the issue

In existing investment agreements, the **decision by an ISDS tribunal is final**. There is **no possibility** for the responding state, for example, **to appeal** to a higher instance to challenge the level of compensation or other aspects of the ISDS decision except on very limited procedural grounds. There are concerns that this can lead to different or even contradictory interpretations of the provisions of international investment agreements. There have been calls by stakeholders for a mechanism to **allow for appeal to increase legitimacy of the system and to ensure uniformity of interpretation**.

Approach in most existing investment agreements

No existing international investment agreements provide for an appeal on legal issues. International arbitration rules allow for annulment of ISDS rulings under certain very restrictive conditions relating to procedural issues.

The EU's objectives and approach

The EU aims to **establish an appellate mechanism** in TTIP so as to allow for review of ISDS rulings. It will help **ensure consistency** in the interpretation of TTIP and provide both the government and the investor with the opportunity to **appeal against awards** and to **correct errors**. This legal review is an additional check on the work of the arbitrators who have examined the case in the first place.

In agreements under negotiation by the EU, the possibility of creating an appellate mechanism in the future is envisaged. However, in TTIP the EU intends to go further and create a bilateral appellate mechanism immediately through the agreement.

[Link to reference text](#)

Question:

Taking into account the above explanation and the text provided in annex as a reference, please provide your views on the creation of an appellate mechanism in TTIP as a means to ensure uniformity and predictability in the interpretation of the agreement.

If you do not want to reply to this question, please type "No comment".

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C. General assessment

What is your overall assessment of the proposed approach on substantive standards of protection and ISDS as a basis for investment negotiations between the EU and US?

Do you see other ways for the EU to improve the investment system?

Are there any other issues related to the topics covered by the questionnaire that you would like to address?

If you do not want to reply to these questions, please type "No comment".

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